

# Chapter Fifteen

## *Town Roads*

### § 15-1. Town Road Authority

Town boards are “road authorities” for township roads. Minn. Stat. § 160.02, subd. 25. Serving as the road authority for over 55,000 miles of road, which constitute about 40% of road miles in Minnesota, is one of the major tasks of town boards in Minnesota. For many towns, establishing, maintaining, and managing roads consumes of 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 must understand the town’s powers and obligations over 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 understand 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 this reason, the chapter will start with a brief overview of the legal status of town roads.

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“Town road” is defined as:

those roads and cartways which have heretofore been or ... may be established, constructed, or improved ... [by] town boards; and 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 describing what a town road 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 will be discussed on their own later in this chapter in §15-19.

A town road is typically an “easement” held by the town on behalf of the public, for use by the public. Most town roads are on land not owned by the town. The easement is a right acquired to use a 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 rare for a town to own title to the land a road occupies. This is called fee simple ownership and refers to an absolute title in land. Everything that is possible to own in a property is owned when one acquires a fee simple title to property.

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 board’s powers to maintain the road and implicates road vacations. (See § 14.9 on vacating a road.) As expected, 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, because 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. To protect public safety and the free flow of people and commerce, the town may do more with a public easement than is usually possible with a private easement.

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

## § 15-3. Establishing Town Roads

There are seven methods for establishing a town road. Each method results in the town acquiring an easement, but each can have on-going implications for the legal status of the road. 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. *MAT Document TR 4000 and its Appendices contain detailed checklists of the this procedure.*

**Petition:** 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. Petitions must also contain a statement of the purpose and necessity for the establishment of the road.

**Filing & Serving the Petition:** 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. The petitioner must deliver a notice of the hearing on all affected landowners by personal service and post the notice. If the petition relates to a road within a plat, the petitioner must mail notice to all the owners in the plat who did not receive personal service. Boards should 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.

One interesting part of the procedure 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 must 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 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 may give land to the town for the road and 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 land by eminent domain. A critical part of any eminent domain procedure is the determination and payment of damages. At the hearing, the board must know the exact location and amount of land it intends to take. If they intend to create the road, the board should consider continuing the hearing to a specific date, time, and place to allow a survey and appraisal to be coordinated before the hearing is reconvened. The survey and appraisal are critical to completing the process and protecting the town.

When the hearing reconvenes, the board reviews the survey and valuation information, allows affected owners to present their information as to value, and decides the amount of damages awarded to each owner that did not give or sell their land to the town. The road may not be opened until all damages are determined and awarded. The board must "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 in writing and filed with the town clerk. Once filed, the clerk must notify the owners of the award amount, in writing, within seven days. The notice must state 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.

Road orders are recorded at the County Recorder's office, and under prior versions of the statute, the County Auditor's office. The board should contact the county offices for their records.

## 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 can 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 emphasized the fact that a road was open for use by the public rather than 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, sometimes courts have been stricter in applying 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 of similar type.

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 the town’s dragging and leveling of a road once or twice a year was sufficient maintenance.

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

Continuous maintenance does not mean every portion of the road is maintained each year. Instead, courts are more likely to consider if the maintenance performed 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 satisfy the timing element.

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

It is important towns do not assume the right-of-way of a road established by use and maintenance is 66 feet. This is the catch in this statute - roads established by use and maintenance roads are 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 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 dispute the public use within the prescribed statute of limitations (i.e., six years), or they are prohibited from 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 made it difficult to accurately determine the width of town roads. When road widths are uncertain, town boards become fearful of trespassing on land beyond the right-of-way, and maintenance activities are often deterred.

The same concern exists for town boards today. Some boards have responded by formally acquiring full 66-foot easements, while others chose 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 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 directly dedicate property to the town for road purposes. The procedure for making such a dedication is contained in Minn. Stat. § 164.15 and involves the following steps:

1. The owners must apply in writing, describing the land to be dedicated and the purpose of the dedication.
2. The owners file the application with the town clerk.
3. The clerk presents the application to the town board (at the next board meeting);
4. Within ten days, the board may accept the dedication by passing a resolution declaring the 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 must 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 a public road easement is conveyed to the town.

However, that alone does not mean it is a town road. The town is not required to accept the conveyance, so it is left to the board to decide if and when it will accept, open, and maintain the roads. *Town of Red Rock v. County of Mower*, 250 N.W.2d 827, 831 (Minn. 1977). 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 if 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 want the town to take over the maintenance of a platted road, they may request it of the town board. When reviewing a request, the board should consider "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 road issues 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 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

"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).

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.

*Be Aware of an Unusual Case:* 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 impassable 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 impassable 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 impassable 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 impassable 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 may revoke a county highway, which reverts the road to a town road. Minn. Stat. § 163.11, subd. 5. While the statute acknowledges 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 landlock five acres or more without owner consent unless other access is provided).

If the road is vacated within one year after the county revocation, the county must pay damages caused by the vacation. In these cases, the county board must be involved in determining and awarding the damages.

To revoke a highway, the county must follow 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.

## 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.

## G. Property Owner-Created Road

A town board may open a road on land the town owns or over which the town acquires an easement that allows the creation or alteration of a road. This process relies on the town's ownership of the property as the authority to create the road. Often, this type of road is created when the board wants a minor change or expansion of an existing road and a landowner is willing to give or sell land for the town's use. For example, a landowner may give the town an easement or ownership of land on a dead-end road for the creation of a turn-around. In these situations, the board can exercise its authority to acquire property directly from the owner and avoid using the Formal Road Creation process or the Dedication by Owner process. For more information on this process, see **TR 4000**.

## § 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

opinion that if a town is simply straightening 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 to intentionally extinguish, or unintentionally lose, the town's 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 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 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 landlocking property and the need to determine damages. A town may not vacate a road without consent of the owners if it is the only means of access to property or prop-

erties totaling at least five acres unless other means of access is provided. Minn. Stat. § 160.09, subd. 3. This is the only statutory prohibition to a town board exercising its discretion to vacate a road. Even though the statute technically allows the landlocking of less than five acres, do not proceed with a vacation if it will landlock 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. Boards should obtain waivers of damages whenever possible, even from the affected owners that signed the petition. If any owner is not willing to waive damages, the board must determine the amount of damages, if any, which must be paid. An owner is entitled to compensation only 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).

Claims for compensation are 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. Damages are 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"

A town board may be able 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 a simple method to eliminate a town's interest in a road, after providing notice of the meeting at which the issue will be considered. Though the word "abandoned" is used in the statute, this process is different than the common law process of abandonment.

This process is often used when a person claims the board has a duty to reopen and maintain an unrecorded "road" that is overgrown by brush and trees. The board often does not want to repair and reopen the road. To avoid such disputes before they arise, boards can use the extinguishment procedure to ensure 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 several 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 by landowners 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 v. North Side Corporation*, 1 N.W.2d 361 (Minn. 1941). A portion of a road 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 estopped 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.

Last, it is important to know 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 re-open 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 refuse 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 unrecorded right-of-way under the Marketable Title Act.

Helpfully, the impassable road complaint procedure in Minn. Stat. § 163.16 does not apply to these old roads. This allows the board to avoid defending against complaints brought on roads 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 tradition-

ally 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.*, 244 N.W.2d at 132. 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.* As such, the town must show it possesses 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 degree 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 Twp.*, 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, led 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. Line road agreements should divide the road into two parts, with each town being responsible for the maintenance of one part. 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 describe the regular maintenance that each town must perform, which items of maintenance require prior approval from both boards, and the timing expected for maintenance. For instance, one town should not remove trees on a property in the adjacent town except as allowed by the agreement.

The agreement should set the cost-sharing expectations for each part. 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 expects the other to pay some of the cost of a project, it should be 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

## § 15-7. Is it a Town Road?

Whether a road is a town road is a question most boards seem to face at some time. 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 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.

To determine if a road is a town road, the board must gather the facts about the road. Gather records held by the town, the County Recorder, and the County Auditor about the road. In particular, the board should look for road orders, platted subdivision records, and maintenance records. Beware of old maps! Those wanting to treat a road as public will often point to old 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 mean that it was ever a town road. Those who have served on the town board or lived in the area for many years can be asked if they have any memory of the town ever maintaining the 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 can-

agreement has become inequitable, a board can petition the county board to review the situation. The county then decides the 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.

not identify any formal establishment of a road by the town board or a history of regular maintenance, it is probably not 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 the road was established, the board must also consider if the easement was lost through a vacation or extinguishment procedure, or by the 25 or 40 year laws. (*See § 15.5*) 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 values is resulting in a marked increase in suits arguing over whether something is a town road.

The board should consult a town attorney for help and an opinion if the board cannot determine the status of the right-of-way.

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 the right-of-way is critical. This is a complex subject, in part because there are several ways to create township roads, and in part because legislative and judicial decisions have muddied the waters on the subject. There is, therefore, a lack of certainty in determining the width of some 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 to rely on the prescriptive easement provision in Minn. Stat. § 160.05, to support a claim to the road. As pointed out earlier, the statute indicates 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. However, these rights of way are not automatically 66 feet wide. Instead, the township's right of way extends only over the land maintained for

road purposes. Courts have 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." See *Barfnecht v. Town Bd. of Hollywood Tp.*, 232 N.W.2d 420 (Minn. 1975). 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.

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, offer a public hearing on the proposal, and then record the map. According to this procedure, the township would get 66 feet of right of way on all the roads included on the map, regardless of how wide any right of way was before the map was recorded. 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. Minnesota courts, in *Alton v. Wabedo*, 524 N.W.2d 278 (Minn. Ct. App. 1994), declared that this process was an unconstitutional taking.

In *Alton*, a landowner objected to the township's clearing of brush and trees within the 66 feet of right of way taken by the record-by-map process. The landowner alleged the process was a taking without compensation because although he received notice of the taking, he was never compensated for the additional land taken as township right of way. The Court of Appeals agreed with the landowner, explaining that even though notice was provided, the statute did not contain a way to compensate owners for any land taken by the pro-

cess. *Alton*, 524 N.W.2d at 282. Because the 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: (1) giving notice to the owners; (2) holding a hearing; (3) setting and awarding damages if the land is to be taken; and (4) an opportunity to appeal the decision. 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 established. Refer to the recording section below for additional information.

The consequence of this decision is that townships may claim the width of actual use, but they remain uncertain about what that width is. Even if the road was recorded as part of a map recording procedure, the board cannot rely on the width indicated on the map. Boards are still faced with the 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.

Most boards do not perform maintenance work in the full 66-foot right-of-way area every year.

It would be costly and would likely not be needed to keep the road reasonably maintained.

Despite these uncertainties, boards must continue 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 recorded 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.

What’s included in width? Shoulders and ditches? Yes. Back-slope of a ditch? Probably. Does brushing a roadside 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?

## § 15-9. Town Road Designations

Town boards may make certain designations on their roads. There are three primary designations boards can place on their roads: minimum maintenance; rustic; and closed. Each designation limits the town’s liability on the road, but not all roads are eligible for the designations.

### A. Minimum Maintenance Roads

Some roads may be designated minimum maintenance. Minn. Stat. § 160.095. To be eligible for the minimum maintenance designation, the road must receive occasional or intermittent use. 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.

A minimum maintenance designation benefits the 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.

It is possible to designate a portion of a road minimum maintenance, if the portion designated meets

the low-use requirement. In the resolution making the minimum maintenance designation, a board must 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, but the board decides what regular intervals it will use. Each sign 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 may 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 several reasons 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 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

prevent an owner from using a convenient access to their property, the town board should discuss the closure with the affected landowners. 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.**

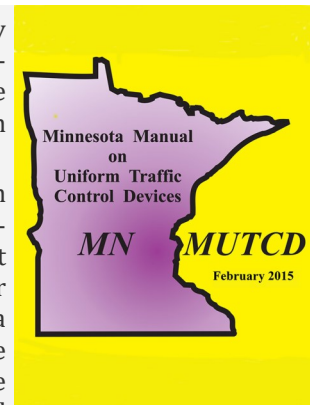
To physically close a road to traffic, the board must erect barricades on the road. Although not always practical, boards should follow the provisions of the Minnesota Uniform Manual of Traffic Control Devices when selecting barricades and related signage. It is very important for boards to use the proper 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 must 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 must 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. To be eligible for a rustic road designation, the road must have the following characteristics: “outstanding natural fea-



tures 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 may 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 may designate a portion of their road rights-of-way as a bicycle lane or route. Minn. Stat. § 160.263. 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 may regulate road use. We will not list all of the potential regulations or discuss them in depth here. Instead, we will point out some common regulations.

### **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.

Many road-related issues are already subject to state regulation. Towns do 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 re-

sources, particularly in rural areas, make the 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, the town board must provide for its enforcement. Towns can use their 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 care-

ful that their proposed regulations do not conflict with state law. Regulations that are inconsistent with state law, either in content or process, may be invalidated. *See Mangold Midwest Co. v. Village of Richfield*, 143 N.W.2d 813 (Minn. 1966). Town boards must be aware of the conditions or limitations associated with their powers.

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. 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 controls 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 to avoid a collision. Similarly, drivers are expected to reduce speeds when approaching stopped emergency vehicles, railroad crossings, 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 miles per hour (mph). 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 that finds and directs the erection of the appropriate speed limit signs.

### **2. Rural Residential District**

Speeds are not to exceed 35 mph 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 the speed limit signs must be erected before the limit goes into effect. Many towns posted a 30-mph speed limit in areas that were considered rural residential under the statute that existed before August 1, 2009. In those towns, the 30-mph speed limit remains in effect despite changes in the law, until the speed limit sign is replaced. Minn. Stat. § 169.14, subd. 5f.

### **3. Residential Roadways**

Speeds may not exceed 25 mph 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. This law changed in 2009, where before up-to 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 mph 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 mph are effective upon the posting of the proper signs.

### **5. Non-Designated Areas**

Speeds may not exceed 55 mph 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 town board 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 mph 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. This 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 mph in urban districts.

### **7. School Zones**

Towns 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 mph, not higher than 20 mph, and are only** in effect when children are present.

### **8. Work Zones**

Towns may 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 mph on a road having a speed limit of 55 mph or greater; or
- 2) 15 mph on a road having a speed limit of 50 mph 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 mph. Also, this authority may not be used to reduce existing limits by more than 15 mph. 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 mph. 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 mph.

### **C. Weight Limits**

Local road authorities may 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 receive an exemption to weight restrictions. An exemption also exists for utility vehicles that do not exceed 20,000 pounds per axle. There are specific exemptions provided for the following: hauling certain crops during harvest season; vehicles transporting milk; and recycling and garbage vehicles.

Town boards may, upon good cause being shown to them, 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**

The placement of utilities is regulated by State statute and rules by default, but towns may enact local ordinances to receive more protections than are received by statute. State rules treat different types of utilities differently, so for example, electric utilities have different default rules than communication utilities.

The traditional regulatory authority given to towns over utilities was found in Minn. Stat. § 164.36(6) and Minn. Stat. § 222.37. 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. 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 town is entitled to:

- (1) notice of what is being placed in town right-of-way;
- (2) description of who is performing the work, the time period of the construction, where the work will occur, and the depth or location of the utility lines; and

- (3) restoration of the right-of-way to the condition it was in before the constructions.

The default rules do not require the utility to relocate the utility lines, at the utility company's cost, if needed to accommodate a public project! If the town wants the utility company to pay for relocation, the town must enact its own utility regulations. Minn. R. 7819.3100.

If a town board decides 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 to 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**

In general, landowners are entitled to one access or approach from the road to their property, but town boards regulate the placement and type of approach allowed by a permitting process. Minn. Stat. § 160.18 governs the placement and cost-burdens of installing approaches. The regulation of approaches can be grouped into three categories:

1. approaches to existing roads (owner pays);
2. approaches to new roads (town pays); and
3. approaches for a particular purpose or additional approaches (owner pays).

If a road already exists, an owner wanting a new or replacement 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 must pay for a culvert if one is needed. However, the town board may 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 must construct and pay for suitable approaches within the right-of-way when reasona-

bly 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.

Regulation of approaches and culverts are not considered planning and zoning actions. *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. These regulations fall into the category of right-of-way management.

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 protected by law because of their public nature and the need to promote safe public travel. 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. Minn. Stat. § 160.27 subd. (6). Consult the town attorney or MAT before removing obstructions from the right-of-way. As discussed earlier, towns are often uncertain of the width of the right-of-way, raising the possibility an obstruction is not within the right-of-way.

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 cannot pursue both a criminal and a civil action against someone who litters. Pursuing one type of action against the person prevents 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 ejection 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 bur-

dened 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

Towns may maintain and supervise town roads to ensure the safety of the travelling public. Minn. Stat. § 164.02. They may employ or contract with such persons as they deem necessary to carry out their maintenance duty. There are many aspects to road maintenance – too many to adequately address here. Instead, we briefly raise some common maintenance issues.

### A. 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 impassable. The county must conduct a hearing on the complaint and if it finds it is well founded, it may direct the town board to do the work needed 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.

The initial focus of many 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-considered policy, it is much more likely to be considered a protected planning level decision. This is one reason boards should adopt maintenance policies related to snowplowing, signs, and mowing/brushing. However, they should not adopt a policy unless the board is 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).

- 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.

Towns are not liable for damages 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.

### B. Maintenance Activities

Statewide, the majority of township resources are devoted to road and bridge maintenance. Towns must balance their duties of maintaining safe roads with their limited resources. The key to these and any other policy decisions is to set out the factors, law, and reasons that support each decision made by the board. Not all policies need to be in writing, but boards should 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. It is also important to regularly revisit policies to ensure they are current and are being followed. Policies that are out of date should be revised or removed, because a forgotten or ignored policy can create a greater risk of liability than not having adopted a policy at all. It's 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 that keeps sight lines clear of obstructions, prevents the growth of brush and trees, controls weed growth, enhances roadside appearances, and to prevents 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 as needed to eradicate noxious weeds. These limitations do not apply to mowing done by a landowner.

## 2. Weed Control

Town boards must destroy all noxious weeds in town road rights-of-way as often as needed 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 must be 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

Towns can cut brush and tree branches hanging into the right of way to keep 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.

- a) *Communicate*: The town should try to contact and inform landowners of the expected work.

Problems arise when owners feel surprised, uninformed, and not heard on the matter.

- b) *Do Not Trespass*: 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. 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.
- c) *Be Careful with Chemicals*: 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 several points boards must keep in mind when engaging in tree cutting.

- a) *Stay in the Right-of-Way*: Board can cut trees only in the right-of-way, unless agreed to by the landowner. Determining the location and width of the right-of-way is a critical first step to any cutting activities. See § 15.8.
- b) *Tree Ownership*: Trees are 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.
- c) *Ownership Exception*: 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. The town could have acquired trees within the right-of-way 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.

- d. *Minimum Size to be called a Tree:* 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.
- e. *Communication:* Contacting the adjacent owners before any cutting is important for reducing complaints and identifying those who 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.
- f. *Ask Permission First:* The town should ask landowners for permission to cut before beginning the work. 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.
- g. *Statutory Tree Removal Process:* If the owner refuses 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.
- h. *Hearing Process:* 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. Snowplowing

Towns can provide their own snowplowing or may contract with a contractor or with another public entity for snowplowing services. Maintaining roads in the winter involves more variables than summer maintenance. As a result, it is recommended towns have a written policy addressing issues such as designating how much snow must fall before plowing will be commenced, in 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 snowplowing policy can be a valuable tool to reduce the town’s liability.

The board can also consider if the town will offer the service of plowing private driveways. Towns may 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.

Many towns have stopped offering service to private properties because of liability risks associated with the work. The authority to plow snow on a private driveway should not be taken as authority to grade or gravel a private driveway - towns cannot grade or gravel private drives at all because the power is not offered by statute.

When using salt, towns must be conservative in placing salt on roads 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 snowplowing 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 of the grader operator. The surface structure and stability of a gravel road depends on the skill of the operator. An improper grading technique can cause 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 should monitor road conditions and work closely with its employees or contractors to ensure they are performing adequately.

## 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's project involves disturbing at least one acre of land, excluding regular maintenance activities such as road grading, the town must obtain a storm water permit. Towns must develop both a temporary and a permanent erosion and sedimentation plan to meet federal EPA's National Pollutant Discharge Elimination System standards. The MPCA's website has more information, found at: <https://www.pca.state.mn.us/>.

### 2. 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."

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.

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 ensure 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), provides an exemption to towns 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. Towns must try to minimize the project's impact on the wetlands and they must file a report concerning the project. Questions regarding this program should be di-

rected to 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.

DNR Permit Not Required	DNR Permit Needed
If ALL the following are true	If ANY of the following are true
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 to road contracts.

When letting a contract for the construction of a road that must be let on 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 contractor 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 construction services for the

town. Minn. Stat. § 471.345. By piggybacking 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 through 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

Two statutes provide procedures for making adjacent landowners responsible for some maintenance activities within the right-of-way. The town's voters decide if they will impose these obligations on landowners.

*Ditch Maintenance Duty:* This authorizes voters to make 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. Minn. Stat. § 366.015. If a board is interested in pursuing this option, it can submit a ballot question to the voters at the town election, asking if this obligation should be implemented. If the voters approve the question, 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 per-

formed and certify the costs to the county auditor for inclusion on their property taxes.

*Snow & Ice Removal Duty:* This authorizes voters to require landowners to remove snow and ice placed on town road rights-of-way by the owner. Again, the board may 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 clear benefit of these procedures is that they expressly allow a town to recover its costs for the owner's failure to maintain the right-of-way 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.

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

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

One controversial issue town boards consider 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, with both threatening to bring a lawsuit 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 disperse 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: (1) the reasonable necessity for drainage; (2) whether care was taken to avoid unnecessary injury; (3) whether the utility to the drained land outweighs the harm to the burdened land; and (4) 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

As road authorities, town boards may repair, clean out, deepen, widen, and improve town road ditches. Minn. Stat. § 160.201. The board decides when work is needed, but before ditch work is done the board must examine and determine that the ditch will be provided with an adequate outlet. Towns must remember to install approaches to each parcel that has an existing approach and that is needed for access to the property. Minn. Stat. § 160.18.

### C. Private Projects

When the course of natural drainage of any land runs to a road, the adjacent owner may connect a drain or ditch to the town road ditch. Minn. Stat. § 160.20. 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 must 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. Once installed, the town board is not responsible for damage to the drain tile.

It is a misdemeanor offense for a person to: (1) install drain tile along or across a road without a permit (Minn. Stat. § 160.20, subd. 4(b)); (2) obstruct a town road or drain any noisome material into any ditch (Minn. Stat. § 160.2715(6)); or (3) litter (Minn. Stat. § 609.68).

### D. Culverts

Towns are typically responsible for the installation and maintenance of culverts under

town roads. Boards should have a regular inspection and repair program for culverts and drainage systems. A properly functioning drainage system is less likely to result in a suit than one that is allowed to break down over time.

As discussed above, the law regarding culverts under approaches places the primary financial responsibility for the culverts on the abutting property owners. Minn. Stat. § 160.18. While owners are responsible for purchasing and installing approach culverts, it's less 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

## § 15-14. Town Road Improvement Funding

Towns are expected to maintain and improve their roads. Improving roads is less a question of authority than a question of how to pay for it. There are a variety of funding sources for town road work. Most funding methods are not specific to town road financing, and are considered in more depth in Chapter 8 - Revenue, Financing, and Debt. The chapter includes information on the town levy, special assessments, bonding and certificates of indebtedness, subordinate service districts, grants or aid programs, local government aid, payment in lieu of taxes and other funding sources.

To finance road projects, towns may use cash on hand, borrowing, or a combination of both. The most common funding source is the town's levy, but expensive projects may require more funding than the town has available in cash.

One funding source unique to road and bridge maintenance is the money received from the State's Highway Users Tax Distribution fund, commonly referred to as gas tax money. Money received from gas tax can be used only for road and bridge repair and maintenance purposes. See Minn. Stat. § 162.081. Even if there is a sur-

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 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 develop a comprehensive policy to 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.

plus of gas tax money in the town's account, it cannot be transferred to any other purpose under any circumstances.

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.

Special assessments are often used for town road maintenance, but they can be used for a

variety of activities within the right-of-way, so they are considered in Chapter 8.

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 activities 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.

## § 15-15. Recording Town Roads

When towns speak of recording their roads they are often referring to recording a map of their existing roads or a road order describing a particular road. Recording roads became a greater priority for towns after 1975 when the Minnesota Supreme Court struck down the portion of the use and maintenance road statute, Minn. Stat. § 160.05, which established 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 these roads are only established to the width of actual use and maintenance. This decision left towns 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.*

The Legislature unsuccessfully tried to fix this problem with the record-by-map process in Minn. Stat. § 164.35. To use the process, the board 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.

However, the record-by-map process was later declared unconstitutional because it too caused a taking of property without compensation. *See Alton v. Wabedo\_Tp.*, 524 N.W.2d 278 (Minn. Ct. App. 1994). The record-by-map 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 procedure in Minn. Stat. § 164.07 if land must be acquired. The cost of using the formal road creation process limits the usefulness of the record-by-map process.

Towns can also use maps to plan their future right-of-way acquisition needs. Towns can adopt an official map indicating lands the town plans to acquire in the future. Minn. Stat. § 462.359. If buildings or other structures are placed in areas designated for future town use without obtaining the proper building permits,

the town does not pay for the building or structure when it acquires the land. Minn. Stat. § 462.359, subd. 3. See **TR3000** for more on recording roads.

## § 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 blacktopping 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 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 bridg-

es. 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.

## § 15-18. Cartways

Cartways are 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 common 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 discussion addresses general dedications and cartways to landlocked property.

### **A. General Cartway Dedications**

For many years a curious one-sentence statute, has said “[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 is: what is the effect of deeming all these dedicated roads to be cartways. Such a discussion could take many paths, but our concern is limited to the most common type of public road dedications – lands dedicated by plat for public road purposes.

Those who develop large tracts of land often create a plat that divides the land 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 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 considered 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 accepts the road

as a town road (Minn. Stat. § 164.08, subd. 3); and

4. If the town has not accepted the platted 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**

Towns must establish cartways to landlocked property of a certain minimum size upon a proper petition from the owners of the property. Minn. Stat. § 164.08. However, the town cannot 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 cartway process places the board in the middle of neighbor disputes. If cooler heads were to prevail, neighbors would see the purchase of a private easement is probably a better option for both sides in a dispute.

For the landlocked owners, the cartway process is very expensive because not only are they going to pay the fair market value of the 33-foot-wide (2 rods) 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. Often, the owner’s total cost far exceeds the cost to purchase a private easement at double the market value. Plus, 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 the board has no discretion to deny the cartway. The board must 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 and the cartway becomes a public road. 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 receives a cartway 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 receives 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 help verify the petition, ensure the petitioner's eligibility for a cartway, and aid in getting a bond or other financial security from the petitioner for the board as it carries out the cartway process. 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 always argue that it should be routed over someone else's property. The town board may 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. The route selected 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 interesting aspect 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. Minn. Stat. § 164.08. The designation is made by board resolution and it must be accompanied by the written consent of the affected landowners. Once the designation is made, the town cannot 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, not necessarily equally, 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 must 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 must spend road and bridge funds to maintain the cartway.

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

