

# Chapter Fifteen

## *Town Roads*

### § 15-1. Town Road Authority

Town boards are designated as “road authorities” for township roads by Minn. Stat. § 160.02 subd. 25. Serving as the road authority for over 59,000 miles of road, which constitute approximately 42% of road miles in Minnesota, is one of the major tasks of town boards in Minnesota. For many towns establishing, maintaining, and managing roads is a major undertaking that consumes most the board’s time and the town’s resources.

Some towns are alone responsible for over 80 miles of road. These roads constitute a critical part of the state’s transportation system. People access their farms, fields, lake cabins, recreation areas, hunting areas, and their homes on these roads. Because roads are such a big part of a town’s function, town supervisors need to make a special effort to understand the town’s powers and obligations toward its roads.

### § 15-2. What is a Town Road?

Town roads can be thought of in both a physical and legal sense. For practical reasons, most town officers focus on the physical aspects of a road – whether it is structurally sound and sufficiently maintained for its anticipated use. However, it is also important to gain a basic understanding of the legal nature of town roads because the legal aspects of roads determine what the town’s rights and responsibilities are regarding its road. For that reason, this chapter will start with a brief overview of the legal status of town roads.

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Town road” is defined as including

those roads and cartways which have heretofore been or which hereafter may be established, constructed, or improved under the authority of the several town boards, roads established, constructed, or improved by counties that have been maintained by the towns for a period of at least one year prior to July 1, 1957.

Minn. Stat. § 160.02, subd. 28.

The word “road” or “highway” is defined as including:

the several kinds of highways as defined in this section, including roads designated as minimum-maintenance roads, and also cartways, together with all bridges or other structures thereon which form a part of the same.

Minn. Stat. § 160.02, subd. 26.

Unfortunately, neither definition goes very far in actually describing what a town road actually is. Furthermore, having “cartway” included in the definition of both “town road” and “road” adds to the confusion between roads and cartways. To avoid adding to this confusion, cartways are discussed on their own later in this chapter in §15-19.

In legal terms, a town road is typically an “easement” held by the town on behalf of the public, for use by the public. The land most roads occupy is not actually owned by the town. In its most basic sense, an easement is a right acquired to use a described portion of another’s property. Most easements are granted for particular purposes; such as the right to travel over the property.

While possible, it is much less common for a town to own the title to the land a road occu-

pies. This is fee simple ownership and refers to an absolute title in land. Everything that is possible to own about property is owned when one acquires a fee simple title to property. The trees, brush, gravel, etc. on the property are owned by the town as part of its fee simple interest.

Even though the legal description of a town’s property interest in a road does not affect the physical nature of the road, it does impact the powers of a board to maintain the road and has implications when a road is vacated. (See § 14.9 on vacating a road.) As one might expect, it is more expensive to acquire fee simple title than it is to acquire an easement.

On easement roads, the rights to the property are shared between the town and the adjacent landowners. That is why boards must seek the permission of the adjacent owners or undertake an acquisition procedure before they can cut large trees within a right-of-way. Trees are considered part of the underlying fee interest rather than part of the easement interest. (See § 15-11 for additional information on tree cutting.)

Even though a road easement is only a limited interest in property, the fact that it is used for public travel gives the town greater powers over the use of the easement than is normally held by the owner of a private easement. A public road easement is a kind of hybrid easement subject to control at all levels of government. To protect public safety and the free flow of people and commerce, what can be done within a public road right-of-way is far more prescribed than privately held easements.

Refer to Document Number: **TR14000** for additional information on town roads.

### § 15-3. Establishing Town Roads

There are basically six methods for establishing a town road. Each method results in the town acquiring an easement, but the method through which a road was established can have on-going implications. That is why it is important for boards to know how a road was established, or at least know how to locate that information. Refer to Document Number **TR4000A**, which includes a checklist for establishing a road.

## A. Formal Establishment by the Board

The basic statutory procedure to formally establish a town road is contained in Minn. Stat. § 164.07. This procedure allows a town board to acquire road easements through gift, purchase, or eminent domain. The process can be initiated either by a petition or by the board upon receiving elector authorization at an annual or special town meeting as provided in Minn. Stat. § 164.06, subd. 1.

A petition must be signed by at least eight voters of the town who own real estate or who occupy real estate under the homestead or preemption laws or under contract with the state within three miles of the proposed road. Minn. Stat. § 164.07. To be valid, a petition must list the names of the owners of the land over which the road will pass, and the road's beginning, general course, and termination. Establishment petitions must also contain a statement of the purpose and necessity for the establishment of the road.

Petitions are filed with the town clerk and then presented to the town board. Once presented and found sufficient, the board has 30 days to set, though not necessarily hold, a hearing on the proposed establishment. A unique feature of the procedure is that it requires the petitioner to provide for the delivery of personal service of notice of the hearing on all affected landowners and to post the notice. If the petition relates to a road within a plat, the petitioner should be told to also mail notice to all the owners in the plat that were not hand delivered notice. Boards should take it upon themselves to also publish notice of the hearing at least once in its official newspaper. Affidavits of notice need to be developed and delivered to the board at the hearing for each form of notice given.

Another unique feature of the procedure is that it requires the board to examine the area of the proposed road as part of the hearing. Some boards hold the entire hearing on-site, while others convene the hearing on-site, conduct the examination, and then continue the hearing at the town hall.

At the hearing, the board is required to hear all the parties concerned and then decide whether to grant the petition. The town electors do not have the power to vote on whether to approve a road establishment. An important part of making the decision is the recording of findings of fact to support the decision. The findings set out the relevant facts, applicable law, and the determinations the board made that led to the decision. If a board decides not to establish the road, a substantially similar petition may not be brought for one year. If, on the other hand,

the petition is granted, the board can order a survey done of the road. A survey is not required, but should always be conducted when establishing a road so a proper legal description can be developed.

Landowners can choose to gift their land to the town for the road or to sign a written waiver of damages. If they do not, the board must either negotiate a purchase of the easement from them or take the necessary land by eminent domain. A critical part of any eminent domain procedure is the determination and payment of damages. At the hearing, the board will need to know the exact location and amount of land it intends to take. For this reason, once a board decides to establish the road it should consider continuing the hearing to a specific date, time, and place in the future to allow a survey and appraisal to be coordinated before the hearing is reconvened. The information developed from the survey and appraisal is critical to completing the process.

When the hearing reconvenes, the board reviews the survey and valuation information, allows affected owners to present their information as to value, and then it must determine the amount of damages it will pay each owner that did not agree to gift or sell their land to the town. The road may not be opened until all necessary damages are determined and awarded. In making the determination, the board is required to "determine the money value of the benefits which the establishment . . . will confer, then deduct the benefits, if any, from the damages, if any, and award the difference, if any as damages." Minn. Stat. § 164.07. The award must be set out in writing and filed with the town clerk. Once filed, the clerk must give written notification of the award to the owners within seven days. The notice must include a clear explanation of the owner's right to appeal the award.

Within 40 days of filing the award, the owner can appeal the award to district court. An appeal does not prohibit the town from beginning work on the road unless the appeal challenges the public purpose or necessity of the establishment and notice of those grounds is given to the board within 10 days.

An important final step is to record the road order at the county recorder's office. Recording the order is a critical part of preserving the property interest the board just created and likely paid for.

All road orders are recorded at the County Recorder's office. MAT recommends that a Board member speak with the county recorder early in the process to learn about the requirements for recording the road order.

## B. Dedication by Use

“When any road or portion of a road has been used and kept in repair and worked for at least six years continuously as a public highway by a road authority, it shall be deemed dedicated to the public to the width of actual use and be and remain, until lawfully vacated, a public highway whether it has ever been established as a public highway or not.” Minn. Stat. § 160.05. This statute serves as the legal foundation for a vast majority of town roads in this state.

The statute operates to create a road regardless of whether the board intended to do so. Interpretation of the statute has focused on three key elements:

1. use by the public;
2. maintenance by a public entity (kept in repair and worked); and
3. for at least six consecutive years.

The standard of proof used by the courts to determine if these factors are satisfied is a preponderance of the evidence. *Rixmann v. City of Prior Lake*, 723 N.W.2d 493 (Minn. Ct. App. 2006).

### 1. Use by the Public

The amount of public use required is relatively small. For instance, “a few people using a road for seasonal access to recreational areas may be sufficient.” *Foster v. Bergstrom*, 515 N.W.2d 581, 586 (Minn. Ct. App. 1994). In one case, the court placed emphasis on the fact that a road was open for use by the public rather than on the amount the public actually used the road:

“It is the right of travel by all the world, and not the exercise of the right, which constitutes a road a public highway, and the user by the public is sufficient if those members of the public - even though they be limited in number and even if some are accommodated more than others - who would naturally be expected to enjoy it do, or have done so at their pleasure and convenience.” *Anderson v. Birkeland*, 38 N.W.2d 215, 219 (Minn. 1949).

However, there have been occasions in which a court has been stricter in its application of the use standard. Two families using a road with no use, or reason for use, by the general public was found insufficient to constitute use under the

statute. *Foster*, 515 N.W.2d at 586 (Minn. Ct. App. 1994). However, such a rigid analysis is the exception not the rule.

### 2. Maintenance by the Town

To satisfy the statute, the maintenance must be of the quality and character performed on an already existing public road. When reviewing this element, the courts have compared the level of maintenance performed with that on similar types of roads.

The courts have found a low level of maintenance qualified when the maintenance was consistent with the road’s status as a minimum maintenance road. *Town of Wadena v. Dorholt*, 465 N.W.2d 435, 437 (Minn. Ct. App. 1991). “It is not necessary that every part of a road be worked at government expense or that any particular part receive attention every year of the six year period.” *Town of Belle Prairie*, 448 N.W.2d at 379. *But see Ravenna Township v. Grunseth*, 314 N.W.2d 214 (Minn. 1981) (court found the lack of culverts, ditches, snowplowing, mowing, or other maintenance, and infrequent grading fell below the level maintenance typical of other roads). In one case, the court found that the town dragging and leveling off a road once or twice a year was sufficient maintenance under the statute.

### 3. Use and Maintenance Continuously – Six Years

As stated, continuous maintenance does not mean that every portion of the road is maintained each year. Instead, the court is more likely to look at whether the maintenance that occurred was consistent with maintenance on similar roads. While the six-year period must still be satisfied, if the character of the road is such that infrequent maintenance during the year is all that is necessary to maintain the road for the purposes for which it is used (e.g., access to a cultivated field), the infrequent maintenance over at least six years will likely be found to satisfy the timing element.

### 4. Width of Right-of-Way Disputed

It is important that towns do not assume that the right-of-way of a road established by use and maintenance is 66 feet. That is because the limitation of the statute is that use and maintenance roads are only established to the “width of actual use.” This restriction resulted from a

challenge to the original language of the statute that indicated the road was established to the width of two rods on each side of the centerline of the road (i.e., 66 feet). The owner claimed that the automatic establishment of the road at four rods, when less than that width had actually been used over the years, constituted an unconstitutional taking of his property without compensation.

Acquiring a road by use and maintenance is based on the notion that such use and maintenance places the owners on notice that the public is claiming their property for a road. *Barfnecht v. Town Bd. of Hollywood Tp.*, 232 N.W.2d 420, 423 (Minn. 1975). The owners must take action to dispute the public use within the prescribed statute of limitations (i.e., six years), or they are prohibited from thereafter challenging the public easement. The court held that since the owner was put on notice only to the extent that his property was actually used and maintained as a road, the road easement created is limited to the width of actual use. *Id.* However, the width of the easement “is not limited to that portion of the road actually traveled; it may include the shoulders and ditches that are needed and have actually been used to support and maintain the traveled portion.” *Id.*

By limiting the width of these roads to the area actually used and maintained the court placed town boards in a position of not being able to accurately determine the width of its roads. When road widths are uncertain, maintenance activities became much more difficult and are deterred out of fear of being sued for trespass by the adjacent owners.

The same concern exists for town boards today. Some boards have responded by undertaking procedures to formally acquire full 66-foot easements, while others have chosen to remain with the easement they acquired through use. Detailed maintenance records for each road can be key to clarifying the width of the roads. The records not only show maintenance activities, they also indicate that the town’s inspection and maintenance activities encompass 33 feet on either side of the road’s center. Performing such activities and keeping detailed records of these activities will help support the town’s claim to a 66-foot right-of-way.

A full discussion on the determining the width of a right-of-way is found in § 15-8.

### C. Dedication by Owner

Owners of land may make a direct dedication of a portion of their property to the town for road purposes. The statutory procedure for making such a dedication is contained in Minn. Stat. § 164.15 and involves the following steps:

1. The owners must develop a written application that describes the land to be dedicated and the purpose of the dedication.
2. The owners file the application with the town clerk.
3. The clerk must present the application to the town board (typically at the next board meeting);
4. Within ten days, the board, if it chooses to accept the dedication, may pass a resolution declaring the described land to be a town road. No damages may be paid to the owners for the dedication.
5. The board records the resolution with the county recorder and files the resolution with the county auditor.

Because of the ten-day limitation, a board interested in accepting a proposed dedication should attempt to work out the details with the owners before a formal application is actually filed. In that way, the board can be properly prepared to accept the dedication. A road order should be recorded at the county recorder’s office to secure the existence of the easement into the future.

Town boards faced with a dedication by owner situation may want to have the transfer occur by easement rather than an application and resolution. Easements are a much more common and accepted form to convey a road interest. Boards will often ask the owners to have an attorney draft the proper easements. The board can then work with the owners and their attorney to perfect the granting and recording of the easements. In either case, the board should have the owners include in the dedication all the vegetation and trees currently on the land and that may thereafter grow on the land. This will help the board avoid future problems that could arise regarding tree removal.

Refer to Document Number **TR4000B** and **TR4000E** for additional information on this process.

## D. Dedication by Plat

Land may be dedicated to a town for a public road by plat. The developer is required to show all roads intended to be dedicated to the public. Minn. Stat. § 505.02-.03. When a plat is recorded, all lands dedicated for public use are held in trust in the town's name for the purpose indicated on the plat. Minn. Stat. § 505.01. (See § 15-15) For roads, this typically means that a public road easement is conveyed to the town. However, that alone does not mean it is a town road. The conveyance does not require acceptance by the town board. *Town of Red Rock v. County of Mower*, 250 N.W.2d 827, 831 (Minn. 1977).

Once the roads are dedicated, it is left to the town board to determine when it will open and maintain the roads. *Town of Red Rock*, 250 N.W.2d at 831 (citations omitted). The town has no obligations on a road dedicated by plat until the town board agrees to open and maintain it as a town road.

In fact, Minn. Stat. § 164.11 indicates a road dedicated by plat actually becomes a cartway provided it is at least 30 feet wide. The board may not spend any money on a cartway unless it passes a resolution determining such expenditures to be in the public interest. Minn. Stat. § 164.08. Cartways are open for use by the public. This helps resolve situations in which an owner wants to close off a platted road that has not been accepted by the town, or use it in a way inconsistent with the public use (e.g., place a building on the right-of-way). (Refer to § 15-19 for dedications deemed cartways.)

If the developer or owners within a plat are interested in having a town take over the maintenance of a platted road, they need to formally make that request to the town board. Some of the factors the board should consider when reviewing such a request are "the cost of maintenance, the number of dwellings abutting the roadways, the condition of the roads, and the degree of hardship suffered by the landowners because of the alleged failure to open or maintain the roads." *Id.*

Some town boards address the road issue with a developer before the plat is recorded. This can be done formally through a development or road agreement, or more informally by telling the developer of the board's policy on such roads and providing them with a copy of the town road specifications that must be followed. Having the

"Plat" means a delineation of one or more existing parcels of land drawn to scale showing all data as required by this chapter, depicting the location and boundaries of lots, blocks, outlots, parks, and public ways. Minn. Stat. § 505.01.subd 3(f).

developer enter into an agreement with the town that is supported by security (e.g., bond or letter of credit) is the best way to protect the town and to ensure the roads are properly built. If an agreement was not reached before the plat was recorded, many town boards address requests to take over a platted road by explaining that the road must be built to town specifications before the town will maintain it. Once the specifications are met, and any other requirements associated with accepting such roads are satisfied, the board accepts the road and thereafter maintains it as a town road. It is recommended that such acceptance occur by board resolution.

Refer to Document Number **TR4000C** on accepting platted roads for town maintenance.

Boards need to be aware that in 1977 the Minnesota Supreme Court created what could be considered an exception to the board's discretion to decide when it will take over the maintenance of a platted road. The potential exception was created when the court found that an impassible road complaint could be filed with a county under Minn. Stat. § 163.16 on a platted road even though the town board had not taken over maintenance of the road. *Town of Red Rock*, 250 N.W.2d at 831. The impassible road procedure allows owners to bring a complaint to the county board claiming that the town's neglect of proper maintenance has resulted in a road not being reasonably passable. The county holds a hearing on the complaint and may order the town board to maintain the road.

The apparent purpose of holding that the impassible road procedure applies to unaccepted platted roads was to provide relief to owners living on platted roads that have been developed to the point that they are public in nature. However, the court's holding directly contradicts the rule it developed, and reaffirmed in the very same decision, regarding the board's discretion over such matters. It also contradicts the fundamental purpose of the impassible road statute, which is to create an opportunity to seek relief when a town fails to adequately perform its duty to maintain a road. The board cannot fail to perform a maintenance duty until the duty actually exists. On platted roads, the duty does not exist until the board has accepted the road for maintenance by the town. Despite the contradictions in the holding, it remains the controlling interpretation of this narrow point of the law at this time.

## E. County Road Reversion

A county is statutorily authorized to revoke a county highway. Minn. Stat. § 163.11, subd. 5. Once revoked, it reverts to the town in which it is located. While the statute acknowledges that the town receiving a road in this way may vacate it, this option often is not available due to the restrictions contained in Minn. Stat. § 160.09, subd. 3. (i.e., prohibiting the vacation of a road if it will land lock five acres or more without owner consent unless other access is provided).

If vacating the road is possible and if it occurs within one year after the county revocation, the county is responsible for paying any damages occasioned by the vacation. In these cases, the county board must be involved in determining and awarding the damages.

To revoke a highway, the county is required to undertake a number of procedures including: notice to the town; hold a hearing; make the repairs or improvements on the highway necessary to meet county standards for a comparable road in the county; record the highway if it is not recorded; and maintain the highway for two years from the effective date of the revocation. The two-year maintenance period does not begin until all the required steps, including bringing the road up to specifications, are completed. If the county has not adopted specifications for the type of road to be reverted, towns have successfully argued that the road must be brought up to the town's specifications. Town boards can agree to an expedited reversion process, but they are not required to do so and can hold the county strictly to the statutory requirements and timelines

## § 15-4. Altering Town Roads

The same procedure used to establish a road is used to alter a road. So, a road alteration can be initiated by the grant of elector authorization under Minn. Stat. § 164.06, subd. 1, or by a petition brought under Minn. Stat. § 164.07, subd. 1. Perhaps the biggest question regarding alterations is what constitutes an alteration requiring the use of the statutory procedure.

As a basic rule, the alteration procedure does not need to be used unless additional right-of-way is being acquired as part of the project. The Minnesota Attorney General has issued an

## F. Common Law Dedication

A public road may also be created by common law dedication. *Sackett v. Storm*, 480 N.W.2d 377 (Minn. Ct. App. 1992). However, because a road created by common law dedication may not necessarily be a town road, only a brief overview of the doctrine will be provided.

Common law dedication typically involves an owner intending, either expressly or impliedly, to dedicate his or her land to the public, and acceptance of the dedication by the public. Intent to dedicate may be inferred from the owner's unequivocal conduct. Public use can show public acceptance of a dedication. Neither maintenance by the town nor acceptance by the town board is required for public acceptance of the dedication. The dedication is effective immediately upon public acceptance, is not revocable by the owner, and binds all future owners of the property.

A town is not required to maintain roads created by common law dedication unless it has expressly accepted that obligation or has impliedly accepted the obligation through at least six continuous years of maintenance.

Another category of common law dedication exists, but comes about only infrequently. If a developer fails to follow the proper procedure to dedicate the roads within the plat, but the plat has been accepted and filed, courts sometime refer to the dedication as a common law dedication. *Doyle v. Babcock*, 235 N.W. 18, 20 (Minn. 1931). If a statutory dedication fails for some reason, a court may turn to the common law concept to save the dedication.

opinion that if a town is simply straitening a road within an existing right-of-way, the Minn. Stat. § 164.07 procedure need not be followed. Op. Atty. Gen., 377a-7, April 19, 1962. However, if the board is widening its right-of-way or relocating it, then the statutory procedure must be followed. In fact, when a town relocates a road, it will often initiate a combined alteration and vacation procedure to acquire new right-of-way and eliminate a portion of the old right-of-way.

Refer to Document Number **TR4000A** for additional information on this process.

## § 15-5. Extinguishing a Town Road

There are various ways by which a town may intentionally extinguish, or unintentionally lose, its interest in a road. As with establishing roads, it is important to understand the distinction between the methods and when they apply.

Before discussing the ways in which a right-of-way may be lost, it is important to point out that once acquired, the town does not lose its property merely by occupation of the land by someone else. Minn. Stat. § 541.01. In other words, an adjacent owner does not acquire a portion of the road simply because he or she builds a fence one foot into the established right-of-way. This protection recognizes that governmental entities should not be expected to patrol all public land in the state to locate and expel everyone who has encroached or is attempting to acquire the land through occupation

### A. Formal Vacation Procedure

Formally vacating a road usually refers to the procedure in Minn. Stat. § 164.07, which is the same procedure to establish or alter a town road. Towns that have adopted urban town powers under Minn. Stat. § 368.01 may use an alternative procedure to formally vacate a road. The process, which is slightly more streamlined, is to be found at Minn. Stat. § 368.01, subd. 25. If the road to be vacated is platted, those interested in the vacation may petition the town board under Minn. Stat. § 164.07, or file an application with the district court under Minn. Stat. § 505.14 asking for the vacation.

Two important issues to consider when vacating a road are the prohibition on land locking property and the need to determine damages. Under Minn. Stat. § 160.09, subd. 3, a town may not vacate a road without consent of the owners if it is the only means of access to property or properties totaling at least five acres unless other means of access is provided. This is essentially the only statutory prohibition to a town board exercising its discretion to vacate a road. Even though the statute technically allows the land locking of less than five acres, do not proceed with a vacation if it will land lock anyone against their wishes unless other access is provided.

Determining damages for vacating a road can be difficult. Many times, the owners who want a road vacated will release any claim to damages. In fact, boards should be sure to obtain waivers whenever possible, even from the affected owners that signed the petition. If any owner is not willing to waive damages, the board is required to determine the amount of damages, if any, which must be paid. An owner is only entitled to compensation if the damages sustained by the vacation are of a different

kind than those sustained by the general public, not merely a different degree. *Underwood v. Town Board of Empire*, 14 N.W.2d 459, 461 (Minn. 1944). This typically means that abutting landowners are potentially eligible to receive compensation. *Id.*; but see *Wendt v. Board of Sup'rs. of Town of Minnetrista*, 92 N.W. 404 (Minn. 1902) (indicating that an owner of land at the end of a vacated road may be entitled to compensation).

A claim of compensation is based on the Minnesota Constitutional provision requiring compensation when private property is taken or damaged for public use. Minn. Const. art. 1, § 13; See also Minn. Stat. § 160.03. The damage relates to the inconvenience sustained by the loss of or interference with reasonable access and is typically measured by the difference of the property's market value before and after the loss of access. *Beer v. Minnesota Power & Light Co.*, 400 N.W.2d 732, 735 (Minn. 1987). This amount is then reduced by the money value of the benefits, if any, which will be conferred by the vacation. As with the payment of damages for establishing a road, the amount of compensation must be determined on a case-by-case basis. The use of legal assistance is highly recommended.

Once a road easement is vacated, the land returns to the owners. It becomes entirely private property that may not be used, not even by the neighboring owners, without the permission of the owner. Boards do not make any sort of conveyance of the vacated area. Boards only have control of vacated land if it retains a drainage or utility easement, or in the rare case where they owned the road in fee.

Refer to Document Number **TR4000A**, which includes a checklist for vacating a road as well as a discussion of reducing damage awards by the amount of benefit conferred.

When a town vacates a platted road, the land typically reverts to the adjoining owners within the plat. If there are platted lots on both sides of the road, the owners on either side take to the centerline of the right-of-way. If the road is on the outside edge of a plat, but still entirely within it, the adjoining owners within the plat usually receive the entire right-of-way area. Despite these relatively simple rules, the question of who gets what after a vacation can become very controversial. The point boards must keep in mind is that they do not decide who gets what after a vacation. This means town boards must resist any temptation to allocate the land upon vacation even if asked to do so by the adjacent owners or the petitioners. Reversion of the right-of-way occurs by operation of law and if there is a dispute, the parties need to take the issue to district court.

### **B. Extinguishment of “Abandoned Roads”**

In 1992, a procedure was created for a town board to disclaim and extinguish a town’s interest in a road without having to use the formal vacation procedure. Minn. Stat. § 164.06, subd. 2. The extinguishment procedure can only be used on roads that:

1. were not recorded;
2. were established more than 25 years ago; and
3. have not been improved or maintained in the last twenty years.

This procedure provides town boards a relatively simple method to eliminate a town’s interest in a road, after providing notice of the meeting at which the issue will be considered.

Many times a board will not be certain whether the town actually has an interest in the road. Often the “road” will be overgrown with brush and trees. The problem boards encounter on these “roads” is when someone wants the board to reopen and maintain them. Rarely is the board interested in spending the funds necessary to restore and maintain the roads, but they often face claims the board has a duty to reopen the roads. To avoid such disputes before they arise, boards can use the extinguishment procedure to make it clear that the town has no legal interest in the roads.

Refer to Document Number **TR4000D** for additional information on this procedure.

### **C. Abandonment**

The term abandonment is used in a number of different contexts when referring to roads. For this section, abandonment means the loss of a town

road easement through long-continued non-use accompanied by affirmative or unequivocal acts by the town that are inconsistent with the continued existence of the road and that indicate an intent to abandon the road. *Wolfson v. City of St. Paul*, 535 N.W.2d 384, 387 (Minn. Ct. App. 1995). Abandonment is a question of intention and “[m]ere nonuser for any length of time will not operate as an abandonment of a public street.” *Village of Newport v. Taylor*, 30 N.W.2d 588, 592 (Minn. 1948). “Nor will nonuser, coupled with failure to remove obstructions erected by abutting property owners or others, constitute abandonment.” *Id.* Claims of abandonment usually involve roads that have not been used for years and that the board has said or otherwise indicated it intends to give up the easement for the roads.

Estoppel is often claimed in conjunction with abandonment. Estoppel is a fairness concept. In this context, it relates to a claim that a town should be prohibited from asserting its interest in a road because it would be unfair to an owner who reasonably relied on the affirmative actions of the town indicating an intent to abandon the road. The elements of estoppel are:

- 1) long-continued nonuse by the municipality;
- 2) possession by a private party in good faith and in the belief that the property’s use as a street has been abandoned;
- 3) erection of valuable improvements on the property without objection from the city, which has knowledge thereof;
- 4) great damage resulting to the possessors if the municipality were allowed to reclaim the land; and
- 5) an affirmative or unequivocal act by the municipality which, in light of all the circumstances, induced a third party reasonably to believe in and to rely upon the act as constituting a representation of the municipality’s intent in fact to abandon the street.

*Reads Landing Campers Ass’n, Inc. v. Township of Pepin*, 533 N.W.2d 45, 49 (Minn. Ct. App. 1995).

One of the initial cases on abandonment provides a good example of the harm the estoppel doctrine attempts to avoid. The case involved a platted Street dedicated to a city. *Rochester, City of, v. North Side Corporation*, 1 N.W.2d 361 (Minn. 1941). The portion of the road in question had not been opened or used as a street in its 83 years of existence. The road that served the area was partially built off the platted right-of-way. Over the years, the adjacent owners built a few permanent

buildings in the unused right-of-way with building permits from the city. The buildings were kept and maintained in that location for over 40 years. The city filed suit to require the owners to remove the buildings from the platted right-of-way.

The court upheld the finding that the city was stopped from asserting its interest in those portions of the right-of-way. Factors such as the long period of nonuse by the city, permission of the city to construct the buildings, and reasonable reliance on the location of the existing road weighed heavily in the finding of abandonment.

As a final note on this issue, it is important to realize that title to public roads and lands may not be acquired by someone through occupancy alone. Minn. Stat. § 541.01. For instance, a claim of adverse possession that may be brought against a private owner after 15 years of occupancy by the claimant is not available against town property or town road rights-of-way.

#### **D. Spending Limitations (25-year law)**

Occasionally, town boards receive requests to reopen and maintain a road or portion of road that has not been maintained for many years. If the road has not been maintained or improved for over 25 years, Minn. Stat. § 365.10, subd. 11, indicates the issue can be submitted to the electors at an annual or special town meeting. At the meeting, the electors may pass a resolution to allow the board to determine whether the road will be opened and maintained.

The inference raised by the statute is that if the electors decide not to pass the resolution, the board would be prohibited from spending town funds to maintain the road. In a sense, this section places owners in a position of having to act within 25 years of when a town stops maintaining a road. Failure to do so could result in the electors either refusing to give the board authority to consider the matter, or the electors authorizing the board to consider the matter and the board deciding not to maintain the road. The operation of this law does not extinguish the road easement, but the prohibition on spending town funds to maintain the road can eventually lead to loss of the right-of-way under the Marketable Title Act.

What is particularly significant about this statute is its statement that the impassible road complaint procedure in Minn. Stat. § 163.16 does not apply to these old roads. This protection allows the board to avoid having to defend against a variety

of potential complaints brought on roads that someone may claim were town roads at some time in the past (it is common for owners to point to maps from the 1800's or early 1900's to support their claim for a town road).

#### **E. Marketable Title Act (40-year law)**

The Marketable Title Act (MTA) is contained in Minn. Stat. § 541.023 and is sometimes referred to as the "40-year law." The MTA provides a defense for owners against those who assert a hostile claim to the same property. The purpose of the MTA is to avoid ancient records that impose conditions and restrictions on property from interfering with its marketability. *Wichelman v. Messner*, 83 N.W.2d 800, 812 (Minn. 1957).

In a troubling decision, the Minnesota Supreme Court specifically found that town roads are not exempt from the application of the MTA. *Sterling Tp. v. Griffin*, 244 N.W.2d 129, 133 (Minn. 1976). Application of the MTA to town roads has traditionally come as a defense asserted by an owner against a town's attempt to reopen a road that has not been maintained for 40 years. Increasingly there are attempts by landowners to use the MTA to deprive a town of its road right-of-way.

To overcome the application under the MTA, the town needs to demonstrate one of the following:

1. the road was created within the last 40 years;
2. if the road was created over 40 years ago, proper notice of the easement was filed with the county recorder within the last 40 years; or
3. the town is in possession of the road.

*Sterling Tp.*, 688 N.W.6d at 576. Typically, the road in question was either never recorded or was only recorded in the county auditor's office, which does not constitute sufficient notice of an interest in land. *Id.* (citation omitted). As such, the town must show that it has been in possession of the road and that the possession was sufficient to place the owner on notice of the town's interest in the road.

To establish possession, the town must show present, actual, open, and exclusive possession that is neither equivocal nor ambiguous, and is of a character that would put a prudent person on inquiry. *Sacket v. Storm*, 480 N.W.2d 377, 381 (Minn. Ct. App. 1992).

When applied to roads, factors such as the amount of use of the road, the amount of work and maintenance performed by the town on the road, the de-

gree of control exercised by the town over the road, whether the road was regularly inspected by the town, and knowledge of the existence of the easement are considered. *Sterling Tp.*, 244 N.W.2d at 134. Possession may be tied to common law dedication in that acts sufficient to constitute public acceptance of an owner dedication may also be sufficient to show possession under the MTA. *Sackett*, 480 N.W.2d at 382.

Possession was found lacking on a portion of town road established in 1889 that was never physically

constructed as a road, was not maintained or snow plowed, received only sporadic use by very few people, was not included in the town's road checks, lead to a dead end, and there was a lack of knowledge of the claimed easement. *Sterling Tp.*, 244 N.W.2d at 134. In another case, sufficient possession was established on a road that joined to more heavily traveled roads, some degree of regular use and maintenance was shown, and a tax credit was given to the properties subject to the road. *Northfork Tp.*, 353 N.W.2d at 218.

## § 15-6. Town Line Roads

Roads can be located on the line between two towns or on the line between a town and a city. To address the issues surrounding the establishment, maintenance, improvement, and vacation of line roads, the legislature created Minn. Stat. §§ 164.12 to 164.14. Because line roads are located in different jurisdictions, their creation, alteration, or extinguishment must be done by joint action of both boards. Keep in mind a town road may become a line road as a result of a city annexing up to the road. Minn. Stat. § 414.038.

When there is a line road, the boards should enter into an agreement to set out an equitable division of the costs and responsibilities for the maintenance of the road. Equitable does not mean equal, it means fair. When developing or updating these agreements, whenever possible it should divide the road into two ends with each town being responsible for the maintenance of one end. By not mixing the maintenance responsibility, potential liability claims are reduced because the responsible authority for each section of the road is distinct and identifiable. Refer to Document Number **TR11000** for a sample line road resolution.

These agreements should also be clear as to what constitutes regular maintenance that each town must perform and which items of maintenance require prior approval from both boards. For instance, one town should not on its own attempt to undertake the tree removal procedure or take any enforcement action against an adjacent owner in areas located in the other town.

The extent to which costs will be shared for a particular maintenance activity must be very clearly set out in the agreement. This is one of the more common areas of dispute between towns on line roads. If a bridge or culvert is needed or already exists on a line road, Minn. Stat. § 164.13 directs that the costs of installing and maintaining the bridge or culvert must be paid in equal shares by the two towns. If one board has an expectation that the other will pay a portion of cost of a project, make sure that is agreed to before the project starts. Another area of dispute is the level of maintenance performed by each town. If an agreement cannot be reached, or if either town believes an agreement has become inequitable, a board can petition the county board to review the situation. The county must then determine the proper division of responsibility between the towns.

Roads on the line between towns and cities must be handled in the same joint fashion as roads between towns. Again, if either party believes the situation has become inequitable, they can petition the county board for a review and determination.

A procedure also exists for the establishment of cartways that start in one town and terminate in another. Minn. Stat. § 164.09. Boards may, by joint resolution, agree to jointly establish a cartway to landlocked property in accordance with the usual cartway establishment procedure in Minn. Stat. § 164.08. See § 15.19.

## § 15-7. Is it a Town Road?

Whether a path is a town road is a question most boards seem to face at one time or another. With the changing uses and ownership of the land over the decades, disputes arise over the status and right to use certain paths. A road that may have been used regularly to access a home site 80 years ago, may have since been abandoned and grown over with brush and trees. When the abandoned property is newly purchased, the owners may ask the town to acknowledge and reopen it as a town road. Another common situation is a new owner of property gating or otherwise blocking a path across the property that has been used by other owners or the public to access other land. Often these disputes or issues are brought to the board for resolution and an increasing number of these disputes result in lawsuits.

Determining if something is a town road starts with a gathering of as many facts regarding the road as possible. Check the town's records for any documents or minutes referencing the road. Particularly important are old road orders and any maintenance records. Those wanting to treat a road as public will often point to old town or county maps because they were often very liberal in what they considered to be a road. However, the fact that a path is shown as a road does not necessarily mean that it was in fact ever a town road. It is very important to find out if there is any record of the road in the county recorder's office. Sometimes old town road orders can also be found in the county auditor's office. Those who have lived in the area for many years, particularly if they served on the town board, can also be asked if they have any memory of the town ever maintaining the road as a town road.

Once the information is gathered, the board should work through the list of methods for establishing a road to determine if any of them apply to the road in question. (See § 15-3 for

the methods of establishing a road.) If the board is not able to identify any formal establishment of a road by the town board or a history of regular maintenance, it is not likely a town road. Furthermore, anything short of a town road order recorded in the county recorder's office is likely not "proof" of the existence of a town road. Each fact regarding a road is a piece of the puzzle that when put together will tend to either support or cast doubt on its existence as a town road.

If it appears that the road was established as a town road, the inquiry cannot end there. It is possible for a board to lose its claim to a road. The board will need to determine if it ever affirmatively eliminated its interest in a road through a vacation or extinguishment procedure. (See § 15.5) If neither is true, then the board will have to determine if it has lost its authority over the road because of the 25 year or 40 year laws. If, after working through the establishment and extinguishments possibilities, it appears a town road was established and not extinguished, then it is possible the board is obligated to reopen and maintain the road.

Unfortunately, because the facts are often incomplete and sometimes even contradictory in these cases, it is difficult to gain a clear picture of the status of a road. Even if the board is fairly confident in its determination, it is still possible for someone to bring suit to challenge the board's decisions. Emotions often run high in these disputes and can involve significant claims of damages. The increase in the number of people moving into rural areas coupled with sharply increasing property value is resulting in a marked increase in suits arguing over whether something is a town road.

Refer to Document Number **TR5000** and **TR14000** for additional information on this topic.

## § 15-8. Determining the Width of a Town Road

Because much of a board's authority over a road is limited to the established right-of-way, knowing the width of a particular right-of-way is critical. Unfortunately, legislative attempts made over the years to provide some certainty to width determinations have been met with disapproval by the courts. Because of the importance, some time will be spent in this section going into the issues surrounding determining the width of town road rights-of-way.

Uniformity in the widths of road rights-of-way benefits the town, the owners adjacent to the roads, and the traveling public. To promote that end, the legislature adopted Minn. Stat. § 160.04 requiring all roads thereafter established to be at least four rods (66 feet) wide. As a result, all but the oldest of the formally established or platted roads are 66 feet wide.

However, many town roads have been established by use and maintenance and are not supported by road orders or plats recorded in the county recorder's office. In other instances, all the proper establishment procedures may have been followed and a road order developed, but for some reason the order did not make it into the county recorder's office when that office was made the official office of record for interests in real estate. There is really no question that the roads in this category are town roads since they have been used and maintained as town roads often for decades. The more troublesome issue that arises is how to determine the width of these roads.

The lack of a recorded road order leaves towns having to rely on the prescriptive easement provision in Minn. Stat. § 160.05 to support its claim to the road. As pointed out earlier, the statute does indicate that property used by the public and maintained by the town as a public road for at least six continuous years is a town road. Many years ago, the statute automatically deemed a road established by use and maintenance under the section to be established at a width of 66 feet. But in *Barfnecht v. Town Bd. of Hollywood Tp.*, 232 N.W.2d 420 (Minn. 1975), that provision was challenged as effecting an unconstitutional taking. In essence, the owner challenged the statute on the

basis that if the public had only used, and the town had only maintained, a small portion of the land for six years, the public should not be able to automatically lay claim to more land than was actually used during that period. The court agreed, stating:

"Public use cannot be said to apply to lands not actually used. There is no reason that an owner should know that he is required to dispute the rightfulness of a nonexistent user. A property owner thus receives no notice as to a public claim on any property in excess of that which has actually been used. Thus, a dedication by public use cannot constitutionally exceed the amount of actual dedication." *Id.* at 867.

The legislature responded to the court's ruling by amending the statute to remove the automatic 66-foot width language and adding the current language indicating the dedication is only "to the width of the actual use . . ." Minn. Stat. § 160.05. For boards attempting to maintain and regulate some 59,000 miles of roads, the obvious question becomes "how do we determine what the width of actual use is on a particular road?"

The court in *Barfnecht* recognized that the width of the right-of-way "is not limited to that portion of the road actually traveled; it may include the shoulders and ditches that are needed and have actually been used to support and maintain the traveled portion." *Id.* So, boards are not required to show that people have been regularly driving in the ditches over six years, but the court did not explain what qualifies a portion of roadside as having been used to support and maintain the traveled portion of the road.

In an attempt to overcome the uncertainty created by the *Barfnecht* case, the legislature enacted Minn. Stat. § 164.35 providing towns a process to develop and record a map of its roads at a uniform width of 66 feet. Adopted in 1987, many boards sought the clarity of having their roads recorded and underwent the new procedure. Unfortunately, the clarity gained was short lived.

In 1992, an owner brought suit against a town when it attempted to clear brush and trees within the 66-foot right-of-way it had recorded by map under the Minn. Stat. § 164.35 procedure. The resulting case, *Alton v. Wabedo Township*, 524 N.W.2d 278 (Minn. Ct. App. 1994), once again raised the question of whether a road established by prescription through continued use can automatically be deemed to be 66 feet wide. The significant difference between the 66-foot width established by the old Minn. Stat. § 160.05 language and the map recording procedure is that under the map recording procedure owners are given notice of the town's claim to 66 feet. Notice and at least one public hearing are required parts of the map procedure. Despite this extra process and the fact that the town in this case was found to have properly followed the procedure, the court held that the statute was unconstitutional. It said that even though notice was provided, the statute does not contain a mechanism for compensating owners for any land that is taken as part of the process. *Alton*, 524 N.W.2d at 282. Because following the statutory procedure could result in an uncompensated taking, the court said it is constitutionally flawed.

To correct the problem the legislature added a compensation mechanism to the statute. "To the extent this section requires recording or dedicating a town road to a width greater than that of its previous, actual public use, section 164.07 governs any award or procedures relating to damages sustained, if any, by the affected property owner." Minn. Stat. § 164.35. As discussed above, Minn. Stat. § 164.07 is the town road establishment procedure that allows a town to establish a road by gift, purchase, or eminent domain. The process involves giving notice to the owners, holding a hearing, setting and awarding damages if the land is to be taken, and then an opportunity to appeal the decision exists. This additional process significantly limits a town's ability to act comprehensively toward the recording of its roads. As a result, rather than using the map recording procedure, some towns choose to go directly to the Minn. Stat. § 164.07 procedure to establish each road until they are all formally estab-

lished. Refer to the recording section below for additional information.

The *Wabedo* decision put towns back into the post-*Barfnecht* situation of only being able to claim the width of actual use, but not knowing with any certainty what that means. That remains the current legal state towns are in regarding roads that can only be claimed as prescriptive roads under Minn. Stat. § 160.05. Even if the road was recorded as part of a map recording procedure, if the existence of the road is based on use and maintenance, the board cannot rely on the width indicated on the map. Boards are once again faced with the uncertain concept of actual use to determine the road's width.

On its face, determining if a road has been used by the public or maintained by the town would seem a relatively simple exercise. This would be true if the inquiry was limited to the surface of the road. However, the difficulty arises the further one moves beyond the edges of the traveled surface.

What's included in width? Shoulders and ditches? Yes. Back-slope of a ditch? Maybe. Does brushing a road-side every four or five years constitute sufficient use? What if there are some trees near the outside edges of the 66-foot area, does that mean the right-of-way is not as wide in those areas?

Most boards do not attempt to perform maintenance work in the full 66-foot right-of-way area every year. It would be extremely costly to do so and would likely not be needed to keep the road reasonably maintained.

Despite these uncertainties, boards must continue to do their best to fulfill their duty to keep their roads properly maintained. An important part of this task is to identify which roads were recorded independently from a town road map developed under Minn. Stat. § 164.35. If an easement, road order, or plat is found on record with the county recorder's office, the board can likely rely on the width indicated on the document. If there is no independent record of the road's width, the board is likely limited to the width of actual use.

## § 15-9. Town Road Designations

Town boards have available to them authority to make certain designations on their roads. There are three primary designations boards can place on their roads: minimum maintenance; rustic; and closed. Each of the designations has the effect of limiting the town's liability toward the road, but not all roads are eligible for the designations. Boards are also authorized to designate bikeways and pedestrian ways, though this authority is not often exercised.

### A. Minimum Maintenance Roads

Certain low volume roads may be designated minimum maintenance. Minn. Stat. § 160.095. Once properly designated, the road may be maintained at a level less than other roads and the town and its officers are exempt from liability for damages or injury to those using the road. It is important to remember that minimum maintenance does not mean NO maintenance; only a lower level of maintenance.

Having a minimum maintenance designation available to road authorities benefits both the general public and the road authority. The public benefits by having more roads available to them than could otherwise be sustained if the town had to maintain them at the same level as more heavily traveled roads. Lower maintenance costs and broad liability protections benefit the road authority.

To be eligible for the minimum maintenance designation, the road must be used only occasionally or intermittently for passenger and commercial travel. It is possible to designate only a portion of a road minimum maintenance, provided the portion designated meets the low use requirement. In the resolution making the minimum maintenance designation, a board is required to identify the beginning and end points of the designation. Notice of the designation must also be sent to the road authorities of each adjoining jurisdiction.

Once passed, the board must post signs on the road to notify the motoring public that it is a minimum-maintenance road and that the public travels on the road at its own risk. The signs must be posted at the entry points to the road and at regular intervals along the road. No definition is provided of the "regular intervals," but the board must decide of how many additional signs it will post on a designated road. Each of the signs must conform to the requirements established in the Minnesota Manual on Uniform Traffic Control Devices.

After the resolution is passed and the signs erected, the road need only be maintained at the level required to serve the occasional or intermittent traffic. In other words, the level of maintenance is

supposed to reflect the level of use. However, even rarely used roads need to be kept at least passable. If a minimum-maintenance road is not needed for vehicular traffic in the winter, the board should consider passing a resolution to close and barricade the road. By closing the road for the winter months, the board can be further assured that it will not incur any liability for injuries or damage resulting from use of the road.

Refer to Document Numbers: **TR1000** and **TR8000** for additional information on minimum-maintenance roads.

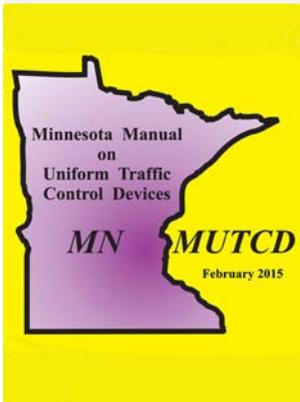
### B. Closed and Barricaded Roads

There are a variety of reasons why a board may choose to close and barricade a road. Road construction may require a temporary closing, while serious damage to a road or bridge may warrant an extended closure. As mentioned above, roads that are not needed during the winter months may be closed and barricaded to save limited maintenance dollars. Also, roads may be closed to certain uses while remaining open for other uses (e.g., closed to motor vehicle traffic, but left open for recreational use).

A board may close a road by passing a resolution. Minn. Stat. § 164.152. As with the other road designations, once a road is properly closed and barricaded, the town, its officers, and employees are exempt from liability for claims of injury or damage from any use, whether recreational or otherwise, of the barricaded road. To make sure the town can avail itself of these protections, the board must be sure to properly pass the required resolution and erect the proper barricades on the road.

No procedure is set out in the statutes for barricading a road, but boards should consider the potential impact a closing may have on the properties served by the road. If a closing will preclude an owner from using a convenient access to their property, it would be advisable to contact the owner to let them know of the proposed closing and the reasons for it. Some boards will choose to close roads that are only needed in the summer. Again, the board should let the owners know of its intent

to close the road for the winter to confirm that the owners will not be using the road during those months. **However, if the closing of a road is in response to an emergency, the first priority is to get the road barricaded to protect the traveling public. Notifying the landowners and formalizing the resolution can come later.**



To physically close a road to traffic, the board must erect barricades on the road. Although not always practical, boards should follow the provisions of the Minnesota Uniform Manual of Traffic Control Devices when selecting barricades and related signage. It is very important for boards to use the proper reflective road closed signs when erecting a barricade. In other words, do not erect a barricade that itself creates an unreasonable hazard.

When contracting for the construction or improvement of any road, culvert, or bridge, the board is required to place a condition in the contract requiring the contractor to place proper warning signs to notify the public the road is under construction. Minn. Stat. § 160.16, subd. 1. Contractors are required to, on their own, post warning and detour signs whenever the road work necessitates the closing of a part of a road.

It is important to remember that a road must be open at least eight months a year to qualify to receive gas tax money.

### C. Rustic Roads

Town boards may designate certain roads as rustic roads. Minn. Stat. § 160.83. In order to be eligible for a rustic road designation, the road must have the following characteristics: “outstanding natural features or scenic beauty; an average daily traffic volume of less than 150 vehicles per day; year-round use as a local access road; and maximum allowable speed limit of 45 miles per hour.” If the board determines a road is eligible, it may pass a resolution to designate it a rustic road. As part of the designation, the board may designate

the type and character of vehicles that may be operated on the rustic road; designate the road or a portion of the road as a pedestrian way or bicycle way, or both; and establish priority of right-of-way. Once designated as a rustic road, the town is allowed to maintain the road at a level less than the minimum standards required for roads, but must be maintained at the level required to serve anticipated traffic volumes. Furthermore, once the designation is made and the speed limit signs are posted, the town and its officers and employees are not liable for tort claims on the road if it was designed and maintained consistent with anticipated use and the design is not grossly negligent. The liability protections are not as broad as those associated with a minimum maintenance designation, but they do assist boards to strike a better balance between the need to maintain the right-of-way and the desire to retain its “rustic” beauty.

The disadvantage to this designation is that once a road becomes a rustic road, the board can no longer receive state-aid for the road. In other words, the board could no longer count the road as part of the mileage for which it receives a gas tax distribution under the town road account maintained by the state. “State money must not be spent to construct, reconstruct, maintain, or improve a rustic road.” Minn. Stat. § 160.83. This language also prohibits the board from receiving other state funds, such as through the park road account, for the road.

### D. Bike and Pedestrian Ways

Towns have the authority to designate a portion of their road rights-of-way as a bicycle lane or route. Minn. Stat. § 160.263. As part of the designation, the board can indicate the type and character of vehicles or other modes of transportation that may use the lane, establish priorities among the uses, and paint lines or construct separation devices for the lane.

In separate authority, urban towns may designate bicycle and recreational vehicle lanes according to the model standards established by the Minnesota Department of Transportation. Minn. Stat. § 160.262. Another statute gives all towns the authority in certain circumstances to create recreational vehicle lanes on the outside edges of town road rights-of-way. Minn. Stat. § 164.151.

## § 15-10. Regulating Roads

As both the local governing body and the road authority for town roads, the town board has certain powers it may exercise to regulate what may occur on the roads. It will not be possible to list all of the potential regulations or to discuss any of them in depth here. Instead, the following will point out some of the areas of regulation that seem to get the most attention.

### A. Regulatory Authority

Road regulations fall into two broad categories — the regulations the state has enacted, and those that can be enacted locally through the authority given to local governments by the state.

There are a number of road related issues that are already subject to state regulation. A board does not need to enact regulations to, for instance, prohibit littering or blocking a road. These and many other prohibitions already exist and can be enforced by law enforcement. Limited law enforcement resources, particularly in rural areas, make the effective enforcement of many traffic or road related laws difficult. However, if a board encounters a regulatory issue that is already prohibited by state law, it should work with the sheriff and county attorney to address the problem.

In addition to enacting its own regulations, the state has also delegated authority to local governments both general and specific authority to regulate roads and traffic. Despite the numerous state traffic regulations, the state has expressly left open to local regulation a number of issues including the standing

or parking of vehicles, erecting traffic-control signals, and designating one-way roadways. Minn. Stat. § 169.04. A board would use its general police powers granted in Minn. Stat. § 365.10, subd. 17 to enact regulations such as these when there is no other authority specifically on point. Urban towns would use their authority in Minn. Stat. § 368.01, subd. 19 to the same end. As with any town ordinance, it is the responsibility of the town board to provide for its enforcement. As may be appropriate, towns can use their own staff for non-criminal enforcement, hire law enforcement officers to provide criminal enforcement, or attempt to contract with the county for civil and/or criminal enforcement.

When exercising local regulatory authority, particularly in an area already heavily regulated by the state, boards must be especially careful that their proposed regulations do not conflict with state law. Even if a town is authorized to regulate a particular issue, if the regulation it creates clashes with state law by prohibiting something that is expressly permitted, or by allowing something that is expressly prohibited, it will be invalidated. See *Mangold Midwest Co. v. Village of Richfield*, 143 N.W.2d 813 (Minn. 1966). Similarly, with grants of authority the legislature often places conditions or limitations on the authority. Failure to abide by a statutory procedure or limitation can also invalidate a local regulation.

Specific statutory authority exists for town boards to regulate a variety of road and traffic related issues. Following are some of the more common regulatory issues.

#### 1. “Special Vehicle” Use

Town boards may enact ordinances to establish a permit procedure for allowing motorized golf carts, four-wheel all-terrain vehicles, or mini trucks to operate on its roads. Minn. Stat. § 169.045. The definition of a mini truck is provided in Minn. Stat. § 169.011, subd. 40a. Once a road is designated, one of these vehicles may not be operated on the road

unless a permit is applied for and issued. While this authority is given to the local government, enacting the ordinance triggers several requirements and limitations the state has attached to the permitting process. See Minn. Stat. § 169.045. Also, neighborhood electric vehicles meeting certain equipment and safety requirements may be operated on town roads unless prohibited by the local road authority. Minn. Stat. § 169.224

## 2. Snowmobiles and ATV's

Snowmobiles and all-terrain vehicles are subject to many state statutes and rules. They are also subject to the authority of towns to impose local regulations. Towns may "regulate the operation of snowmobiles on public lands, waters, and property under their jurisdiction and on streets and highways within their boundaries . . ." Minn. Stat. § 84.87, subd. 3. However, local regulations may not impose a fee for using public lands or waters and may not require a snowmobile operator to possess a motor vehicle driver's license while operating a snowmobile.

Recreational motor vehicles are also subject to both state and local laws. The legislature made it clear that the state laws are not meant to preempt the adoption of local regulations and that towns are authorized to adopt such regulations. Minn. Stat. §§ 84.87, subds. 3, 6; 84.928. Towns wishing to adopt snowmobile or recreational vehicle ordinances should have their own attorney review any such proposed regulations.

## 3. Mailboxes

Mailboxes can pose a problem for several reasons ranging from owners housing their mailboxes in concrete monoliths to the maintenance operator knocking them down while snowplowing. Under direction from the legislature, the Minnesota Department of Transportation has created rules and standards that apply to mailboxes located on roads with speed limits of at least 40 m.p.h. Minn. Stat. § 169.072; Minn. R. Chap. 8818. Mailboxes that do not meet the standards established by rule are declared to be a public nuisance, a road hazard, and a danger to the health and safety of the traveling public. Upon giving proper notice, road authorities may remove or replace mailboxes that do not meet the state standards.

As to mailboxes damaged by snowplowing activities, boards should develop a policy for how it will handle such issues. Most towns will not agree to repair or replace a mailbox unless there is some indication the plow caused the damage striking the mailbox versus merely hitting it with thrown snow.

## 4. Moving Buildings Over Town Roads

Anyone intending to move buildings that, together with the vehicle, exceed the standard size or weight limitations must obtain a written permit from the road authority. Minn. Stat. § 160.26, subd 2.

## B. Speed Limits

The Minnesota Department of Transportation largely control the setting of speed limits. There are, however, some opportunities for local governments to set speed limits on their roads.

The basic speed rule, which applies to all roads, is that no person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions. Minn. Stat. § 169.14. Drivers are assumed to be aware of actual and potential hazards and their speed must be restricted as may be necessary to avoid a collision. Similarly, drivers are expected to reduce speeds when approaching stopped emergency vehicles, railroad crossing, curves, hills, and when special hazards exist. Beyond these basic statements, the legislature has created some specific speed limits that apply to town roads.

### 1. Urban District

Speeds in an urban district are not to exceed 30 m.p.h. Minn. Stat. § 169.14, subd. 2(a)(1). "Urban district" means the territory contiguous to and including any city street or town road that is built up with structures devoted to business, industry, or dwelling houses situated at intervals of less than 100 feet for a distance of a quarter of a mile or more." Minn. Stat. § 169.011, subd. 90. To increase the likelihood of enforcement, towns with roads that qualify as urban districts should adopt a resolution making that finding and directing the erection of the appropriate speed limit signs.

### 2. Rural Residential District

Speeds are not to exceed 35 m.p.h. on a town road in a rural residential district if adopted by the town board. Minn. Stat. § 169.14, subd. 2(a)(8). A rural residential district "means the territory contiguous to and including any city street or town road that is built up with visible dwelling houses situated at intervals averaging 300 feet or less for a distance of a quarter of a mile or more." Minn. Stat. § 169.011, subd. 69a. Furthermore, "interval" is the distance, measured along the centerline of the roadway, between the primary access points for adjacent dwelling houses, regardless of whether the dwelling houses are located on the same side of the road.

The statute requires that the speed limit signs must be erected before the limit goes into effect. Many towns posted a 30-m.p.h. speed limit in areas that were considered rural residential under the statute that existed before August 1, 2009. In those towns, the 30-m.p.h. speed limit remains in effect despite changes in the law, until the speed sign is replaced. Minn. Stat. § 169.14, subd. 5f.

### 3. Residential Roadways

Speeds may not exceed 25 m.p.h. on roads designated by the road authority as a residential roadway. Minn. Stat. § 169.14, subd. 2(a)(7). “Residential roadway’ means a city street or town road that is less than one-half mile in total length.” Minn. Stat. § 169.011, subd. 64. The primary purpose of this limit is to allow the local road authority some discretion in setting speed limits where the need arises on short roads. The scope of this law was reduced in 2009 where before a one-half mile segment of a longer road could be designated a residential roadway, now the designation can only apply to a road that has a total length of less than one-half mile.

The road authority must act to designate the residential roadway and erect signs indicating the speed limit. Signs must also be posted to designate the beginning and end of the residential roadway. An ordinance or resolution should be adopted to designate the roadway.

### 4. Alleys

Speeds in alleys may not exceed 10 m.p.h. Minn. Stat. § 169.14, subd. 2(a)(6). Local road authorities are authorized to set speed limits in alleys based upon their own engineering and traffic investigations. Limits set at other than 10 m.p.h. are effective upon the posting of the proper signs.

### 5. Non-Designated Areas

Speeds may not exceed 55 m.p.h. in locations that are not designated by law or a Department of Transportation speed study with a different speed limit. Minn. Stat. § 169.14, subd. 2(a)(3). This default speed limit is what applies to a majority of town roads.

### 6. Speed Study Established Limits

If a local road authority believes a speed limit on one of its roads is greater or lesser than is reasonable or safe under existing conditions, it may request the Department of Transportation to conduct an engineering and traffic investigation (speed study) to determine if a different speed limit is appropriate. These requests are usually made by resolution.

Speed studies are typically only conducted during the summer months when the weather is good and the roads are dry. Once the department completes a study, it will certify a speed limit and authorize the road authority to erect signs for that limit. The new limit is effective upon the erection of the signs. If requesting a speed study on a road that has something less than a 55-m.p.h. limit, the road authority must keep in mind that if it is asking for the limit to

be reduced, the study may result in the limit being increased.

Once a speed is established by a speed study, the speed may not be changed except as authorized by the Department of Transportation. Which also means the board cannot simply disregard the certified limit and stay with the speed limit that was there before. The exceptions to this rule are the authority of local road authorities to set a school speed limit and to limit speeds to 30 m.p.h. in urban districts.

### 7. School Zones

Local road authorities may establish a school speed limit within a school zone of a public or nonpublic school based upon an engineering and traffic investigation as prescribed by the Department of Transportation. Minn. Stat. § 169.14. The limit may not be lower than **15 m.p.h., not higher than 20 m.p.h., and are only** in effect when children are present.

### 8. Work Zones

Local road authorities are authorized to reduce maximum speed limits in road work zones. Minn. Stat. § 169.14, subd. 5d. An engineering and traffic investigation are not required to set a work zone limit. A road authority may not reduce the limit more than: (1) 20 miles per hour on a road having a speed limit of 55 m.p.h. or greater; or (2) 15 m.p.h. on a road having a speed limit of 50 m.p.h. or less. The limits are in effect once the proper signs are posted. The signs must be covered or removed when they are not in use.

### 9. Park Roads

A town with a park may establish a speed limit on a road within the park. Minn. Stat. § 169.14. The limit must be based on an engineering and traffic investigation prescribed by the Department of Transportation and must not be lower than 20 m.p.h. Also, this authority may not be used to reduce existing limits by more than 15 m.p.h. Speed limit signs must be erected as well as signs indicating the beginning and end of the reduced speed zone.

### 10. Manufactured Home Parks and Camping Areas

Within the limits of a manufactured home park or recreational camping areas, vehicles are not to exceed 10 m.p.h. Minn. Stat. § 327.27. Signs indicating the speed limit are to be posted within the park and may be enforced by local law enforcement. Local road authorities may pass an ordinance to increase the speed limit within a manufactured home park, but the limit may not exceed 30 m.p.h.

### C. Weight Limits

Local road authorities are authorized to prohibit the operation of vehicles upon their roads or to impose weight restrictions if they determine the operation of such vehicles will seriously damage or destroy the roads. Minn. Stat. § 169.87. No specific procedure is set out for determining and imposing the limit, but it is recommended boards develop findings of fact for its decision and enact the limitation by ordinance. As with any ordinance, it is a town's responsibility to enforce the lower weight limit or work with the county sheriff for enforcement.

To help reach a decision on the appropriate weight restriction, boards may consult an engineer and obtain a written opinion as to what the weight should be for a particular road. The statute indicates an established limit is not effective until proper signs are erected and maintained.

To protect all town roads during the spring months when the potential for damage is the greatest, the legislature has established a seasonal weight restriction. Over an eight-week period established by the Department of Transportation for an area based on local conditions, an automatic weight restriction applies to all town roads that do not have a permanent weight restriction. During the established period, the weight on any single axle must not exceed five tons and the gross weight on consecutive axles shall not exceed a factor of the gross weight allowed by law.

In addition to the weight limits established by statute or the local road authority, the gross weight of any vehicle driven onto a bridge may not exceed the safe capacity of the bridge as may be indicated by signs posted on the bridge or the bridge approaches. Minn. Stat. § 169.84.

There are several exceptions to the weight limitations, and each year there are attempts to add more exceptions to the statute. Locally established weight restrictions and seasonal limitations do not apply to school buses or Head Start buses if the gross weight on a single axle of the vehicle does not exceed 14,000 pounds. However, a local road authority may act to lessen the allowable axle weight of buses. If such limitations are imposed, the local authority must provide the school board written notification of the limitation.

Certain implements of husbandry are provided an exemption to weight restrictions. An exemption also exists for utility vehicles that do not exceed

20,000 pounds per axle. There are also specific exemptions provided, with some limitations, for the following: hauling certain crops during harvest season; vehicles transporting milk; and recycling and garbage vehicles.

Town boards also have the authority, upon good cause being shown to them, to issue special permits to applicants wishing to move a vehicle across a town road that exceeds the size or weight limitations set by law or locally. Minn. Stat. § 169.86. Applications for a special permit must contain certain information and the permit, if issued, must be in writing and be carried in the vehicle. Towns may issue an annual permit to operate on its roads to snowplowing vehicles that have a blade that when deployed does not exceed ten feet in width.

Persons who drive vehicles in excess of the weight limitations set by the state or the local road authority are subject to a civil penalty in an amount established by statute. Minn. Stat. § 169.871. A general statement of civil liability also exists in Minn. Stat. § 169.88 for those who cause damage by illegally operating a vehicle or operating without a special permit. An even broader statement indicates that any person who by willful acts or failure to exercise due care, damages any road, street, or highway or highway structure shall be liable for the amount thereof.

### D. Utilities Within a Right-of-Way

In the mid 1990's the issue of local governments regulating the placement of utilities within road rights-of-way received a great deal of attention. Deregulation of the telephone industry spurred new entries into the market and an increased demand to place additional lines in rights-of-way. In response to the increased demands, some local governments enacted stricter regulations in an attempt to limit the problems associated with multiple utility lines being located in the same right-of-way. A legal challenge to the local regulations was eventually brought that resulted in the adoption of legislation, commencement of a study, and the subsequent development of rules by the public utilities commission. The legislation and rules essentially set out the rights of utilities companies to use rights-of-way for their facilities, affirms the rights of local governments to regulate their rights-of-way and recover their management costs, and defines the scope of permitted regulation.

The traditional regulatory authority given to towns over utilities was found in Minn. Stat. § 164.36(6)

and Minn. Stat. § 222.37. The two new statutes enacted as part of the process were Minn. Stat. §§ 237.162 & 237.163. The rules created from the statutes were codified in Minn. R. Chap. 7819. Both the statutes and rules are far too detailed to discuss here. However, it is important for boards to understand the basic distinction that was created in the rules regarding towns that choose to regulate this field and those that do not.

If a town board does not adopt an ordinance regulating the placement of utilities in its rights-of-way, the rules provide some basic protections in attempt to keep them informed of what is being placed in their roads and assuring the roads are not damaged. Before a utility company may excavate or significantly obstruct a town road, it is required to give the town board written notice that contains basic information about who is doing the work, the period of work, where the work is to occur, and the typical depth of the lines. The actual installation of the lines must comply with the standards established in the rules. When the work is completed, the utility is required to restore the right-of-way to the same condition that existed before the work. Maximum restoration standards for different road types are established in the rules that can be required by the town.

One protection that was not extended to all towns in the rules was the right to require utility companies to relocate their lines at their cost if needed to accommodate a public project. To take advantage of the rule requiring utilities to move existing lines at their own expense to prevent interference with the right-of-way, the town must be regulating its rights-of-way within the meaning of the rules. Minn. R. 7819.3100.

If a town board does decide to exercise its power to regulate the placement of utilities in its rights-of-way, it is entitled to expanded rights under the rules. However, it is also subject to additional requirements and limitations that do not apply to towns choosing not regulate utility placement. Local regulation basically means establishing a permitting process a utility company must work through before being allowed to excavate or obstruct a right-of-way. Before adopting an ordinance, the board must have its attorney carefully review the statutes and rules to make sure its provisions fall within the established parameters. Also, boards that adopt an ordinance are required to take additional steps before vacating a right-of-way. If the vacation does not require the relocation of the

lines, the board must reserve an easement for itself and right-of-way users to install and maintain lines.

Refer to Document Number **TP8000A** for a sample utilities in the right-of-way ordinance.

### E. Approaches

The law regarding approaches, as set out in Minn. Stat. § 160.18, changed in 1998. Previously, the town was presumed to be responsible for paying the costs of approaches and approach culverts unless the electors acted at the annual meeting to shift that responsibility to the owners. Under current law, the presumption is that the owners will be responsible for paying for approaches and related culverts unless the town is constructing a new road or relocating a road. Approaches are grouped into three categories:

1. approaches to existing roads;
2. approaches to new roads; and
3. approaches for a particular purpose or additional approaches.

If a road already exists, an owner wishing to construct an approach must seek a permit from the town board. If granted, the owner must follow the restrictions, if any, placed on the permit and pay all installation costs. The owner is also responsible for paying for a culvert if one is needed. However, it is possible for the town board to adopt a policy of paying all or a portion of the costs of a needed culvert.

When a town constructs a new road or relocates an existing road, it is required to construct suitable approaches within the right-of-way when reasonably necessary and practicable to provide abutting owners a reasonable means of access to the road.

Owners that already have an approach to a road may seek a permit from the town to install additional approaches to facilitate the efficient use of their property for a particular lawful purpose. Again, the installation of the approach is subject to reasonable regulation by the town. The owner pays for the approach and culvert, if needed. *In C and R Stacy, LLC v. County of Chisago*, 742 N.W.2d 447 (Minn. Ct. App. 2007) the court determined the regulations imposed by a local government on accesses under Minn. Stat. § 160.18 did not constitute “official controls” requiring the enactment of a zoning ordinance.

The statute does not require its regulations to be adopted by ordinance. However, any town intending to impose a set of regulations on road accesses should, in order to promote consistency, adopt

them at least by resolution. However, when local regulations deprive an owner of reasonable or reasonably convenient and suitable access a taking has occurred that requires compensation be paid to the owner. *Id.* at 457. Towns need to remain aware of this constitutional limitation on its authority to regulate access to public roads.

Refer to Document Number **TR13000** for additional information on approaches and culverts.

### **F. Prohibited Uses & Activities**

Town roads are afforded numerous protections because of their public nature and the need to promote safe public travel. The protections range from giving local governments the authority to enact road and traffic related ordinances as discussed above, to a variety of state created restrictions on the use of roads. Following are some of the more common statutory prohibitions.

Many of the restrictions applicable to roads are found in Minn. Stat. § 160.2715. The statute makes it a misdemeanor to:

- obstruct a road;
- place snow or ice on a road;
- plow or perform any other detrimental operation in a right-of-way;
- erect a fence on a right-of-way;
- erect a driveway headwall within a right-of-way without obtaining a permit;
- dig holes in a road;
- remove earth, gravel, or rock from a road;
- obstruct or drain noisome materials into road ditches;
- place a building or structure within a right-of-way;
- place advertisements in a right-of-way;
- damage roadway structures, signs, or other appurtenances;
- remove or destroy right-of-way markers; and
- drive around or remove a barricade.

A town may take down, remove, or destroy any advertisement, building or structure placed in its right-of-way in violation of the section.

The legislature has also declared it a public nuisance to interfere with, obstruct, or render dangerous for passage a public road. Minn. Stat. § 609.74 (2). Intentionally creating this public nuisance is punishable as a misdemeanor. It is also a misdemeanor to litter in a right-of-way, and depositing snow or ice in a right-of-way is considered littering. Minn. Stat. § 169.42.

To help defray the cost of removing litter from roads, road authorities may pursue a civil action against a violator. Minn. Stat. § 169.421. However, the language of the statute suggests this authority is intended as a response to depositing solid waste types of items in the right-of-way, not the snow or ice that can constitute a criminal violation. Furthermore, a town could not pursue both a criminal and a civil action against someone who litters. Pursuing one type of action against the person precludes the town from bringing the other type of action.

Beyond the statutory prohibitions, boards can also consider bringing a civil action against someone if they are interfering in some way with the road easement. No one has a right to interfere with another's easement regardless of whether it is private or public. Rather than attempting to convince the sheriff and county attorney to act under the criminal statutes, the board can have its attorney file a civil action for ejectment or interference with property rights against the person.

### **G. Private Uses of a Right-of-Way**

Despite the many limitations imposed on the use of public roads for purposes other than transportation, owners retain some limited rights to continue to use the right-of-way area adjacent to their property. With private easements, the owner of the burdened land generally retains the right to continue to use the easement area as long as their use does not interfere with the use by the owner of the easement. With public easements, the right of the adjacent owner to use the easement area for their own purposes is similar, but far more limited in order to protect the public using the road.

The scope of this right can be argued, but an owner can likely engage in activities that have minimal impact on the maintenance and safety of the right-of-way. For example, an owner likely can, within reason, plant and maintain grass and flowers in the town road right-of-way. But likely not place fences, landscaping boulders, and crops, particularly corn. Whether a use is permissible will most often depend on a case-by-case analysis of the potential negative impacts the use has on the right-of-way itself as well as its use and maintenance.

Landowners that are not adjacent to a section of road do not have an automatic right to use that portion of the right-of-way for non-road purposes. To do so, they would need the permission of both the town and the owner of the underlying property. This type of issue most commonly arises when one

landowner wants to run an irrigation or slurry line through the road ditch past another property. Similarly, there is no right for a member of the public to mow and bail a road ditch for property they do not own.

The extent to which owners within a plat can use the right-of-way area dedicated to the public within the plat was classified by the Minnesota Supreme Court in *Bolen v. Glass*, 755 N.W.2d 1 (Minn. 2008). Recognizing that each person who buys a lot in a plat is entitled to the benefit of the plat, including the roads, as it appeared at the time of purchase,

the court held purchasers in a plat are entitled to use the roads designated on the plat. The court did not address the rights of the public generally to use platted roads that the board has not opened and is not maintaining. However, in towns it appears the legislature having deemed such roads to be legal cartways under Minn. Stat. § 164.11 suggests the public may use them.

Refer to Document Number **TP8000** for a sample town road administration ordinance that addresses many of the issues towns commonly face in attempting to protect and maintain their roads.

## § 15-11. Maintaining Town Roads

There are many aspects to the issue of properly maintaining town roads – far too many to adequately address here. Instead, an attempt is made in this section to briefly raise some of the more common maintenance issues towns face. The numerous political considerations and pressures that may be brought to bear on the level of maintenance a town provides will not be discussed here.

### A. Maintenance Authority

Towns are authorized to maintain and supervise town roads. Minn. Stat. § 164.02. They may employ or contract with such persons as they deem necessary to carry out their maintenance duty.

### B. Maintenance Duty & Liability

Courts consider road authorities to have both a common law and statutory duty to keep their roads reasonably maintained. *Johnson v. County of Nicollet*, 387 N.W.2d 209 (Minn. Ct. App. 1986). Because what is considered “reasonable” may vary from road to road, the legislature has wisely not attempted to create a single town road standard. They have, however, created legal consequences if a board is found to have failed to keep their roads properly maintained. The two primary consequences

are a process for bringing complaints to the county regarding the lack of maintenance and the imposition of liability for damages or injuries arising from improperly maintained roads.

If owners believe a town is not satisfying its maintenance obligation on a road they can bring a written impassable road complaint to the county. Minn. Stat. § 163.16. A complaint must be signed by at least five eligible town voters who own property in the town and allege that because of the town’s failure to keep a road properly maintained it has become impassible. The county must conduct a hearing on the complaint and if it finds that it is well founded, it must pass a resolution directing the

town board to do such work as is necessary to put the road into a passable condition. If the town board fails to do the work, the county can have it done and certify the costs to the town. The town board must then levy a special tax upon all the taxable property in the town to pay the costs.

As discussed in Chapter 11, towns are liable for their torts, which include acts of negligence regarding their roads. Negligence suits can be based on a variety of assertions claiming the town either acted improperly or failed to act.

Examples of allegations found in road related negligence claims include failures to:

- post or maintain warning signs;
- properly inspect roads;
- remove objects or other hazards;
- cut brush or other visibility obstructions;
- install guardrails;
- act promptly to repair ruts or other road surface problems;
- install barriers; and
- properly manage snow removal and storage.

The initial focus of many of cases is whether the road authority is entitled to one of the exemptions to liability provided in Minn. Stat. § 466.03. The exceptions most applicable to road maintenance are planning level discretionary acts, logging roads, accumulation of snow or ice, and the use of recreational vehicles in rights-of-way. Whether an act or omission regarding a road is a protected policy level decision or an unprotected operational level decision is often debated. Courts seem to focus on who made the decision and what factors were considered as part of the decision-making process. If the decision was based on a well thought out policy it is much more likely to be considered a protected planning level decision. This is one very important reason boards should seriously consider adopting maintenance policies related to at least snowplowing, signs, and mowing/brushing. However, do not adopt a policy unless the board and those who need to implement it are willing and able to follow it.

Road authorities are protected from any claim arising out of the accumulation of snow or ice as long as the condition was not affirmatively caused by the negligent acts of the road authority. If the condition was the result of natural weather conditions, even if affirmative actions could have avoided them such as applying salt, it will likely not be considered caused by the affirmative acts of the road authority. *Matter of Heirs of Jones*, 419 N.W.2d 839 (Minn. Ct. App. 1988).

A relatively new exemption indicates road authorities are not liable for a claimed loss arising out of the use or operation of a recreational motor vehicle within the right-of-way of a road or highway. Liability can still exist if the road authority is found to have engaged in conduct that would entitle a trespasser to damages against a private person.

Overall, except in extreme cases, it is very difficult to predict if a town will be liable for a particular road condition. However, if boards

implement and follow maintenance and inspection policies, and then respond quickly when they receive notice of a possible hazard, they will significantly reduce the likelihood of being found liable if an accident does occur.

### C. Maintenance Activities

A significant amount of a town's resources are devoted to maintaining roads. Though not always apparent, a number of policy considerations are involved when making maintenance and improvement decisions. Boards must balance factors such as providing an adequate transportation system, road safety, operating within a limited budget, recognizing different types of uses on the roads, and future transportation needs.

The key to these and any other policy decisions is to set out the factors, law, and reasons to support the decision. Not all policies need to be in writing, but boards should strive to make a written record of its policies and supporting rationale whenever possible. Once a policy is adopted, boards must be sure to follow it and apply it in a consistent manner so everyone is treated equally. This does not mean all roads in the town must be exactly the same or that one cannot be improved unless all are improved, but the board should approach similarly situated roads in the same way under its policies. It is also important to regularly revisit policies to make sure they are still current and are being followed. A forgotten or ignored policy can create a greater risk of liability than not having adopted a policy at all. Its recommended that policies be reviewed as part of a town reorganizational meeting.

Refer to Document Number **TR15000A** for a sample snow and ice control policy for towns with their own personnel and equipment and Document Number **TR15000B** for a sample policy for towns that contract for snow and ice control services.

## 1. Mowing

Mowing roadsides is an important maintenance activity done to keep sight lines clear of obstructions, prevent the growth of brush and trees, control weed growth, enhance roadside appearances, and to prevent the drifting of snow.

In order to limit potential impacts to wildlife, the legislature has placed limits on when public entities may mow their roadsides. Minn. Stat. § 160.232. The first eight feet from the road surface, or shoulder if one exists, may be mowed at any time. The entire right-of-way may only be mowed July 31 to August 31. After August 31 to the next July 31, the entire right-of-way may only be mowed if necessary for safety reasons, and may not be mowed to a height of less than 12 inches. Beyond these restrictions, mowing may be performed as needed to maintain sight distance for safety and at other times as provided by rules adopted by the commissioner of Minnesota Department of Transportation or by local ordinance - provided the ordinance does not conflict with the commissioner's rules. These limitations do not apply to mowing done by a landowner.

## 2. Weed Control

Town boards are required to cause all noxious weeds in town road rights-of-way to be cut down or otherwise destroyed or eradicated as often as may be necessary to prevent the ripening or scattering of seed and other propagating parts of such weeds. Minn. Stat. § 160.23. Because town supervisors are also the local weed inspectors with inspection and enforcement powers, they need to be particularly aware of the need to control noxious weeds growing in town road rights-of-way.

If the town uses chemicals to control noxious weeds in its road rights-of-way the board must make sure the person applying the chemicals is properly licensed. A town employee applying chemicals must hold at least a non-commercial license if restricted use pesticides are being used. If the board contracts with someone to apply chemicals that person must have a commercial license and be specifically endorsed by the state to apply chemicals in rights-of-way. Boards should contact the Minnesota Department of Agriculture if they have any questions regarding licensing and the use of chemicals.

## 3. Brushing & Tree Trimming

The authority of towns to cut brush or trim trees located in, or hanging over, a town road right-of-way arises out of their authority to keep the roads

open and safe for the traveling public. No specific procedure is provided for either activity, but there are some recommended steps boards should take before undertaking any brushing or non-emergency trimming.

Boards should make a reasonable effort to notify the adjacent owners of the board's intentions before the work is started. Problems frequently arise when owners feel they were not informed of the work and allowed to ask questions and express concerns before the work was done.

Do not enter private property or reach outside of the right-of-way to brush or trim without expressed (preferably written) permission from the owner. To avoid entering private property the board must understand the width of its right-of-way in the specific work area. See § 15.8 for determining the width of the right-of-way.

Do not use chemicals to trim a tree and do not trim more than is necessary to keep the right-of-way reasonably maintained and safe. If the board is contracting for this work, make sure the contractor clearly understands what is to be done and where. Stress the importance of not going outside of the right-of-way unless specifically directed to do so by the board acting on permission from the owner. Be sure the cut branches are promptly cleared from the right-of-way.

## 4. Tree Cutting

There are a several points boards must keep in mind when engaging in tree cutting.

1. The general authority of boards to cut trees is limited to trees located within the right-of-way. Therefore, determining the location and width of the right-of-way is a critical first step to any cutting activities. See § 15.8.
2. Trees are considered the property of the adjacent land owner, even if they are located entirely within the right-of-way. "In this state the title of the owner of land extends to the center of a street or highway abutting thereon, and includes all trees, sand, gravel, and other appurtenances situated or being upon or within the same, subject to the general public right to take and use any thereof as may be necessary in the improvement of the highway for public use." *Town of Rost v. O'Connor*, 176 N.W. 166 (Minn. 1920). This ownership interest is balanced with the general prohibition from interfering with the right-of-way.

Trees within a platted right-of-way are an exception to the ownership rule. Minn. Stat. § 160.22. The lot owners do not have a preexisting interest in the land on which the right-of-way sits. Instead, the developer owned the land and chose to dedicate a portion of it to the public. Another exception are trees the town has already acquired. It is possible for the board to expressly acquire trees within the right-of-way either as part of the road establishment procedure or separately. If the town owns a road in fee title, rather than the more limited easement which is standard, the town is considered the owner of the trees within the road.

3. The tree removal procedure only applies to “a tree or woody perennial shrub or vine which is at least six inches in diameter, as measured at a point two feet from the ground.” Minn. Stat. § 160.22, subd. 7a. Trees smaller than indicated in the definition may be treated as brush and cut without having to go through the removal procedure.
4. Contacting the adjacent owners prior to any cutting is very important for reducing complaints, or at least in identifying those who might oppose the cutting. If there is going to be a dispute regarding the right-of-way, it is best to know before work begins to avoid an additional claim of trespass.

With these considerations in mind, it is recommended the board speak with the owners and occupants of land adjacent to the areas where the board would like to cut the trees. If the owners agree to the cutting, have them sign a form indicating their consent to the cutting. On the form, the owner should indicate whether they want the wood or if they want the town to dispose of it. Remember, because the trees are their property, they get to choose whether they want to keep the wood.

If the owner is not willing to agree to the cutting, the board can initiate the Minn. Stat. § 160.22, tree removal procedure. The board must give the owner written notice at least 14 days before the cutting. During the notice period, the owner can request a hearing. If no hearing is requested, the board may proceed with the cutting. The wood is to be placed on the adjacent owner’s property without causing any unnecessary damage.

If the owner requests a hearing, the board must schedule, give notice, and hold a hearing. As with all hearings regarding a specific property, the owner

must be given an opportunity to be heard. It is important for the board to make written findings of fact at the hearing that discuss, at a minimum, that the trees are within the town’s right-of-way, an explanation of why the trees interfere with the maintenance and/or safety of the right-of-way, why those trees need to be cut, and the board’s determination to cut them. The owner has 30 days from the time the board makes its decision to appeal to district court. Do not cut trees adjacent to the property of an owner that had requested a hearing until the appeal period expires.

Again, if the trees are located within a platted right-of-way, the board may cut the trees without having to work through the removal procedure. However, it is strongly recommended the board notify the adjacent owners before the cutting begins.

Refer to Document Number **TR6000** for additional information on controlling vegetation and trees within rights-of-way.

### 5. Snow Plowing

Towns can provide their own snow plowing or may contract with a contractor or with another public entity for snow plowing services. Maintaining roads in the winter involves even more variables than summer maintenance. As a result, it is generally recommended that boards develop a written policy for how they will deliver winter services. A policy would address issues such as designating how much snow must fall before plowing will be commenced, what order will the roads be plowed, will salt be used, and when will plowing be called off to protect the safety of the plow operators. Developing and following a snow plowing policy can be a valuable tool to reduce the town’s liability.

Another policy decision is whether the town will engage in the plowing of private driveways. The legislature allows towns to snowplow private driveways if the owner reimburses the town at least its actual costs for performing the plowing and if it does not unduly delay or interfere with the plowing of public roads. Minn. Stat. § 160.21. All money paid to the town for snow removal must be placed back into the road and bridge fund. Towns may also remove snow from unopened or private roads in uncompleted subdivisions in certain situations. If such work is authorized, the board may impose reasonable charges on the properties within the subdivision to pay for the service.

Growing concerns over liability risks associated with doing work on private property has caused many boards to discontinue plowing private drives.

The legal authority to plow snow from a private driveway should not be taken as authority to grade or gravel a private driveway. That authority does not exist.

When using salt, the legislature directs road authorities to be very reserved in order to protect the environment, reduce vehicle corrosion, and minimize salt splash on windshields that could reduce visibility. Minn. Stat. § 160.215.

For a sample snow and ice control policy refer to Document Number **TR15000A** if your town has its own equipment and personnel or **TR15000B** if the town contracts for snow plowing services.

### **6. Grading**

Little is said in the statutes about grading roads. Many of the issues that arise regarding grading seem to revolve around the skill, or the claimed lack thereof, of the grader operator. The surface structure and stability of a gravel road is depend-

ent on the skill of the operator. An improper grading technique can result in an insufficient or excessive crown, the loss of gravel, the creation of ridges, and many other situations that can negatively impact a road and possibly create liability. Boards need to remain watchful of potential problems and continue to work closely with its employees or contractors to make sure they are performing adequately.

Because the grader and snowplow operators travel the roads on a regular basis they should be asked to monitor the condition of the road, its signs, and the right-of-way generally. Most boards conduct a road inspection in the spring of the year, but they are not able to tour the roads as often as the maintenance operators. As such, the board should adopt a procedure for the operators to correct or report potential problems with the roads. Early notification can lead to early corrective actions and the avoidance of liability.

## **D. Permit Requirements**

In certain instances, the town or its contractor will need to obtain one or more permits before they can undertake proposed roadwork.

### **1. Storm Water**

One of the permitting requirements that has the broadest applications is the storm water/erosion control permit program administered by the Minnesota Pollution Control Agency (MPCA). Minn. Stat. § 115.03.

When a town plans to undertake a project that involves disturbing a total of one or more acres of land, excluding regular maintenance activities such as road grading, the town is required to obtain a storm water permit. Part of the permitting process is a requirement to develop both a temporary and a permanent erosion and sedimentation plan. This requirement is based on the National Pollutant Discharge Elimination System operated by the EPA at the federal level. For additional information on the storm water program for construction activity go to the MPCA's website at: <https://www.pca.state.mn.us/>.

### **2. Public Waters**

Another permitting requirement towns encounter is related to doing work that affects

public waters. With a few exceptions, a town must obtain a public waters work permit to:

1. "construct, reconstruct, remove, abandon, transfer ownership of, or make any change in a reservoir, dam, or waterway obstruction on public waters; or
2. change or diminish the course, current, or cross section of public waters, entirely or partially within the state, by any means, including filling, excavating, or placing of materials in or on the beds of public waters."

Minn. Stat. § 103G.245. Depending on the circumstances, this may include beaver dams. The Minnesota Department of Transportation issue permits. For more information on the permit requirements and when a permit must be obtained refer to the waters section of the DNR's web site at: [www.dnr.state.mn.us](http://www.dnr.state.mn.us).

### **3. Wetland Replacement**

If a road project will impact wetlands or waters, additional permits may be required. The local Soil and Water Conservation District office is a starting point for local road authorities to identify whether water related permits are required for a proposed project. There is a long list of federal, state, and local agencies that have regulatory authority over waters.

Boards are urged to take all reasonable steps to make sure all required water related permits are obtained before undertaking a project. There are criminal penalties associated with a failure to obtain some permits as some town officers have learned the hard way.

One particularly beneficial wetland program, Local Roads Wetland Replacement Program (LRWRP), for road authorities provides an exemption from the wetland replacement requirements for the “repair, rehabilitation, reconstruction, or replacement of a currently serviceable existing state, city, county, or town public road necessary, as determined by the public transportation authority, to meet state or federal design or safety standards or requirements . . .” Minn. Stat. § 103G.222. Road authorities are to try and minimize the project’s impact on the wetlands and they must file a report concerning the project. Since 1996 LRWRP provides for the wetland mitigation for the above types of road repair projects. Funding for the program has been a continu-

ing struggle, and MAT is working on additional funding for 2017 and beyond. Any questions regarding this program should be directed the SWCD office or the Board of Water and Soil Resources.

#### 4. Culverts

Minnesota law was changed in 2015 to exempt some culvert restoration and replacement projects from Minnesota Department of Natural Resources (DNR) public waters permitting requirements. A long-standing rule already exempts bridge and culvert projects when the stream is a public watercourse with a total drainage area, at its mouth, of five square miles or less, except on designated trout streams and their tributaries. An additional exemption has been added for culvert restoration or replacement of the same size and elevation, if the replacement does not affect designated trout streams. The table summarizes the characteristics of culvert projects on public watercourses that are now exempt from DNR permit requirements under the new law.

<b>DNR Permit Not Required</b>	<b>DNR Permit Needed</b>
<b>If ALL the following are true</b>	<b>If ANY of the following are true</b>
The stream is not a designated trout stream or tributary to a designated trout stream	The stream is a designated trout stream or a tributary to a designated trout stream.
An existing culvert is being restored or replaced at the same location.	A new crossing is being constructed, or an existing crossing is being relocated.
The diameter, length, shape and elevation are all the same as the culvert being replaced.	The diameter, length, shape or elevation is different than the culvert being replaced,
The number of culverts being replaced is the same as the existing number of culverts at a given location.	The number of culverts is different.
The alignment is the same as the culvert being replaced.	The alignment is different than the culvert being replaced.
	A new culvert is being installed into an existing culvert.
The “culvert” is not a water-level control structure that controls the elevation for an upstream wetland or lake.	The “culvert” is actually a water-level control structure.

## E. Road Contracts

In addition to the discussion in chapter 9 on contracting, there are some special statutory provisions that apply specifically to road contracts.

When letting a contract for the construction or improvement of a road that must be bid under the municipal contracting law (Minn. Stat. § 471.345), towns must follow the additional requirements imposed by Minn. Stat. § 160.17. The contract may not be let until the plans and specifications for the construction or improvement are on file with the town clerk. The advertisement must be published in a newspaper of general circulation in the area once a week for two successive weeks with the last publication being made at least ten days before day of the meeting at which the contract will be awarded. A general description of the work to be done, where the plans and specifications may be found, and the deadline and place for submitting bids must be included in the notice.

Final payment on a road construction or improvement project for which sealed bids were required by law may not be made until the engineer or person in charge of the work has certified to the town board that the work was done and performed according to contract and filed the certificate with the town clerk.

When letting a contract for the construction or improvement of a road, culvert, or bridge, the town must place a condition in the contract requiring the contractor to place suitable warning signs as needed. Minn. Stat. § 160.16, subd. 1. The contract should also require the contractor to place road closed signs, detour signs, and barricades when needed to accommodate the work and protect the public. Minn. Stat. § 160.16, subd. 2 & 3. If a road needs to be closed for any length of time, the contrac-

tor should inform the board so it can pass a resolution to close and barricade the road. Minn. Stat. § 164.152.

Before soliciting bids or letting a contract for excavation, a town must provide a proposed excavation request to the Gopher One notification center to obtain from the affected operators of underground facilities the type, size, and general location of underground facilities. Minn. Stat. § 216D.04. The information obtained regarding the underground facilities must be obtained within 90 days of, and submitted with, the final drawings used for the bid or contract. This obligation does not relieve the contractor from providing the required notice to the notification center. Minn. Stat. § 216D.04.

Towns may take advantage of a county contract to have the same contractor perform road maintenance or constructions services for the town. Minn. Stat. § 471.345. By piggy-backing on the county's contract towns can benefit from the county's greater bargaining power and avoid the time and expense of having to work through the sealed bid procedure itself.

If a road construction project is anticipated to cause a substantial business impact, before the town may begin the project it must designate a person to serve as a business liaison between the town and the affected business. The liaison is to consult with the affected businesses before and during construction and must investigate means of mitigating project impacts to the businesses, including though the use of signage. A substantial business impact is defined as "impairment of road access, parking, or visibility for one or more business establishments as a result of a project, for a minimum period of one month." Minn. Stat. § 160.165.

## §15-12. Adjacent Owner Obligations

There are two statutes that provide a procedure for making those who own land adjacent to town roads responsible for some maintenance activities. These are decisions by the town voters.

The first is found in Minn. Stat. § 366.015 and relates to making owners responsible for removing rocks larger than five inches in diameter from and to cut, destroy or remove all weeds, grass and other plants up to three inches in diameter that grow upon the town road adjacent to their land. If a board is interested in pursuing this option, it can make a motion to submit a ballot question at the town election to ask if this obligation should be implemented. If a majority votes in the affirmative, the obligation is created. However, because the statute does provide a detailed description of the obligation, it is strongly recommended that the board pass a resolution or ordinance setting out the details.

If an owner fails to comply with the obligation, the board can send the owner a notice indicating that if the work is not done the board will have the work performed and place the costs on the person's property taxes. Once the notice period runs, the board can have the work performed and then certify the costs to the county auditor for inclusion on their property taxes.

The second authority relates to removal of snow and ice placed on town road rights-of-way by the owner and is modeled after the rock, weed, grass, and brush procedure. Again, the board can decide to submit, by ballot at the town election, the question of whether owners shall be required to remove snow or ice they have deposited on a town road right-of-way adjacent to their property. If the question passes, owners who fail to remove the snow or ice are subject to the same process for notifying, having the work performed, and then placing the costs on their property taxes.

One of the clear benefits of these procedures is that they expressly allow a town to recover its costs for the owner's failure by imposing a tax on their property. Because it is a tax on the property, it is important that all notices be sent to the property owner and not just the resident of the property. In many other instances there is a strong desire to place town costs incurred by the actions or inactions of owners, but absent specific statutory authority, a board can only to send a bill and then attempt to collect the costs through a court action – usually a small claims action. This frustration is what led to the adoption of the snow and ice authority in Minn. Stat. § 366.016.

Refer to Document Number **TR2000** and **TR2500** for additional information on these procedures.

## § 15-13. Town Road Ditches and Drainage

One of the more controversial issues town boards deal with is the drainage of water to, from, across, and along its roads. Because no one usually wants the water, the town board often finds itself in the middle of a dispute with the owners on either side of the road threatening to bring a suit regardless of what the town does or does not do.

### A. Surface Waters

In most cases, town road ditches are built to accommodate the flow of surface waters. Courts have defined surface waters as rains,

springs, or melting snow that lie or flow on the surface, but do not form part of a well-defined body of water or natural water course (e.g., a stream). Because natural watercourses give rise to public and private rights, the law treats such waters differently than those classified as surface water.

Surface water is considered a common enemy that may, within reason, be used or expelled by an owner. In some cases an owner may alter the natural flow of surface waters to dispel the water. Whether an owner acted appropriately with respect to surface water is

measured by the “reasonable use” doctrine. The doctrine essentially involves determining whether the use was reasonable under the facts of the particular situation. If harm results to others from the use of surface waters, the owner incurs liability only if that use is found to be unreasonable. Some of the factors that may be considered when determining liability are the reasonable necessity for drainage, whether care was taken to avoid unnecessary injury, whether the utility to the drained land outweighs the harm to the burdened land, and whether the drainage was accomplished by improving a natural drainage system or by adopting an artificial drainage system. Claims based on surface water use are usually brought as nuisance suits.

### **B. Public Projects**

Town boards as the road authority, are authorized to repair, clean out, deepen, widen, and improve town road ditches. Minn. Stat. § 160.201. The board determines when such work is necessary. However, before any ditch work is done the board must examine and determine that the ditch will be provided with an adequate outlet. When a town constructs a new road, or relocates or reconstructs an existing road, it is required to construct a suitable approach to the adjacent parcels within the right-of-way when the approach is reasonably necessary and practicable to provide abutting owners a reasonable means of access to their property. Minn. Stat. § 160.18.

### **C. Private Projects**

When the course of natural drainage of any land runs to a road the adjacent owner has a right to connect a drain or ditch to the town road ditch. Minn. Stat. § 160.20. However, before any connections are made the owner must receive a written permit for the connection from the town board. The permit may set forth specifications for the work and the town board may establish reasonable rules and regulations governing connections. The owner is required to leave the road in as good of condition as before the connection was made.

An owner may seek a permit from the town

board to install a drain tile along or across the road right-of-way. Minn. Stat. § 160.20. The town board may set specifications, adopt reasonable rules, and may require a bond before issuing a permit. Certain restrictions are placed on what may be permitted. Once installed, the town board is not responsible for damage to the drain tile.

It is a misdemeanor offense for a person to: install drain tile along or across a road without a permit (Minn. Stat. § 160.20, subd. 4(b)); obstruct a town road or drain any noisome material into any ditch (Minn. Stat. § 160.2715 (6)); or litter (Minn. Stat. § 609.68).

### **D. Culverts**

Towns are typically responsible for the installation and maintenance of culverts under town roads. Boards are encouraged to establish a regular inspection and repair program for culvert and its road drainage system generally to ensure it continues to function adequately. A properly functioning drainage system is far less likely to result in a suit than one that is allowed to break down over time. Furthermore, attempting to repair a system that has deteriorated is more difficult because of the expectations of the adjacent owners that have developed over time and the stricter regulatory structure that may apply to waters that have been allowed to accumulate.

As discussed above, the law regarding culverts under approaches was changed to place the primary responsibility for paying for the culverts on the abutting property owners. Minn. Stat. § 160.18. While owners are primarily responsible for purchasing and installing approach culverts, it is not entirely clear who is responsible for maintaining them. Because of the systematic nature of drainage, towns have an interest in making sure all culverts within their rights-of-way are properly maintained. Furthermore, there are practical difficulties in attempting to monitor and enforce a private maintenance requirement.

On the other hand, sometimes the only reason the culvert exists in the right-of-way is because the owner placed it there to facilitate

cause the owner placed it there to facilitate the use of their private property. The culvert may have been needed to avoid interfering with drainage in the public road ditch, which is a misdemeanor. So, it would seem owners have an obligation to keep “their” culverts cleaned out to avoid interfering with draining the road. There is not a single answer to this question, but boards should strive to develop a comprehensive approach to how it will address the installation, maintenance, and repair of drainage structures in their rights-of-way.

Refer to Document Number: **TR13000** for additional information on culverts and approaches and Document Number: **TR9000** for additional information on ditches and drainage.

## § 15-14. Town Road Improvement Options

Boards have general authority to improve their roads. Road improvements are less a question of authority than a question of who is going to pay for them. This section will briefly touch on the most common methods used by towns to finance improvement projects.

### A. Town Financed

The most obvious method to finance a road improvement is for the town to pay the costs of the project. If the funds for the project have already been levied and exist in the town’s road and bridge fund the board is permitted to undertake the project on its own initiative. If, however, the funds are not already available, the board will likely need to consider incurring debt to secure the needed funds.

If the project is relatively small and the debt incurred can be paid back within ten years, the board can consider issuing certificates of indebtedness under Minn. Stat. § 366.095 to finance the project. If the amount of the certificates to be issued does not exceed 0.25 percent of the market value of the town, the board can incur the debt on its own initiative. If the amount exceeds the 0.25 percent, then notice must be published giving the town elec-

tors the opportunity to call for a vote on whether to issue the certificates.

Bonds are the common financing tool for larger projects or those that need to have the pay-back extended for more than ten years. *See* Minn. Stat. Chap. 475. With some exceptions, a referendum vote is needed before a town can issue bonds. The cost of issuing bonds is higher than issuing certificates, but bonds are a much more flexible financing tool. Any board considering whether to use bonds to finance a project needs to speak with a bond attorney. Having someone knowledgeable with all of the bonding requirements and that can walk the board through the procedure is very important to avoid problems that could delay or kill a project. Refer to Chapter 7 for additional information on town debt.

### B. Privately Financed

Occasionally a business owner or a group of owners express a willingness to pay for a town road improvement on their own. Usually they wish to pave the road leading to their camp or group of cabins. Because there are no statutory procedures specifically addressing privately financed improvement projects, boards must be careful in how they handle such requests.

Another variation boards sometimes encounter involves the group of owners expressing a willingness to pay all of the costs, but asking the town to finance part of the project and assess over time the owners who could not pay up front for their share of the costs. In a sense, it is a special assessment procedure without going through the assessment procedure. This process has been used successfully, but it raises some serious concerns regarding authority and the enforceability of the owner’s obligation. If one of the owners sell the property before the obligation is paid in full, the board would have a difficult time collecting any outstanding balance.

If a board is approached with a private financing proposal, it should seek the assistance of an attorney before agreeing to any part of the project. The attorney can help identify if the

board has the authority to undertake the project, determine how the project can best be accomplished, and draft the appropriate documents to make the obligation as enforceable as possible.

### **C. Special Assessment**

Perhaps the most common method used to undertake a public improvement project to be paid in part by the benefited owners is the special assessment procedure in Minn. Stat. Chap. 429. All towns are authorized to use the special assessment procedure for road improvement projects and a limited number of other types of improvement projects. Towns with urban powers are authorized to use the special assessment procedure for the full range of improvement projects listed in the statute.

The town board may initiate a special assessment procedure by its own resolution or by a petition of the affected owners. If a board receives a petition, or is considering initiating a special assessment project, it is strongly encouraged to retain the services of an attorney familiar with the process. There are a number of procedural steps that, if not properly followed, could expose the board to suit and jeopardize its ability to assess owners for the improvement.

A special assessment procedure may be started either by petition or by board action. Property owners may petition the board for the improvement and special assessment. If a petition is supported by the owners of at least 35% of the frontage of real property abutting the proposed improvement, then a simple majority of the board may approve the project. If the proposed project does not have the support of owners of at least 35% of the frontage of real property abutting the proposed improvement, then the board may approve the project only by a four-fifths majority. This means that on a typical three-supervisor town board, a unanimous vote is required to pass the resolution.

Alternatively, the board may start the special assessment process. If this method is used,

the board may approve the special assessment only with the support of four-fifths of the board's voting power. Again, on a three-supervisor board, this requires unanimous support of the supervisors.

Before a board can order a special assessment it must hold at least one hearing. It must also have a feasibility report completed that indicates whether the improvement is necessary, cost-effective, feasible, and whether it should be conducted in conjunction with another project.

"The cost of any improvement, or any part thereof, may be assessed upon property benefited by the improvement, based upon the benefits received, whether or not the property abuts on the improvement..." Minn. Stat. § 429.051. Because the amount of benefit conferred by an improvement is often contested a great deal of case law has developed around the special assessment procedure and the permissible methods for determining benefit. Benefit essentially refers to the market value increase in the property as a result of the improvement. In deciding how much it will assess a property, the board must determine that the assessment does not exceed the amount of benefit incurred. The method the board intends to use to calculate these amounts must be determined very early in the process. This is just one of the reasons why having the assistance of legal counsel is particularly important before initiating this procedure.

Refer to Document Number **F4000** for additional information on special assessments.

### **D. Subordinate Service District**

In 1989, the legislature created Minn. Stat. Chap. 365A granting towns the authority to establish subordinate service districts. A subordinate service district is a defined area within a town receiving one or more town services, or enhanced services, provided specifically for that area and financed from revenues from the area. While districts can be created for any service the town is authorized to provide, some common uses are road im-

provement projects, clustered septic systems, and dust control.

At least 50 percent of the owners within the proposed district must sign the petition requesting the creation of a district. Upon receipt of a sufficient petition, the board must give notice and hold a hearing within 30 days. The board must decide whether to establish the district within 30 days after the public hearing. If the district is created, before its effective date the owners have an opportunity to petition for a reverse referendum to stop the creation of the district. If a petition is brought, a vote must be held and the board is bound by its outcome.

Not only is the subordinate service district authority procedurally less complicated than

the special assessment procedure, the options for financing the districts are more flexible. The board may impose a property tax, a service fee, or both to finance the service. This procedure also does not contain the strict benefit calculation disclosure and limitations found in the special assessment procedure. Amendments clarified a town's authority to issue debt for subordinate service district projects have made this process even more desirable.

Once created, at least 75 percent of the owners in the district can petition to request the removal of the district. The board must give notice, hold a hearing, and decide whether to discontinue the district.

## § 15-15. Recording Town Roads

When towns speak of recording their roads they are most often referring to recording a map of their existing roads. Recording roads became a greater priority for towns after 1975 when the Minnesota Supreme Court struck down the portion of Minn. Stat. § 160.05 establishing the right-of-way of use and maintenance roads as two rods on each side of the center line (66 feet). *Barfnecht v. Town Bd. Of Hollywood Tp., Carver County*, 232 N.W.2d 420 (Minn. 1975). The court found that these roads are only established to the width of actual use and maintenance. This decision left boards having to guess as to the widths of their roads and in need of a method to bring some certainty to the road width issue. Refer to the discussion in § 15-7 for information on the uncertainties associated with unrecorded roads.

To provide a comprehensive procedure for recording existing roads the legislature created Minn. Stat. § 164.35. A town following the statute basically passes a resolution indicating its intent to consider recording its roads, develops a map of its roads, determines if any right-of-way needs to be acquired in order to make the rights-of-way 66 feet wide, gives notice, holds a hearing, follows the Minn. Stat.

§ 164.07 procedure if additional right-of-way must be acquired, adopts the map by resolution, and then records the map. Minn. Stat. § 164.35, subd. 4.

The constitutionality of this procedure was challenged in a case named *Alton v. Wabedo Tp.*, 524 N.W.2d 278 (Minn. Ct. App. 1994). Because the court found the procedure could result in a town claiming private property it had not acquired as part of the road, it found the procedure flawed. During the next legislative session the statute was amended to provide a procedure for acquiring and paying for any land that is taken as part of the process. Specifically, the statute directs the board to use the formal town road establishment and alteration procedure in Minn. Stat. § 164.07 if land must be acquired.

There are other methods a board can use to record its roads, but this statute was developed specifically to give towns a comprehensive method for recording all of its roads. However, because of the costs associated with using the Minn. Stat. § 164.07 procedure to resolve right-of-way width issues towns are usually limited in the number of roads it can record in a year using this method.

Towns can also use maps to plan their future right-of-way acquisition needs. Though it is rarely used, towns can follow the procedure in Minn. Stat. § 462.359 to adopt an official map indicating lands the town plans to acquire in the future. The benefit of adopting

such a map is that if buildings or other structures are placed in these areas without obtaining the proper building permits, the town is not required to pay for the building or structure when it acquires the land. Minn. Stat. § 462.359, subd. 3.

## § 15-16. Transportation Planning

Transportation planning means different things to different people, but all towns can benefit from planning the future of their road systems. Towns with comprehensive plans should have considered transportation as part of its planning process. For towns that have not adopted a comprehensive plan, transportation planning allows all towns to leverage the most out of their road expenditures and to anticipate and respond to changing transportation needs.

Planning can lead in many directions, but at a minimum a board should take stock of what it currently has for infrastructure, equipment, personnel, and funds. Then try to determine what it wants each of those categories to look like in the future (at least five years out).

Some towns will identify a goal of black-topping all of its roads in the next 10 years. Other towns may have a more modest goal of clearing the brush and trees out of its rights-of-way over the next two years and asking the electors to make adjacent owners responsible for vegetation control under Minn. Stat. § 366.015. Working from cost estimates, the town can determine the criteria for selecting the next road to be improved and a budget proposal that will allow it to achieve the goal. Having a starting and ending point, the board can then break down the process into manageable steps. With a committed board, the support of the town electors, and a good plan, much more can be achieved to advance a town's road system than most would have previously believed possible.

## § 15-17. Town Road Funding

The primary source of funding for town roads is the local levy. At the annual town meeting the town electors set the levy for the road and bridge fund. Minn. Stat. § 164.04. The amount set by the electors is what the board is required to levy for that fund, but once levied, it is up to the board to decide how best to spend the funds for their intended purposes.

Towns also receive a portion of the state's gas tax (highway user tax). Five percent of the gas tax goes to the county state-aid highway fund. From that fund, 30.5 percent goes toward the town road account and 16 percent goes to the town bridge account. Minn. Stat. § 161.081. The distribution to each county of the town road account funds is

based on the total miles of town road in the county compared with the total miles of town roads in the state. Minn. Stat. § 162.081. Distribution to the individual towns within the county is based on a distribution formula adopted by the county.

Most counties distribute the funds based on the number of miles of town road in a particular town compared with the total miles of town road in the county. Town treasurers are supposed to receive the town's portion of the funds by March 1 each year, or within 30 days after the county receives the payment from the state. Once a town receives these funds, they may only be used for the construction, reconstruction, and gravel maintenance of town roads within the town.

A portion of the county state-aid highway fund goes into another state funding process available to towns. Called the state park road account, town boards that have a road that provides access to public lakes, rivers, state parks, or state campgrounds can apply to the Minnesota Department of Natural Resources for funds from this account. Minn. Stat. § 162.06, subd. 5. The funds are available to reconstruct, improve, repair, and maintain these access roads. A screening board operated through the DNR decides which roads will receive the funding.

Another state source of funding for some town roads comes through the consolidated conservation area account. Minn. Stat. § 84A.51. Income received from various activi-

ties on state land is gathered together into this fund. One-half of the funds are distributed to the counties from which the income was derived. The county must then distribute ten percent of the funds to the town from which the income was derived for its road and bridge fund.

In addition to state funding sources, there are also opportunities for local governments to assist each other on road projects. Both cities and counties are expressly authorized to provide financial assistance to towns for road projects. Minn. Stat. §§ 441.26; 160.07; 162.08, subd. 3; 163.04. Towns can also provide financial assistance to others for roads lying beyond the town's boundaries. Minn. Stat. §§ 160.07; 164.03.

## **§ 15-18. Town Bridges**

Bridges are, by definition, considered part of the road and are addressed in Minn. Stat. Chap. 165. The chapter gives towns the authority to construct, reconstruct, improve, and maintain bridges. Bridges must conform to state standards and must be inspected by the county engineer at least once every two years. Minn. Stat. § 165.03. All newly established, constructed, or improved bridges, culverts, or appurtenant approaches on town roads, excluding cartways, must be at least 20 feet wide.

If a town fails to keep a bridge properly maintained so that it becomes unsafe for travel and in need of repair, the county board has the authority to take action to have the bridge repaired. After notice and a hearing, the county can have the bridge repaired and certify the costs to the town. The town is then required to levy a special tax in the town to pay one-half of the repair costs. If the town fails to impose the levy, the county may impose the levy.

## § 15-19. Cartways

Cartways are perhaps one of the most misunderstood parts of Minnesota's transportation system. Those who own landlocked property often rely on the ability of town boards to establish a cartway so they can legally access their land. At the same time, cartways are almost always controversial and the potential for litigation is particularly high. Furthermore, because of a curious one-sentence statute, cartways are actually more prevalent than expected.

There are four methods for establishing a cartway:

1. an owner dedicating their land to the town specifically for a cartway under Minn. Stat. § 164.15;
2. an owner making a general dedication of their land to the town for road purposes provided the dedicated area is at least 30 feet wide (Minn. Stat. § 164.11);
3. a town board may establish a cartway to provide access to land consisting of at least 150 acres, at least 100 acres of which are tillable (Minn. Stat. § 164.08, subd. 1); and
4. a town board may establish a cartway to provide access to landlocked property containing a certain minimum amount of acreage (Minn. Stat. § 164.08, subd. 2).

Because methods 1 and 3 are almost never used, this brief discussion will only address general dedications and cartways to landlocked property.

### A. General Cartway Dedications

For many years there has existed a curious statute, consisting of a single sentence, indicating that "[l]and dedicated to public use as a street, road or cartway, if not less than 30 feet in width, shall be deemed a legal cartway." Minn. Stat. § 164.11. This statute is interesting because it creates a cartway wherever: (1) land is dedicated to public use as a

street or road; and (2) it is at least 30 feet in width. The question then becomes what is the effect of deeming all these dedicated roads to be cartways. Such a discussion could take many paths, but for the present purposes, the discussion will be limited to the single largest group of public road dedications – lands dedicated by plat for public road purposes.

Those who develop large tracts of open land often do so by creating a plat that divides the lands into lots, roads, parks, etc. Roads are drawn on the plat and are usually labeled as being dedicated to the public for road purposes. Minn. Stat. § 505.021. Once the plat goes through the zoning approval process and is recorded, the roads in the plat are deemed dedicated to the local government and are held in trust in its name until the board decides to open and maintain the roads. Because these roads are typically 66 feet wide and are dedicated to the public as roads, applying Minn. Stat. § 164.11 would mean they are to be deemed legal cartways.

Without setting out the full analysis, it appears the following would hold true of roads dedicated to the public by plat:

1. they are deemed legal cartways (Minn. Stat. § 164.11);
2. they are open for public use upon dedication, even if the board chooses to not yet open and maintain them as public roads;
3. they are maintained by those who use them until the town board passes a resolution determining the public interest warrants it to take it over and maintain it as a town road (Minn. Stat. § 164.08, subd. 3); and
4. before the town board decides to open and maintain a platted road as a public road, the town electors can petition for a vote at the annual town meeting on whether the town should spend public funds on the road (Minn. Stat. § 164.10).

## B. Cartways to Landlocked Property

The legislature mandates towns to establish cartways to landlocked property of a certain minimum size upon a proper petition from the owners of the property. Minn. Stat. § 164.08. Another important qualification to this mandate is that the town is not to establish or open a cartway unless the petitioners pay all the costs associated with the establishment.

Unfortunately, even though the petitioners pay the costs, the controversial nature of establishing cartways to landlocked property places the board squarely in the middle of neighbor disputes. If cooler heads were to prevail in the early stages of the landlocked-owners attempt to negotiate an access to the property, all concerned would see it does not make sense to force the issue into a cartway establishment procedure.

For the landlocked owners, the cartway process is very expensive because not only are they going to pay what the board determines is the fair market value of the 3-foot-wide strip of property for the cartway, they must pay all of the board's costs and professional fees (attorney, surveyor, appraiser) related to the establishment. In the usual case, the owner's total cost far exceeds the cost to purchase a private easement at double the market value. Add to this the fact that the establishment procedure, if appealed, could take over two years to reach a final resolution.

For the neighbors who oppose a cartway, they must realize that the board has no discretion to deny the cartway. The board is required to use its power of eminent domain to take the neighbor's property to establish the cartway. Furthermore, they will only get paid what the board determines is the fair market value of the land. As such, refusing to negotiate a private easement or asking an excessive price for the easement serves little purpose. Rather than having what could be a relatively narrow private easement across their property, they are likely to end up with a 33-foot wide cartway that is open to all the public.

If a board does receive a petition, it must act promptly to determine its sufficiency. Two criteria must be present in order for a parcel to be eligible for a cartway:

1. The parcel of land to be served by the cartway must contain at least five acres or, if it was a separate tract of land as of January 1, 1998, contain at least two acres; and
2. the parcel of land either has no access except over the lands of others (i.e., is landlocked), or whose only access is less than two rods wide.

Access by water is not deemed access for the purposes of the statute.

If the board does receive what appears to be a proper cartway petition, it is in the best interests of all concerned for the board to immediately obtain the services of an attorney. The attorney can assist the board to verify the petition, the petitioner's eligibility for a cartway, and aid in the development and passage of a resolution requiring the petitioners to post financial security with the board for the entire estimated amount of the cartway establishment if the board so requires. Once the security is filed, the board uses the same Minn. Stat. § 164.07 road procedure to establish the cartway.

The petitioner for a cartway needs to propose a route for the cartway as part of its petition. The proposed route of a cartway often becomes the focus of the dispute because the neighbors burdened by the proposed cartway almost uniformly argue that it should be routed over someone else's property. The town board does have the authority to alter the proposed route for a cartway if it determines the new route would be less disruptive and damaging to the affected landowners and in the public's interest. When altering the route, the Minnesota Supreme Court recently clarified the selected route must provide the petitioner "meaningful access" to its property. *Kennedy v. Pepin Tp. of Wabasha County*, 784 N.W.2d 378, 384 (Minn. 2010).

If a cartway petition proposes to establish a cartway that crosses a town line, the boards of

the adjoining towns may pass a resolution to proceed with a joint establishment of a cartway to access landlocked land. The boards may also enter into an agreement to equitably divide the costs associated with the cartway. Once agreed upon, the cartway is established using the usual procedure.

### C. Public versus Private

One of the unique aspects of cartways is their public-private nature. Generally, cartways are public and may be used in the same manner as town roads. *See Rask v. Town Board of Hendrum*, 218 N.W. 115 (Minn. 1928). It is, however, possible to designate a cartway as a private driveway once it has been constructed. The designation is made by board resolution and it must be accompanied by the written consent of the affected landowner(s). Once the designation is made, the board is barred from exercising its discretion to, or from being petitioned to, spend any road and bridge funds on the driveway. The statute also indicates cartways designated as private driveways can only be vacated through the procedure provided in Minn. Stat. § 164.07. The effect of designating a cartway a private driveway is not expressly set out in the statute. However, it presumably allows the affected owners to prohibit use of the cartway by the general public. Whether adjacent landowners can continue to use a cartway after it is designated a private driveway is not clear, but boards must keep in mind this possibility and address it before passing the resolution.

Another important point to keep in mind about cartways generally is that a town board is prohibited from spending public funds to construct or maintain a public cartway unless it passes a resolution specifically determining that the expenditure is in the public interest. If such a resolution is not adopted, the petitioner typically pays to construct the cartway. The benefit of having the petitioner, rather than the town, construct the cartway is that the petitioner can decide what type of road to construct. Some petitioners want no more than a

two-rut path back to their property while others want a fully constructed and paved road. Once a cartway is built, the cost to maintain it is the responsibility of the petitioner. If the adjacent owners use the cartway they must share in the cost of its maintenance. Maintenance costs must be equitably divided among the adjacent owners and the owners who have no access to their land that use the cartway. When determining an equitable division of the maintenance costs the following factors may be considered:

- the frequency of use,
- the type and weight of the vehicles or equipment used, and
- the distance traveled on the cartway.

If the owners cannot agree on the division of costs, the town board may make the determination. The board's determination is to be based on the above listed factors. An owner may appeal the board's decision within 30 days to the district court. Each of the owners responsible for the maintenance costs have a civil cause of action against any other responsible owner who refuses to pay his or her share of the maintenance costs.

When a town board has refused to spend public funds to maintain a cartway, a petition signed by at least ten taxpayers of the town can be brought to the board requesting public funds be allocated toward the maintenance of a cartway. If a petition is received, the board is required to submit the question to the electors at the annual meeting. The statute indicates "due notice" is required, but does not explain what type of notice satisfies this requirement. As such, it is recommended that the question to be submitted be included in the notice of the annual meeting. If a majority votes in favor of the petition requesting the allocation of funds the board is required to spend road and bridge funds to maintain the cartway.

Refer to Document Number **TR12000** and **TR12500** for additional information on cartways.

