



HIGHWAY TOPICS

VOL. 35, NO. 5

BULLETIN FOR TOWN AND COUNTY HIGHWAY SUPERINTENDENTS

MAY, 1976

1976 Highway School

The 1976 Highway School will be held at Cornell University, Ithaca, New York, on June 7th, 8th and 9th, 1976 (a Monday, Tuesday and Wednesday).

Additional details will be distributed by correspondence and in Topics. Meanwhile, it is planned to follow the general format of recent Highway Schools—classroom, lecture-type programs at the three morning sessions, followed by workshop sessions during the afternoons of Monday and Tuesday.

Registration will begin at 4:00 P.M. Sunday Afternoon, June 6th, in the Lobby of Riley-Robb Hall. Registration will resume at 8:00 Monday Morning, June 7th, in the Lobby of Morrison Hall, where most of the School Sessions will be held.

Rooms will be available in Cornell Dormitories as well as in area motels. Lists and rates will be forwarded to all highway superintendents. The Dairy Bar, on the Campus, will be available for breakfast and lunch at modest prices.

Parking is a problem on the Cornell Campus. Parking Permits will be issued to allow parking in designated locations near the School. The University makes a charge of \$.25 per car per day. This charge will be collected at the time of registration to each registrant issued a Parking Permit. In case of loss, duplicate permits can only be issued at this same initial fee. Frequent bus service will be available at no charge to and from various Campus locations.

The actual and necessary expenses incurred by town officers attending this School, including registration fees, are proper town charges under authority of Town Law, §116(12). Receipts will be issued to each registrant for use in preparation of claims for reimbursement.

Some of the topics discussed for presentation in lecture and/or workshop sessions at the recent School Planning Meeting include: Are You Getting A Day's Work for a Day's Pay—Management's Rights, Work Rules, Enforcement, Suspension; All Phases of Purchasing; Drainage—Rights Off Easement—Practical and Legal; Environmental Quality Act, Mined Reclamation, Existing Stream Protection Law—Permits Required, etc.; Pitfalls of Subdivisions, Abandonment, Dedication; Recycling Asphalt; The Disaster Following the Disaster (Emergency Aids, Forms, etc.); History of Road Building; Gravel—Availability at Various Locations; Gravels for Bases and Shoulders. As the program develops, further information will be forwarded.

Highway Superintendents and employees are urged to attend. There is much advantage to be had in sharing common problems, experiences and solutions, as well as in discussions of new techniques, statutes and legal interpretations of existing law.

Whether Or Not To Maintain A Highway Not Dedicated To The Town

[From presentation by Anthony C. Brankman, Associate Attorney, Office of Community Affairs, NYS Dept. of State, 1976 Annual Meeting, Association of Towns]

Let me make a slight change in this topic. My talk will be on "Whether or not to maintain a highway which is not a *town* highway". This is somewhat broader in scope, because a highway which is dedicated to the town is only one of a number of ways a highway may become part of the town highway system. A town could also acquire a highway by purchase, condemnation or by prescription, i.e., by use over a period of ten years.

The question, then, is basically whether you, as the town official in charge of maintaining the town's network of town highways, may use your men and machinery to maintain *private* roads.

What private roads am I talking about? Some

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examples are regular driveways or the type of long driveways leading to camps, cottages and homes; streets constructed by developers of a subdivision which have never been accepted by the town, lanes in shopping centers, service roads around apartment houses or factories. In other words, any road or street which is not a part of the town highway system.

Most of us have heard about the rule which prohibits a town from removal of snow from private driveways. What law forbids that, you ask? The answer—there is no *statute*—it's the State Constitution. Article VIII, §1 prohibits a local government from making a gift of public funds to a private individual. When the town clears snow from the supervisor's driveway, he doesn't have to pay a private person to have it done, so in effect he's that much better off. The town, however, paid town funds for the gas, oil, time and equipment to plow the driveway. Put the two together, and you run square into a gift of public funds to a private person. Forbidden! says our State Constitution.

It is probably no news to you, then, when I tell you that the same constitutional principle applies to the town maintaining private roads. It's very simple. There is no *law* against it; but the State Constitution, Art. VIII, §1 prohibits it, just like snow removal on private roads.

Town highway superintendents are pretty smart. They're thinking all the time. One comes up with a great idea on how to get around the State Constitution. Instead of fixing the pot holes in that private road for free, he'll get paid for doing it.

Voila! no *gift*—no Constitutional Prohibition! And the highway superintendent can do it at less cost than a private contractor can! But wait. That's part of the problem. The highway superintendent is in *competition* with private enterprise. Towns were never established to be in the contracting and construction business. They're *municipal* corporations, not General Motors or US Steel. Fundamentally, there is no legal authority for a town to engage in this business.

There is an exception to the lack of legal authority to maintain roads for others, however. The Highway Law, §142-b and §142-c provide that the town board may authorize the town highway superintendent to repair streets or roads or remove snow and ice from streets or roads located in the towns belonging to a village or school district as agreed upon by the town board and the governing body of any such village or school district. Under those same sections the town may also authorize the highway superintendent to permit the use of the town's highway equipment by a village, fire district, school district or other improvement district located in whole or located in part in the town. One caution, here. If town employees operate the equipment, the rental of the machinery to the fire district, village or improvement district may not be sufficient to relieve the town of liability for any negligent operation of the equipment (see 23 Op. St. Compt. 785).

Even with the exception, this rule is hard to live with. There are situations where it works hardships. We all know of examples. Such as the elderly widow living on social security who just happens to have a long driveway filled with pot holes in the spring or snow in the winter. She may even be sick. Or the subdivision street that was never dedicated to the town, and now the school bus won't drive down it because it's in such bad repair. Your constituents, the taxpayers, are howling. Constitution or not, they want action. It is very hard to resist these pressures.

But watch out. There are real dangers here. Not only for the town, but also for you, the town highway superintendent.

Should there be an accident or some other negligence occur when the town is maintaining a private highway, the person damaged may sue everyone in sight. Who is everyone? For one, the town. Towns are liable for the negligence of their officers or employees incurred in the performance of their duties. No problem, the town's insurance policy

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Cayuga County Highway Department Moves Ahead

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in areas where two lanes of traffic have to be maintained; they are centrally located and dispatched as required.

For efficient coverage of the 65-mile-long county, plows are strategically located at several places, north and south. During the critical snow months, a round-the-clock snow watch is maintained at the Auburn garage, and the department receives weather reports from the U. S. Weather Service and a number of other agencies. When a storm is imminent, operators are ordered to their vehicles as soon as possible, and the rest of the snow-fighting crews assemble at the headquarters garage and six out stations.

The progress of the storm is carefully watched at each of the out stations and the overall snow battle is coordinated at the Auburn garage from reports coming in from these stations.

Plowing starts after about 3 inches have fallen and continues until the storm abates, with crew members snatching what sleep they can in the 30-bed dormitory at the Auburn garage. As well as plowing the county roads, county forces are also responsible for plowing all state roads by contract. Here again there is cooperation with the towns in that some of the state plowing is contracted out to the towns, and certain sections of county roads in towns are plowed by the town forces.

Sanding and salting are done almost entirely by the towns. The county highway department purchases the sand and salt, mixes it and stockpiles it at several locations. About 35,000 tons of the mixture are used every year.

The highway department's headquarters in Auburn has a fully-equipped maintenance shop with five full time mechanics. A paint shop, parts shop, sign shop, fuel storage space, adequate storage space for the growing fleet of equipment, make it one of the better-equipped counties in the upstate New York area.

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covers negligence and their attorneys will defend the town. But will they? The town had no authority to do what it did. It may well be that under your insurance policy there is no obligation for the insurance company to defend the town where there is an *ultra vires* act. After all, the town is not liable for the *ultra vires* acts of its officers or employees. The town may have to hire its own attorney. Even if the court decides that eventually the town is not liable, there would be attorney's fees for the defense of the town.

Who else is in sight. The town highway employee. Also the town highway superintendent. Generally the officers and employees of a town are responsible for their own negligent *ultra vires* acts. And they would probably have to hire and pay for their own attorney, because the town's attorney would not be available for their defense where it appears that they have performed an action outside the scope of their duties and authority. They may have to pay any judgment and attorneys' fees against them out of their own funds.

Incidentally, the town (or its insurance carrier) may also have a claim against the town employee or highway superintendent for the cost of any repairs to the town highway equipment that might have been damaged.

And if the town employee were injured, he might not have any workmen's compensation coverage.

Even if no accident or other negligence should occur, you should be aware of the possibility of a taxpayer suing to prevent "waste" of public funds. Although taxpayers' actions are somewhat limited under General Municipal Law, §51, this year the State Legislature enacted a law which may significantly broaden the ability of taxpayers to sue town officers or employees for wrongful expenditures or unconstitutional disbursement of funds (State Finance Law, Art. 7-A, added by L. 1975, c. 827). It also enacted a class action statute (see L. 1975, c. 207) which will make it easier for a group of persons to pool their resources to sue another party.

I don't mean to frighten anyone with the possibilities of law suits because we know that historically there is a reluctance to sue. But you should know the possible legal consequences of your actions.