

Dear Dina –

September 27th, 2011

I am writing to follow-up my conversation with Simon last week during which he asked that I prepare a summary of the liability issues that the town is exposed to due to the current condition of River Road. Pursuant to RSA 231:92, the town will not be held liable for personal injury or property damage caused by the “construction, maintenance or repair” of a town road unless the claim arises out of an “insufficiency” in the road and the town had notice of the insufficiency. The town’s actual knowledge of an insufficiency constitutes the required notice. An “insufficiency” is defined as either: (a) the road is not passable in “any safe manner” by those authorized to use the road, or (b) a safety hazard exists which is not reasonably discoverable or avoidable by the traveler, who is obeying all speed and use regulations, including warning signs, and using the road reasonably given its condition and the weather and visibility. My understanding is that the hazard presented by the road is both visible (cut away by the river) and not reasonably discoverable or avoidable (bank support under road compromised or potentially compromised). To summarize, the road is “insufficient” if it cannot be safely traveled at all or if the danger is not known or is not avoidable when reasonably using the road. The town’s liability for injury and damage caused by an insufficiency does not attach if the town posts warning/danger signs/signals and, within 72 hours of notice of the deficiency, prepares a plan for repairing the insufficiency. The town must then act in good faith to implement the plan “with reasonable dispatch.” RSA 231:91. The cases have not provided guidance as to what constitutes “reasonable dispatch.” However, we did review this issue in the context of the loss of bridges after the “Mother’s Day” floods, and believe that where the cost to repair in the near future is prohibitive, it is reasonable for the repair plan to provide that repairs will occur within a specified number of years, pending funding. Does this mean that the town can “open” one or two lanes of travel on River Road prior to improvements so long as it posts notices warning that the road is insufficient due to steep banking, possible road collapse, etc.? I believe that the answer would be yes if the only issue was the steepness of the bank along the river, if travelers are warned of the danger presented by the steep bank along the river, if the edge of the safe area for travel is clearly marked and traffic is directed away from the dangerous sections, and the road is posted at an appropriate speed for the condition. However, if there is a reasonable danger that the road’s undersupport is insufficient or may become insufficient without further notice such that a traveler could find himself on a road that is suddenly falling into the river, I believe the answer is no, regardless of the number or types of warnings that are provided. Please note that, pursuant to RSA 231:92, I (b), the selectmen can only be individually held liable for injury and damage if they were “grossly negligent or exercised bad faith” in their response to the notice of insufficiency. As you can see, the selectmen need to make a determination as to whether the road is “safe” for the type of use for which it may be opened. Where the selectmen have retained an “expert” who has provided an opinion, I believe the selectmen should base their decision on that opinion, unless the selectmen have access to contrary facts upon which it would be reasonable to rely.

Jae Whitelaw