New Hampshire municipalities have no legal obligation to plow, salt or sand Class VI roads, private roads or private driveways with municipal funds or resources. More importantly, they have no legal authority to do this, except in very narrow circumstances.

For a very long time, New Hampshire municipalities have been prohibited from appropriating or spending public funds or using public resources on purely private purposes such as the plowing of Class VI roads, private roads and driveways. The New Hampshire Supreme Court clarified this point in 1952 in the case of *Clapp v. Town of Jaffrey*, 97 N.H. 456 (1952). Towns and cities may appropriate money “for any purpose for which a municipality may act if such appropriation is not prohibited by the laws or the constitution of this state.” RSA 31:4. Under the New Hampshire Constitution, public money can be appropriated only for valid public purposes, but not to create a purely private benefit. When a private driveway is plowed, this benefits only the private owners of that property. When a private road is plowed, it benefits only the private property owners along that road. These are not valid public purposes. As a general rule, town money can’t be granted to or spent on a benefit for a private person, company or organization unless that private person takes on some obligation to benefit the town. See *Clapp v. Jaffrey*, 97 N.H. 456 (1952); *Opinion of the Justices*, 88 N.H. 484 (1937). In other words, there must be a “quid pro quo” by which the town obtains something real in exchange for that public money. If a town or city simply spends its highway funds (or other municipal money) to provide this service to private property owners without any payment or quid pro quo by those particular owners for the service, this is a problem.

Furthermore, there is no authorization in the law for any municipality to spend public funds to maintain Class VI roads, private roads or driveways. The fundamental rule of municipal government in New Hampshire is that towns and cities get all of their authority to act from the state legislature. See *Girard v. Allenstown*, 121 N.H. 268 (1981). This means that municipalities have to go one step further than everyone else; they cannot rely on the fact that there is no statute prohibiting a certain action, but instead have to find a statute that specifically permits it. “Towns only have such powers as are expressly granted to them by the legislature and such as are necessarily implied or incidental thereto.” *Girard*, 121 N.H. at 271. The law specifically allows municipalities to spend town money to maintain Class IV and V roads, but there is no authorization for Class VI or private roads, or private driveways. RSA 231:59.

Given all this, if a municipality wants to spend public funds to plow Class VI roads, private roads or private driveways (either by using municipal equipment and employees or by contracting with someone to provide that service), it can only do so legally if: (1) each owner of the plowed driveways and each property owner along a Class VI or private road pays the town the cost of that service, and (2) this plowing is truly “subordinate and incidental” to the needs of the municipality’s own highways. See *Clapp v. Jaffrey*, 97 N.H. 456 (1952). Using tax money raised from all citizens to provide a purely private benefit for a select portion of the citizens is not legal, no matter how small the amount.
There are many risks to this activity:

- Illegally spending town or city funds exposes a municipality to a citizen lawsuit for improper expenditure of funds.

- A Class VI road may become Class V even if the municipality did not mean to change its classification. While Class VI roads are public roads, and the municipality has the authority to regulate their use, the municipality has no obligation or authority to maintain them. It is possible for a Class V road (usually thought of as an “ordinary” town road) to lapse into Class VI status over time. If the municipality fails to maintain or repair a Class V road for five successive years or more in suitable condition for travel, its classification automatically changes to Class VI. RSA 229:5, VII. Nevertheless, the road may once again become a Class V road (which the municipality must fully maintain and repair) if the municipality regularly repairs and maintains it on more than a seasonal basis, in a suitable condition for year-round travel, for at least five successive years. RSA 229:5, VI.

- Public maintenance of a private road could arguably be construed by a court as an acceptance of the highway, resulting in the municipality’s permanent responsibility not only to plow that road, but also to repair and maintain it. *Hersh v. Plonski*, 156 N.H. 511 (2007).

- Towns and cities are also granted significant protection from liability with respect to the use of public roads, but the same is not true for private roads or driveways. This means a town or city might find itself forced to pay for injury or damage caused by the plowing activity on a private road or driveway that it would not be liable for on a Class IV or V road. See RSA 231:92-a; RSA 507-B:2-b.

If a municipality is currently providing maintenance services to Class VI roads, private roads or driveways, this practice generally should be stopped. If a governing body wishes to continue this service, it should only do so under the following conditions:

1. All landowners whose driveways are plowed/maintained or who live on a private road that is plowed/maintained should be charged a fee so that the municipality spends no tax dollars or other public funds for this service.

2. The governing body should only provide the service if they determine it is “subordinate and incidental” to the needs of the municipality’s own highways. In other words, does it benefit the town or city by ensuring that, for instance, snow from private driveways does not end up in the street and cause an ice problem, or that municipal plows need to travel through a private road to reach the public roads they have to plow, or that municipal plows have an area to turn around or access the public roads that they have to plow? If it is not truly “subordinate and incidental” to the needs of the municipality’s other functions (words which the New Hampshire Supreme Court has said are “vital and restrictive,” and should not be read broadly), then the plowing is illegal. See *Clapp v. Jaffrey*, 97 N.H. 456 (1952).

3. The governing body should require a written agreement with each landowner that explicitly recognizes that the private road or driveway is not “dedicated” to the town by the owner, that the maintenance does not constitute “acceptance,” and that the owner will indemnify the municipality for any and all liabilities resulting from the work.
4. Alternatively, for private roads, the governing body might choose to declare one or more of these private roads “emergency lanes” under RSA 231:59-a. In a town, an emergency lane declaration may only be made by the board of selectmen after a public hearing if the selectmen find that “the public need for keeping such lane passable by emergency vehicles is supported by an identified public welfare or safety interest which surpasses or differs from any private benefits to landowners abutting such lane.” RSA 231:59-a, II. If a road is declared an emergency lane, municipal funds may then be spend to remove brush, repair washouts or culverts, plow, or do other work “deemed necessary to render such way passable by firefighting equipment and rescue or other emergency vehicles.” RSA 231:59-a, I. The municipality then has the authority, but not the obligation, to maintain the road in that manner. An emergency lane declaration may be withdrawn or disregarded at any time by the selectmen, and no one may recover damages from the town for failure to maintain an emergency lane. RSA 231:59-a, IV.

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For more information regarding this or other legal issues, please contact the LGC Legal Services Attorneys at 800-852-3358 ext. 384 or legalinquiries@nhlgc.org.