Musings on Municipal Roads

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As this article is being written, winter, at long last, has finally yielded to spring in the Northeast, and a New Hampshire municipal lawyer's thoughts inevitably turn to municipal roads, mud, and frost heaves.[1] So, too, do the thoughts of New Hampshire municipal *road agents*. ("Road agent" is New Hampshire's and New England's quaint term for the person in charge of municipal highway maintenance. Though some taxpayers might dispute the notion, the term does not refer to a highwayman, i.e., a thief and brigand who preys on those traveling the roadways). Frost heaves are such a regular component of the spring landscape here in the Granite State that local theaters host *Frost Heaves,* a show featuring "Live comedy, music, and assorted Yankee nonsense from the most underappreciated town in New Hampshire!"[2]

The frost heave: winter's gift to spring driving.

Not every municipality across the country experiences the joys of frost heaves or mud season. Yet, every municipality inevitably faces concerns with the condition and maintenance of highways, and potential liability to users. A thoroughly unscientific study (aka an Internet search) proffers one main conclusion about local roads: sometimes municipalities are held liable for incidents occurring on their roads and sometimes they are not.

Immunity and liability vary not only from jurisdiction to jurisdiction, but also with respect to causation (e.g., inclement weather, comparative or contributory negligence, warnings, postings, and discretionary function). The National Conference of State Legislatures has a webpage discussing sovereign immunity and tort liability,[3] it reviews matters such as damage caps and punitive or exemplary damages. Though the webpage focuses primarily on state liability, it does provide information and perspective on local governments.

Municipal Liability: Knowledge and Culpability. Flippant as the above comment on municipal liability or immunity might seem, it would appear at least to be a reasonable description regarding the general state of local government responsibility to users of roads. This article seeks to provide some practical (and a little legal) guidance that might assist in protecting your municipal treasury from claims relating to highway defects. The term "defect" – or any of its multiple variants (e.g., "insufficiency") – is significant, as most jurisdictions generally hold that local government liability is premised upon some degree of culpability based on a defect in the road.[4] That means that liability associated with the duty to maintain roads is neither barred by application of sovereign immunity nor imposed strictly as a guarantor of the safety of travelers.[5]

Liability will arise under what appear to be fairly common requirements:

Municipal ownership of (or responsibility for) the road. Municipalities are generally not responsible for accidents or damages occurring on private roads or roads maintained by another jurisdiction (e.g., another municipality, a county, or the state.)

As with any general proposition, exceptions exist. Several years ago the limb of a tree located on state college property in New Hampshire fell onto a vehicle being operated on a state-maintained road, resulting in severe injuries. Under applicable law, the town in which this occurred would have no share of liability; but here the town had been designated a "Tree City" and had recently inspected the tree without noting its dangerous condition.

Road classification systems may free municipalities from responsibility for maintaining particular classes of roads. In New Hampshire, the state is responsible for class I, 2, and 3 roads. Municipalities are responsible for class 4 and 5 highways. Class 6 roads are deemed public, but municipalities have no duty to maintain them.

But as a small town north of Canterbury, New Hampshire learned, municipal immunity associated with a class 6 road is not immutable. There, a class 6 road crossed over the Merrimack River. The bridge was in a hazardous condition. The town selectmen, seeking to protect travelers from falling into the river, erected a metal bar across the road. Sure enough, a motorcyclist riding at night ran into the bar and suffered injuries.

The town pled immunity under the class 6 road statute, but the New Hampshire Supreme Court allowed the suit to go forward, finding that the town's actions were not encompassed solely by the class 6 road categorization. Instead, the motorcyclist was permitted to bring an action because of allegedly tortious municipal conduct in constructing and/or maintaining a barrier to a discontinued bridge.[6]

Notice of defects. Statutes may require that the municipality have notice of a defect or insufficiency as a necessary condition to a finding of negligence or culpability. Receipt of notice alone may not trigger liability as-- consistent with the avoidance of strict liability--a municipality ought to have some opportunity to correct or at least post some form of warning of a defect. Some statutes may require actual notice and may define the officials to whom notice must be provided.

New Hampshire even requires the notice to be in writing – yet, the statute also states that municipalities are deemed to have notice if "(t)he selectmen, mayor or other chief executive official of the municipality, the town or city clerk, any on-duty police or fire personnel, or municipal officers responsible for maintenance and repair of highways, bridges, or sidewalks thereon had actual notice or knowledge of such insufficiency, by means other than written notice pursuant to RSA 231:90, and were grossly negligent or exercised bad faith in responding or failing to respond to such actual knowledge." [NHRSA 231:92, I (b).] One difficulty posed by these actual notice requirements is proving that a designated official did not observe a defect, particularly one that is reasonably obvious. (To address that situation, this article includes a suggested policy to establish reporting requirements and a system for docketing and responding to both formal written notices and actual, observed defects).

Time to review and cure. A feature of this type of liability is that a municipality ought to have some time to review a claimed defect and that, practically, it cannot cure the defect immediately. The claimed inability to act may be for budgetary, weather-related, or lack of personnel, or because action may be complicated or require appropriations or engineering work. The ability to defer correction, though, is accompanied by a requirement to act promptly, at least to the extent of posting warnings or taking some other protective action.

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Possible Municipal Lawyer Preventive Maintenance Practices. Over the course of some 35-plus years of municipal lawyering, including serving as a municipal official in various posts, I have encountered situations in which a lack of knowledge about municipal roads and records affected exposure to liability. The following list of questions may not apply to all municipalities, but they do cover a number of instances in which knowing the answers may serve as a one means of "preventive maintenance."

1. Do You Know Where Your Roads Are?
- –Identification of roads by classification or other factors:
  - Extent, width, length?
  - Verification of status[7]?
- –Location of road rights-of-way:
  - Maps or as-built plans;
  - Is a defect located in the road or somewhere else?
- –When was the last time roads were mapped or catalogued?

2. Have You Received "Notice" of a Defect Without Knowing It?
- –It's not just the highway work crew that is "charged" with noticing AND reporting highway defects (and potential defects)!

3.Have You Assumed Liability for Roads (or Other Areas) that Are Not Public?
- –If so, are they "roads" or "premises" (or some other term), liability for which may be governed by statutes other than road laws?
- –Are these properties "paved with gold" for plaintiffs?

4. How Does the Public Know if a Road Is Municipally Maintained?
- –Can they tell by a road sign?
- –Do they need to look at maps in municipal office or website?
- –Do they need a crystal ball?
- –If there was a sign, is it still there? – Can it still be seen?

5. Are Officials/Boards/Employees Singing the Same Tune?
- –Do planning board, zoning board, governing board, road agent, and other municipal "agents" or "representatives" (official or not):
  - Know and agree on road status and maintenance?
  - Know what to say when asked about status or maintenance?
- –Are official statements consistent? Do you know if they are consistent?

6. What Is Done with Notices of Defects?
- –Do all people charged with notice know what to do when they see something or have something reported to them?
- –Do individuals who are not statutory recipients of notice know what to do if somebody tells them about a problem?
- –Is there a system for follow-up?
- –Is there a system to follow up on the follow-up?
- –What is done with records? [You do keep records, right?]

7. Is it Appropriate to Restrict Road Use by Any Types of Vehicles – Seasonally or Year-Round? If So, Do Municipal Officials Know:
- If it can be done?
- Who does it?
- How is it done? Are there studies required?
- Who is notified?
- What gets posted?
- How is the restriction changed or removed?

8. How Do "New" Roads Get Created?
- –By accident or design?
- –When does a road shown on a

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plat approved by a planning board become a public road – a municipal road – a maintained road?
–Does everyone know the process?

Policy and Practice Considerations. In a state with exposure to liability for municipal roads, procedures that set forth municipal practices in light of existing capabilities, particularly in inclement weather conditions, can create some insulation from, or a defense to, claims. In those states in which a notice of insufficiency may trigger liability, a degree of protection may be created by adopting and using policies to establish reporting and tracking procedures for handling and responding to such notices.

Even in states where notice is not a key component in liability, these types of procedures may assist in preventing an accident or damage or injury – which, after all, is a goal all municipalities and municipal attorneys share.

The following policies are premised upon New Hampshire laws which turn on some form of notice being given as a predicate to liability (and, it is hoped, offer some insights about other municipal protocols).

Sample Policy #1. Winter and Inclement Weather Policy and Priorities. Pursuant to RSA 231:92-a, the Board of Selectmen hereby establishes this policy and procedure for winter and inclement weather road maintenance.

Part A: Policy Objectives.

1. Objective. The Town seeks to provide timely, efficient and cost-effective winter maintenance, snow removal, and ice control on public highways, bridges and sidewalks under its jurisdiction for the safety and benefit of residents and the general motoring and pedestrian public.

2. Procedure. The objective stated in Section 1 may be achieved by implementation and execution of the procedures and tasks outlined in Part B, the Town's Winter Operations Standard Snow Removal and Ice Control Procedures. *[Due to many variables that are inherent in New England weather, each storm or weather event may require different efforts or emphases on maintenance tasks which, together, determine the overall winter maintenance, snow removal or ice control strategies]*

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3. Level of Service. It is not reasonably possible to maintain snow- and ice-free roads or sidewalks during a storm. The Town intends to utilize reasonable and feasible effort, within the means available, to provide practical, safe use of municipal facilities during and after winter storms.

(A) As a general policy, the Town will commence snow removal operations upon accumulations of _____ inches of snowfall. The Road Agent may, at his or her discretion, based upon weather information reports or prevailing conditions, elect to not commence snow removal until greater or lesser amounts have accumulated.

(B) Snow removal or road or sidewalk treatment operations may be suspended at any time when continuing operations would pose a hazard to persons or property.

(C) Pre-treatment and ice control may be implemented prior to, during, or after a storm, as determined to be appropriate. Treatment chemicals vary in effectiveness with temperature and will be applied as conditions warrant.

(D) Sidewalk snow clearance will be conducted as soon as practicable, subject to availability of personnel and equipment. The need to maintain safe roadways will generally take priority. The sidewalks which are to be cleared are those located at _____. Property owners may assist the Town in sidewalk safety by clearing snow from sidewalks in front of their properties, provided that the snow so removed is not placed in the streets. *[Note: Any provisions of Part B (operating procedures) concerning sidewalks and priority of treatment need to be consistent with this policy statement.]*

4. Direction. The Road Agent, or the Road Agent's designee, shall direct all winter maintenance activities for the Town.

5. Implementation. This policy, including the standard operating procedures set forth in Part B, is intended to serve as the normal procedure for winter maintenance, snow removal and ice control for the Town. One or more of the following events or circumstances, (among other factors) which may delay or prevent the implementation of this policy, may affect all or any part of normal operating procedures:
–Equipment Breakdown
–Snow Accumulation in Excess of One Inch per Hour
–Freezing Rain or Other Icing Conditions
–Traffic Congestion
–Emergencies
–Personnel Illness
–Other Events Beyond the Reasonable Control of the Town

6. Notice. This policy may be posted in appropriate public places in the Town as determined by the Selectmen. Residents are encouraged to familiarize themselves with this policy as it describes conditions that one might expect to encounter before, during and after a winter storm event.

*[Part B: **Operating Procedures** is omitted from this article as it would state specific priorities, available equipment and related matters for individual communities.]*

Sample #2. Reporting, Prevention and Notification Policy Sample.
[Note: Adoption of a policy such as this may demonstrate that the municipality is undertaking reasonable preventive practices. Even if a policy is not adopted, it is recommended that a municipality undertake actions as suggested in this sample policy. A policy is preferred as this may invoke "discretionary function immunity."]

Municipal Road and Sidewalk Liability: Avoiding or Lessening Liability through Preventive Policies

As part of the obligations of the Town to carry out its responsibilities and duties of maintaining class V (and IV) roads

and public sidewalks in accordance with RSA 231:90 - 231:93, the (Council/ Board of Selectmen/Manager/Board of Commissioners) adopts this policy.

1. Purpose and Intent. The New Hampshire Legislature has enacted laws to specify conditions under which a municipality may be held liable for insufficiencies in highways and sidewalks which it must maintain. This policy adopts procedures seeking to facilitate compliance with the law and to carry out obligations in a reasonable and meaningful way within the limits of available resources.

2. General Standards. The Town will make reasonable attempts to keep its class V (and IV) roads and public sidewalks free from insufficiencies as defined by RSA 231:90, II. Because of the nature of the municipality and the number of miles of maintained roads and sidewalks, the Town cannot practically assure that all roads and sidewalks will be safe and free from defects of all kinds at all times. Some roads are "rural" roads that are often unpaved and "rough." *[Describe sidewalks, if appropriate].* While the Town will make reasonable efforts to keep roads safely passable by normal passenger vehicles traveling at safe speeds under then-existing conditions and sidewalks safely usable by prudent pedestrians, operators of motor vehicles and pedestrians are required to exercise due caution and common sense to prevent injury to persons (including themselves) and damage to property.

3. Road Classification. To assist operators in safely using roads, the Road Agent, in cooperation with the (Council/Selectmen/ Manager/ Commissioners), shall inspect and review the existing Municipal road system.

(A) Roads shall be classified according to the following standards:

- Thoroughfares
- Local service roads
- Rural or scenic roads
- Limited use roads
- Roads closed to passenger vehicles.

(B) The classification of a road under paragraph (A) shall not be deemed a guarantee that the road is sufficient at any given time for use as indicated nor that the road will be maintained to any given standard. Instead, the classification is merely an indication of the general quality of the road and the type of maintenance it usually receives.

(C) The classification of existing roads shall be completed by ___, 20__. Upon completion of the classification, the Selectmen/Municipality Manager shall determine the feasibility and wisdom of posting all or a portion of the road system to indicate road classifications as so designated. Classification shall be updated as frequently as practicable.

(D) As part of this review, the Road Agent shall attempt to post any roads or sidewalks or segments thereof which are observed to contain potential safety hazards that are not reasonably discoverable or avoidable by a prudent user. The (governing board) may determine if it is necessary to take further action beyond posting.

4. Notices of Insufficiency. This section describes usual procedures for handling notices of insufficiency in accordance with RSA 231:90 - :92. These procedures supplement the municipality's inclement weather policy adopted pursuant to RSA 231:92-a and are not intended to replace or impose a higher standard of care than that stated in said policy. Only a notice which conforms in all respects to RSA 231:90 and this policy shall be deemed to comply with that statute.

(A) In accordance with RSA 231:90, a written notice of insufficiency must be delivered to (one of the Selectmen or Village District Commissioners) or the municipal Road Agent (or other title, e.g., Public Works Director) (or in a city, the Mayor or Street Commissioners) with a written copy of the notice provided to the Municipal Clerk. In addition, the municipality delegates the authority to receive notices on behalf of said officials to (insert, for example, staff in the municipal office.) The notice must be signed by the individual(s) providing the notice, and shall contain each signer's name printed legibly, along with the signer's address and telephone number or other means of contact. In addition, the notice shall:

(1) Contain the date and time of the notice;
(2) Contain the date and time at which the insufficiency was observed;
(3) Describe, at least in general terms, the location of the insufficiency with such detail as may permit it to be found without undue difficulty; and
(4) Describe in reasonable detail the nature of the insufficiency.

(B) The municipality may provide forms upon which notices of insufficiency may be filed, but an individual need not use that form if the notice conforms to the requirements of law and this policy.

(C) The municipality encourages other municipal officials and employees who may receive notice of an insufficiency to advise individuals to report the insufficiency as required by law and to advise appropriate officials of conditions called to their attention. However, the municipality cannot assure that any notice which is provided in a manner other than that specified for a formal notice under this section will actually be received by the appropriate official/employee and therefore must require that notices be provided as required by law and this policy.

(D) Upon receipt of a notice of insufficiency, the individual receiving the notice shall first indicate on the notice or an appropriate form the exact time and date on which the notice is received and the identity of the person with whom it is filed. Upon receipt, the (road agent or governing board or other official) shall determine if the notice conforms to the requirements of this policy and the law. It is the municipality's intent to implement action to investigate any claimed notice of insufficiency which is reasonably identified in a notice even if the notice does not formally conform to the requirements of law and this policy, but the municipality does not thereby waive any immunity

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or limit of liability which otherwise would apply.

(1) As soon as practicable, a determination shall be made as to whether an insufficiency exists. If it is determined that no insufficiency exists, the (designated official) promptly shall so advise the person filing the notice, and shall include a statement of the reasons why no insufficiency exists.

(2) If an insufficiency is found to exist, the municipality shall take one or more of the following actions as appropriate to the circumstances and shall, at an appropriate time, notify the person filing the notice of the actions taken or planned.

(a) If the insufficiency was temporary and no longer poses a hazard, the (official) shall determine the likelihood of another occurrence and what action, if any, is required to prevent or post warnings of such conditions. In most such cases, the posting of warnings is not required unless there is a reasonable likelihood of a recurrence of the insufficiency.

(b) If the insufficiency is not temporary, the (official) shall as soon as practicable post warning of the insufficiency. Within 72 hours after receipt of the notice of insufficiency, the (official) shall develop a plan to remedy the insufficiency. The plan shall be implemented in good faith within a reasonable time. If the insufficiency is not immediately remedied, appropriate warnings shall be continued. The municipality may take reasonable interim action and shall determine if warnings continue to be required. The reasonableness of any proposed action shall consider the requirements that the expenditure of municipal funds may be made only in accordance with proper procedures.

5. Municipal Observations and Inspections.

(A) *Scheduled and Regular Inspections.* As part of its routine road and sidewalk maintenance, the municipality will seek to conducts periodic inspections of their condition.

(B) *Actual Notice Observations.*

(1) In accordance with RSA 231:92, I (b), any official or employee designated in subparagraph (5) (B) (2) of this policy who has actual notice or knowledge of an insufficiency by means other than a written notice filed in accordance with section 4, shall promptly report such insufficiency to (official) who shall take the same action as would be taken if the insufficiency was reported by written notice.

(2) The employees/officials required to act under subparagraph (5) (B) (1) are the following: (Selectman/Commissioner/Mayor/the Municipal Manager or Municipal Administrator/Municipal Clerk/any on-duty Fire or Police Personnel/Road Agent/Public Works Director).

(C) *Informal Observations.* Only knowledge by or notice to those officials or employees designated in paragraph (5) (b) shall impose an obligation to act as provided by RSA 231:92. While the municipality is not designating or authorizing any other municipal officials and employees to receive notice or otherwise commit the municipality to act, in the interest of safety and efficiency, all municipal officials and employees are encouraged to be observant of highway and sidewalk conditions and to advise (official) if they observe conditions which they believe might pose a problem. Any such observation provided to the municipality shall not constitute formal or actual notice or knowledge on the part of the municipality unless made in accordance with section 4 or an official designated in paragraph (5) (B) (2) has actual knowledge of an insufficiency through personal investigation or observation.

6. *Inclement Weather Practices.* In accordance with RSA 231:92-a, insufficiencies or hazards caused by snow, ice or other inclement weather shall be handled pursuant to the municipality's inclement weather policies and procedures.

Conclusion

This framework may not be appropriate for every municipality (particularly those fortunate enough to measure annual snowfall in millimeters and below-freezing days in the single digits, if at all). But the proposition that each jurisdiction should be fully aware of the roads for which it is liable, and that procedures for notice and remediation of defects be thoroughly spelled out, should apply to virtually all municipalities, whether ice-bound or tropical.

Notes

1. According to Wikipedia, "frost heaving" or "frost heave" is "an upwards swelling of soil during freezing conditions caused by an increasing presence of ice as it grows towards the surface, upwards from the depth in the soil where freezing temperatures have penetrated into the soil (the freezing front or freezing boundary). http://en.wikipedia.org/wiki/Frost_heaving.

2. http://www.frostheaves.com/.

3. http://www.ncsl.org/research/transportation/state-sovereign-immunity-and-tort-liability.aspx.

4. For example, New Hampshire imposes liability when a road for which a duty exists is "insufficient."

> II. For purposes of this subdivision, a highway or sidewalk shall be considered "insufficient" only if:
>
> (a) It is not passable in any safe manner by those persons or vehicles permitted on such sidewalk or highway by state law or by any more stringent local ordinance or regulation; or
>
> (b) There exists a safety hazard which is not reasonably discoverable or reasonably avoidable by a person who is traveling upon such highway at posted speeds or upon such sidewalk, in obedience to all posted regulations, and in a manner which is reasonable and prudent as determined by the condition and state of repair of the highway or sidewalk, including any warning signs, and prevailing visibility and weather conditions. [NHRSA 231:90, II.]

5. Of course, each jurisdiction has its own set of rules governing liability. Sometimes the requirement that municipalities have notice of defects or insufficiencies is stated as arising from the notion that local governments are not required to be guarantors of public safety on all public roads.

6. Bancroft v. Town of Canterbury, 118 NH 453 (1978).

7. A New Hampshire town learned the "hard way" that lack of definitive statements of a road's classification, accompanied by inaccurate statements by a town official could lead a court to rule that a class VI or private road would be deemed a public road that the town had a duty to maintain, Turco v. Barnstead, 136 N.H. 256 (1992). ML