



Knowing the TERRITORY

2022



**An Overview of Selected Topics in Municipal
Law for New Hampshire Local Officials**

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INTRODUCTION

KNOWING THE TERRITORY 2022 EDITION

This book is intended for use in conjunction with the New Hampshire Municipal Association's 2022 Local Officials Workshops and as a reference throughout the year. *Knowing the Territory* offers an introduction to the way municipal government works in New Hampshire. Several chapters are specific to the town meeting form of government, particularly Chapter Three on Town Government, Chapter Four on the Select Board's Relationship with Other Local Officials, and Chapter Six on the Local Budget Process. Otherwise, the information in the remaining chapters applies to both towns and cities. The details of individual town and city charters are not covered here; however, they are vital to much of what officials do in those municipalities.

The 2022 edition of *Knowing the Territory* is newly updated to include the latest case law and legislative changes affecting municipal law. The information presented is not intended as legal advice and is not a substitute for consulting your municipal attorney or NHMA's Legal Services attorneys. Other NHMA publications are available to provide you with more in-depth information on specific areas of municipal law, such as *Guidebook for New Hampshire City and Town Councilors, Mayors and Aldermen; Town Meeting and School Meeting Handbook; A Hard Road to Travel; The Basic Law of Budgeting: A Guide for Towns, School Districts and Village Districts; New Hampshire's Right-to-Know Law*. NHMA offers a variety of educational workshops, and online training is available through monthly webinars covering a variety of topics of interest to municipal officials. NHMA wishes to thank William J. Phillips, Staff Attorney and Director of Policy Services for the New Hampshire School Boards Association for his assistance updating Chapter Two, Section IV on Education.

The NHMA's Legal Services staff provides general legal advice to municipal officials from New Hampshire Municipal Association (NHMA) member municipalities. Attorneys are available to answer legal inquiries by telephone, email, or mail; please visit <https://www.nhmunicipal.org/legal-services> for more information on the scope of legal services offered to NHMA member municipalities. The Legal Services attorneys present many educational workshops throughout the year, and attorneys are available to bring individualized programs to your area.

The NHMA's Government Affairs staff represents municipalities before the legislature and state agencies. Municipal members guide staff activity by adopting a series of legislative policies for each legislative biennium. In addition, NHMA publishes materials related to legislative issues, including the *Legislative Bulletin* and *A Guide to Legislative Advocacy for Local Officials*. For more information on NHMA legislative advocacy please <https://www.nhmunicipal.org/legislative-advocacy> .

Visit the NHMA website at <https://www.nhmunicipal.org/> to learn more about NHMA programs, services and publications.

We hope you find these introductory materials helpful as you carry out your duties, but we know that you will have questions along the way. Please don't hesitate to call on us. We're here to help you. You can reach us at 603.224.7447, or by email at legalinquiries@nhmunicipal.org or governmentaffairs@nhmunicipal.org

CHAPTER ONE

FINDING THE LAW

I. TYPES OF STATE LAW

Towns, cities, and village districts, and all their local officials, are bound by state law. That includes not just (a) the written laws (statutes) passed by the legislature, but also (b) the New Hampshire Constitution, (c) administrative regulations enacted by state agencies under authority from the legislature, and (d) the “common law,” which is the set of legal principles developed and explained by the courts in their written opinions (usually referred to as case law). Keep in mind that the court system is an equal branch of government and is just as powerful within its domain of interpreting law as the legislature is in its power to make laws. Thus, “common law” (court cases that define the law) is just as legal and binding on the town and its officials as are statutes.

A. Statutes

The statutes of New Hampshire, as passed by the legislature, plus the United States and New Hampshire constitutions, are collected in the *Revised Statutes Annotated*, issued by Thomson/West as the official publisher. They are referred to as either statutes or “RSAs.” They are published in 36 volumes, plus an index volume and a table volume. At the end of every annual legislative session, each volume is either updated with a supplement or reprinted to include all the new laws and the changes to existing laws. Most of these supplements fit in the pocket at the back of the hardbound book (thus earning the name “pocket part”), but some grow so thick over time that they stand as separate softbound companion books until the next reprint of the volume. (See Section C for more information on supplements.)

The RSAs are arranged by title, chapter, and section. The title is a main grouping of chapters dealing with related topics. For example, the first main division of the RSAs deals with “The State and Its Government” and includes chapters 1 through 13. Titles are rarely cited. In a typical citation, such as “RSA 41:11,” the number “41” is not the title, but the chapter number.

A chapter is the most frequently used division of the RSAs and is a collection of sections dealing with the same subject. They are cited with the chapter number separated from the section number by a colon. For example, a citation to “RSA 31:39” refers to RSA chapter 31, section 39. Sometimes a section of the RSAs is divided into subsections, paragraphs and even subparagraphs. In written citations, paragraph numbers are separated from the section number with a comma. So, for example, RSA 676:4, I(g) means chapter 676, section 4, subsection I, paragraph (g).

When the legislature enacts a new chapter of the statutes that belongs between two existing chapters, or a section that belongs between two other sections, a letter suffix is used. For example, RSA chapter 36-A is a completely different chapter than chapter 36, but it falls right after chapter 36 and before chapter 37. Similarly, RSA 31:39-a is a separate, distinct section that follows RSA 31:39.

B. Legislation

The state legislature has its own system for identifying bills that are being considered in any given year. A citation such as HB 424 refers to a bill that has originated in the House of Representatives. It is a proposed law that has not been passed yet. SB 123 would represent a Senate bill. Bills are passed back and forth and reviewed by both the House and Senate but retain their original reference number for the entire session. Once a bill passes, it receives a session law chapter number, such as “Laws of 2012, Chapter 144.” Chapter numbers are simply assigned in the order that bills become session laws in that year. However, not all session laws necessarily become statutes. Some are enacted for specific places or situations, or are otherwise non-statutory matters. Do not confuse session law numbers with the RSAs.

Session law chapter numbers are chronological and are only of historical interest. For example, Chapter 1 of the session laws of 2012 is the first law in 2012 that was signed by the governor after passing the House and Senate. The law appears as Chapter 1 regardless of where it will appear in the RSAs. Shortly after those session laws that modify the RSAs are “chaptered,” they receive the appropriate statutory designation in the RSAs and are printed in the annual supplements to the RSA volumes. The RSA numbers are the ones to use when citing state law.

You may wonder why you would need to look up a session law. Perhaps you need to know when a particular statute was amended, or you need to find a “special act” (i.e., legislation that did not become chaptered). In these situations, you will want to look at the session laws.

To figure out where to find the relevant session law, look at the historical information immediately following the text of the statute, after the word “Source.” The first year listed is the year the statute was enacted, and it is followed by the chapter of the session law. For example, again using RSA 676:4, we would find this:

Source. 1983, 447:1. 1985, 159:1. 1986, 57:1, 2; 229:1, 2. 1989, 266:30. 1990, 275:1. 1995, 117:1, 2. 1997, 142:1-4; 249:1. 1998, 274:1. 2004, 71:6. 2005, 33:3, 4. 2008, 229:2. 2009, 31:2, 3. 2010, 39:1, 2. 2011, 164:1, 2. 2013, 270:2, eff. Sept. 22, 2013. 2016, 81:1, eff. July 18, 2016. 2017, 59:3, eff. Aug. 1, 2017. 2019, 6:1, eff. July 9, 2019; 242:3, eff. Oct. 10, 2019.

This means the statute was enacted in 1983, and the session law can be found in the 1983 session laws in chapter 447:1. The years and chapters that follow indicate subsequent amendments.

C. Supplements

Statutory research is not complete upon finding an RSA in the bound volume. In fact, it is always best to start your search by checking the most recent supplement before checking the bound volume. In order to find the most updated and accurate version of law, one must check that same citation (statute number) in the supplement or pocket part. These supplements, reprinted every year, contain changes the legislature has made since the hardbound book was printed. The supplement is a paper pamphlet, usually stuck in the back of the hardbound RSA book. When the paper pamphlets become too thick to be placed in the back of the bound volume, they are printed in a separate softbound booklet (with a white paper cover) that follows the hardbound volume on the shelf. This update is usually referred to as the supplement. If there is nothing in the supplement under the number at issue, then the version in the hardbound book is the current, correct statute to use.

If the town subscribes to the hardbound volumes of the RSAs, it will receive yearly supplements. These should be placed at the back of the appropriate hardbound volume, and the old supplement should be discarded. The hardbound volumes cannot be relied upon as an accurate source for the most current version of the law unless the annual updates are received and properly maintained. The online version of the statutes, found at <http://www.gencourt.state.nh.us/rsa/html/indexes/default.html>, are

not necessarily updated immediately so it is possible that they might not contain the most recent versions of the statutes at all times. The online versions do not include annotations, which are discussed in the next section.

D. Annotations

Below the text of each law as printed in the RSAs, there often appears in smaller print one or more annotations. These are summaries, not actual quotations, of New Hampshire Supreme Court cases that interpret the statute. These summaries are written by the publisher, not by the Court. The supplements also contain annotations of cases that have been decided after the hardbound volume was printed. The annotation is not part of the statute itself. Do not rely on the annotation; instead, use it to find the case to which it refers.

E. The Common Law (Court Cases)

A decision of the New Hampshire Supreme Court is as binding on the town and its officials as the RSAs because the Supreme Court authoritatively interprets New Hampshire law. Decisions of the Superior Court are binding on the parties to the particular cases and often provide important guidance to others with similar cases. Citations to court decisions, found at the end of the annotations and elsewhere, are written in the following format:

Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993)

- “*Union Leader Corp. v. Fenniman*” is the title of the case;
- “Union Leader Corporation” is the name of the plaintiff (the person or entity who originally brought the lawsuit);
- “Fenniman” is the defendant (the one who got sued), in this case, the Dover police chief;
- “136” is the volume of the series where the Court’s complete written opinion is published;
- “N.H.” stands for *New Hampshire Reports* (published by LexisNexis), the reporter, or court cases series, containing the opinion. *New Hampshire Reports* contains the cases from the New Hampshire Supreme Court (Similarly, the *United States Reports* (“U.S.”), contains cases of the United States Supreme Court);
- “624” is the page number in volume 136 on which the opinion begins; and
- “(1993)” is the year the case was decided

Note that the party appealing a case to the Supreme Court (the party dissatisfied with the prior decision) may be either the plaintiff or the defendant and, depending on the ultimate disposition of the case, may end up winning (a decision of “reversed” or “vacated and re-manded”) or losing (“affirmed”).

Throughout the year, NHMA publishes summaries of cases that are of importance to municipalities. These case summaries are included in *Newslink*, NHMA’s biweekly email newsletter to members, and are published on the “Court Updates” page of the NHMA website.

F. Administrative Rules

Administrative rules, also referred to as regulations, are also binding on the town and its officials. Known as the New Hampshire Code of Administrative Rules, they are the regulations passed by state administrative agencies (such as the Department of Revenue

Administration) to carry out the provisions of the statutes contained within the RSAs. The citations for administrative rules are different from RSAs, so it is easy to distinguish a statute from a rule. For example, the statutes for current use taxation are located at RSA chapter 79-A, while the administrative rules for current use are located at NH Admin Code Cub 100-300 as promulgated by the Department of Revenue Administration. An administrative agency cannot enact regulations in any field unless the legislature has passed a law allowing it. To obtain a copy of an agency's rules, make a request of the agency itself. Many administrative regulations are also available on the New Hampshire state government website (www.gencourt.state.nh.us/rules/). Thomson/ West publishes softbound sets of state regulations, but they are not complete.

Federal agencies enact administrative rules, too. Federal agencies' administrative law/ regulations are codified in the Federal Code of Regulations (referred to as the "CFR").

Always remember that administrative rules are the law. The difference is that this type of law is created (promulgated) by administrative agencies rather than a court or the legislature.

II. WHERE TO GET THE LAW

A. Internet

The Internet is probably the fastest and easiest way to access the legal information local officials need on a daily basis. For New Hampshire law, use the state's official website (www.nh.gov). The site contains full text copies of the RSAs, a list of the sections affected by legislative action, current bills and court opinions. Legislative sessions may be heard live from the State House. From the homepage, choose "Laws and Rules." There, you will have the option to view the RSAs, rules, recent Supreme Court slip opinions, or the New Hampshire Constitution. For legislative materials, follow the "legislative branch" link from the homepage. The state website also provides information on all aspects of state government. In addition to state agencies, such as the Office of Planning & Development (OPD), links will take you to municipal and county websites, water resources, waste management information, family services resources, vital records research, newspapers, political trivia and election regulations, unclaimed property, job search services, hiking trail reports, links to museums and cultural calendars, education links and resources, labor department requirements, tax information, business search engines, utilities information, and many other resources. Again, be aware that this information is not always updated. Check the "last modified" date on the page to be sure that you are viewing information that is current enough given your purpose. (Of course, NHMA's website, www.nhmunicipal.org, is also a great resource for understanding some of New Hampshire's laws more complex areas).

For New Hampshire federal district court opinions and rules, go to the United States District Court's website at www.nhd.uscourts.gov. Opinions issued by the United States Court of Appeals for the First Circuit, which covers New Hampshire, Maine, Rhode Island, Massachusetts, and Puerto Rico, are available at <http://media.ca1.uscourts.gov/opinions/>. PACER, Public Access to Court Electronic Records, is an electronic public access service that allows users to obtain case and docket information online from federal appellate, district and bankruptcy courts. Access is available at <https://www.pacer.gov/>. Users must establish an account with a credit card to gain access to federal court decisions, although there is no charge for obtaining a copy of a final decision or judgment of a federal court.

For information on any federal law or government agency, use the official U.S. government website at www.usa.gov. Referred to as USA.gov, this website allows the user quick and easy access to information on federal laws and regulations, links to libraries throughout the country that provide information via the web, links to every federal agency website and many other interesting and helpful websites. For example, sites that may be helpful to municipal officials, including the U.S. Environmental Protection Agency and the U.S. Department of Labor, are easily accessed via USA.gov.

Several law schools also offer free legal reference materials online. The Legal Information Institute is sponsored by Cornell University and is located at www.law.cornell.edu. You will also locate valuable resources for general legal research (www.findlaw.com) and other subjects with a keyword search on any of the major search engines.

B. Libraries

Many municipal offices have copies of the RSA volumes, as do many public libraries. For access to case law, some local libraries may have copies of *New Hampshire Reports*. The New Hampshire State Library (located on Park Street in downtown Concord) and the New Hampshire State Law Library (located in the Supreme Court building off Hazen Drive in Concord) both have extensive collections of statutes, regulations, and court opinions, and are open to the public.

CHAPTER TWO

THE MUNICIPALITY'S RELATIONSHIP WITH OTHER GOVERNMENTS

I. THE AUTHORITY OF TOWNS AND CITIES

A. Local Government Receives Its Authority from the State

The executive, legislative and judicial branches of the New Hampshire state government are granted their authority by the people through the New Hampshire Constitution. Towns and cities receive all their authority from the state legislature. Whenever the town meeting, the town or city council, or an individual official takes any action in an official capacity, they are acting with authority received from the state legislature. See RSA 31:1 and other sections in that chapter for a description of the powers of towns. See RSA chapter 47 for a description of the powers of cities.

B. No Home Rule Authority in New Hampshire

Contrary to popular belief, New Hampshire is not a “home rule” state. It has a political tradition of local control, but unlike many state constitutions, the New Hampshire Constitution does not grant any power directly to municipalities. In New Hampshire, municipalities are political subdivisions of the state. So are village districts, school districts, counties and other similar governmental entities. They only have authority if the legislature gives it to them, and the legislature is free to withdraw it at any time. The New Hampshire Supreme Court has said:

“[T]owns only have such powers as are expressly granted to them by the legislature and such as are necessarily implied or incidental thereto.” *Girard v. Allenstown*, 121 N.H. 268 (1981).

The expression “home rule” is also used in New Hampshire to refer to the ability of towns and cities to change their form of government via the charter adoption procedure found in RSA chapter 49-B. But this is only form, not substance. Towns and cities cannot, by charter, add to their authority or reduce their responsibilities. Only the legislature can make those changes.

C. Authority Is Usually Found in Statute

Usually, the legislature provides authority to municipalities in the language of a state statute. The statutes are published as the New Hampshire Revised Statutes Annotated (RSAs). In general, when a question comes up about whether a municipality or a particular local board or official has authority to take a certain action, the municipality, board and/or official must find a law that grants them that authority to act. It is not enough to conclude that there is no law prohibiting the action. Silence in the law generally should be interpreted as a prohibition against that particular municipal action.

D. Town Statutes Apply to Cities

The text of RSA 47:1 provides that all powers vested by law in towns also may be exercised by cities. Therefore, a law that allows a town to do something also allows a city to do the same thing.

The reverse, however, is not true. The legislature has enacted some statutes that grant certain authority to cities, but towns do not necessarily have the same authority.

E. Use Caution with Broad Statutory Language

Some statutes are very narrow and specific and grant very limited authority. However, as the following examples show, others provide a rather broad grant of authority.

1. APPROPRIATIONS

RSA 31:4 authorizes towns (and, via RSA 47:1, cities) to appropriate money “if such appropriation is not prohibited by the laws or by the constitution of this state.” While that language offers broad authority to municipalities in determining the purposes to which they appropriate public money, it is not unlimited. For example, Part II, Article 5 of the New Hampshire Constitution prohibits towns from appropriating funds directly for the benefit of a profit-making entity. This does not mean that the municipality may not contract to purchase goods or services from a for-profit business. So long as the entity receiving the public money is committed to provide goods or services that directly benefit the public, the appropriation is valid. For more information about valid appropriations of municipal funds, please refer to Chapter Six and/or to NHMA’s publication *The Basic Law of Budgeting: A Guide for Towns, Village Districts and School Districts*.

2. ORDINANCE AUTHORITY

RSA 31:39 grants authority to towns to enact ordinances (bylaws) regulating 16 listed activities, including noise, tattoo parlors, Memorial Day observances, public dances and roller-skating rinks. Also included in the list is authorization for towns to enact ordinances for “making and ordering their prudential affairs.” RSA 31:39, I(l). Similar language appears in RSA 47:17 regarding the authority of city councils. RSA 47:17, XV. This language seems to grant broad authority to towns and cities to legislate on just about any issue. New Hampshire courts have upheld a wide variety of health, safety and welfare ordinances, including a water body setback, *Freedom v. Gillespie*, 120 N.H. 576 (1980), and a surfing ordinance, *State v. Zetterberg*, 109 N.H. 126 (1968). A recent Superior Court decision ruled that RSA 47:17, XV authorized the Nashua City Council to enact a mandatory mask wearing ordinance to combat the spread of Covid-19. *Cooper v. Sununu, City of Nashua*, Hillsborough County Superior Court – Southern District, Case No. 2020-CV-00266, (decided July 7, 2020).

However, other ordinances justified under the “prudential affairs” statute have been challenged and invalidated by the courts. For example, a growth control ordinance was held invalid because growth is a zoning issue, and the control provision was not enacted using the specific procedures required by the legislature to establish zoning ordinances. *Beck v. Raymond*, 118 N.H. 793 (1978). A rent control ordinance was struck down because state statute contains no provision authorizing municipal rent control, and the town could not rely on prudential affairs authority to enact such an ordinance. *Girard v. Allenstown*, 121 N.H. 268 (1981).

The “prudential affairs” authority should be thought of as a means for local governments to “fill in the details” of how they will exercise the authority that is found in other statutes. Town and city officials should seek assistance from the municipality’s legal counsel before taking actions in the absence of statutory language clearly granting authority for the activity. In addition, as explained in more detail later in this chapter, even when a statute

authorizes a town or city to take a certain action, another statute may take some of that authority away when the state or federal government preempts local action.

F. Unfunded State Mandates

In 1984, the New Hampshire Constitution was amended to prohibit state mandates on municipalities, school districts, counties and other political subdivisions. Part I, Article 28-a reads:

The state shall not mandate or assign any new, expanded or modified programs or responsibilities to any political subdivision in such a way as to necessitate additional local expenditures by the political subdivision unless such programs or responsibilities are fully funded by the state or unless such programs or responsibilities are approved for funding by a vote of the local legislative body of the political subdivision.

Article 28-a applies only to “new” programs or responsibilities. This means it does not apply to legislative mandates imposed prior to 1984, when the constitutional amendment was enacted. Thus, state mandates such as local welfare assistance and maintenance of reclassified highways are not unconstitutional and must be carried out.

Several New Hampshire Supreme Court opinions have examined the unfunded mandate issue, although an unconstitutional mandate has only been found once (in the very first case decided under Article 28-a, see below, *N.H. Workers Comp. Fund v. Flynn*, 133 N.H. 17 (1990)):

- ***City of Concord v. State*, 164 N.H. 130 (2012)**

The legislature changed the manner of funding the New Hampshire Retirement System (NHRS), which comes from three sources: investment returns, employee contributions, and employer contributions. From 1977 to 2009, RSA 100-A required political subdivisions to pay 65 percent of the employer’s contribution for certain classes of state and local employees and required the state to pay the remaining 35 percent. In 2009, the legislature increased the political subdivisions’ share of the employer contributions to 70 percent for fiscal year 2010 and 75 percent for fiscal year 2011, and in 2011 eliminated the state’s contribution entirely, thus requiring political subdivisions to pay 100 percent of the employer contribution for future years. The plaintiffs (three political subdivisions representing hundreds of towns, cities, school districts and counties) asserted that by requiring them to enroll these employees in the NHRS with the promise that the state would pay 35 percent of the cost, and then withdrawing the state’s contribution and requiring the plaintiffs to pay the entire amount, the legislature had violated Article 28-a by imposing an “expanded responsibility” after 1984. In ruling that the mandated increase in retirement funding does not violate Article 28-a, the court held for the first time that the term “responsibilities” must mean “something more than merely a financial obligation.” Instead, for Article 28-a to be implicated, “the state action must impose some substantive change to an underlying function, duty or activity performed or to be performed by local government.” Since the change in the funding obligation “did not change any underlying activity or function” – it “merely” imposed a significant new financial obligation – the court concluded that it did not violate Article 28-a.

- ***N.H. Ass’n of Counties et al. v. State*, 158 N.H. 284 (2009)**

The legislature “extended” the effective date of a “sunset” provision that would have terminated certain county welfare responsibilities. The legislature also increased county responsibilities under other welfare programs but included a “hold harmless” provision that would cap the financial impact at the level of the previous statutory scheme for fiscal years 2009 and 2010. The Court held that the net effect of the legislation was not to

increase costs at this time and thus did not violate Article 28-a. The effect of the legislation on county costs after 2010 was deemed speculative and thus unripe for decision.

- ***Nelson v. N.H. Dep't of Transportation*, 146 N.H. 75 (2001)**

The New Hampshire Department of Transportation reclassified two sections of Route 9 in Nelson from Class II to Class V status. The town argued that the state's decision to reclassify the highway impermissibly burdened the town with new maintenance costs. The Court found no constitutional violation, reasoning that reclassification of roads between state-maintained and town-maintained classes, and between town-maintained and non-maintained (for example, from Class V to Class VI), was part of a process that predated the 1984 enactment of Article 28-a.

- ***Nashua School Dist. v. State*, 140 N.H. 457 (1995)**

The school district filed a declaratory judgment action seeking an order that imposition of "special education" costs by state regulation violated Article 28-a. The Court held that since municipalities were in fact responsible for educational placement costs prior to the adoption of the amendment, the regulations did not mandate a new (post-1984) program.

- ***Opinion of the Justices (Solid Waste Disposal)*, 135 N.H. 543 (1992)**

The Court examined proposed legislation that would have prohibited the disposal of certain items into the solid waste stream. In this advisory opinion, the Court determined that the Article 28-a prohibition applies only where the mandate imposes both a new, expanded or modified program responsibility and an additional municipal fiscal obligation. In this case, the proposed legislative change did not impose a mandate upon municipalities to recycle the prohibited items, and thus was not unconstitutional.

- ***N.H. Workers' Comp. Fund v. Flynn*, 133 N.H. 17 (1990)**

The Court found a statutory amendment affecting workers' compensation responsibility toward firefighters to constitute a new and unfunded financial responsibility imposed upon municipalities because it reduced the burden of proof applicable to firefighter claimants and increased the fiscal burdens placed on municipalities.

II. PREEMPTION

With the United States Congress, state legislature and all local legislative bodies actively creating new laws each year, it is not surprising that conflicts arise between these laws. Preemption is a legal term used to describe how these conflicts are resolved by the courts. "Preemption" occurs when one level of government claims regulation of a given field as its own and prohibits lower levels of government from regulating that field. Article VI of the U.S. Constitution says the federal constitution, laws and treaties are the "supreme law of the land" and are superior to conflicting provisions of state constitutions or laws. This is commonly known as the "Supremacy Clause" and it means that, if state law conflicts with federal law, the federal law controls.

- ***Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251 (2013) (car towing and storage)**

This U.S. Supreme Court opinion is one of the very few decisions of the Court that have directly resulted from an incident occurring in New Hampshire. New Hampshire state and local law enforcement officers are called upon regularly to have vehicles towed, both by governing bodies and by private parties requesting assistance with the removal of vehicles

from private parties. This is true in all states, and the Court granted review in order to determine whether a federal law preempted inconsistent state and local regulations in this area of the law.

Mr. Pelkey's landlord required tenants to remove their cars from the parking lot when it snowed, in order to allow the lot to be cleared. In February 2007, a snowstorm occurred at a time when Mr. Pelkey was confined to bed with a serious medical condition and he was unable to move his car. The landlord had Mr. Pelkey's car towed by Dan's City Used Cars. Soon after, Mr. Pelkey was admitted to the hospital, and remained under hospital care until his discharge on April 9, 2007.

Dan's City wrote to Mr. Pelkey that it had towed and was storing his car. However, the post office returned the letter, checking the box "moved, left no address." Dan's City scheduled an auction of the car for April 19. Meanwhile, Mr. Pelkey's attorney learned that the car had been towed and was scheduled for auction. On April 17, two days before the scheduled auction, Mr. Pelkey's attorney informed Dan's City that Mr. Pelkey wanted to pay any charges owed and reclaim his vehicle. Dan's City proceeded with the auction anyway. Attracting no bidders, Dan's City later disposed of the car by trading it to a third party without any notice to Mr. Pelkey.

Mr. Pelkey sued Dan's City in the superior court for violation of the NH Consumer Protection Act (RSA 358-A:2) for failing to comply with the requirements of RSA chapter 262 regarding the disposal of stored vehicles and proceeding with an auction despite actual notice that Mr. Pelkey wanted to reclaim the car. Dan's City argued that RSA chapter 262 was preempted by federal law, and therefore it could not be the basis of a Consumer Protection Act claim. The NH Supreme Court found for Mr. Pelkey, and Dan's City appealed to the U.S. Supreme Court.

Under the Federal Aviation Administration Authorization Act of 1994 (FAAAA), "A State...may not enact or enforce a law, regulation, or other provision having the force and effect of a law related to a price, route, or service of any motor carrier... with respect to the transportation of property." 49 U.S.C. §14501(c)(1). The legal issue was whether Dan's City's actions regarding the storage and disposal of the car was related to "the transportation of property." If it was, then the FAAAA would preempt RSA 262, and Dan's City could not be found liable under New Hampshire law.

The FAAAA defines "transportation," in relevant part, as "services related to the movement" of property, 49 U.S.C. §13102(23)(B). The U.S. Supreme Court agreed with the NH Supreme Court's interpretation of this language, finding that that the auction of the car was not related to the movement of the car. Although the definition of "transportation" includes the words "storage" and "handling," the Court held that these words apply only to temporary storage and handling before the vehicle reaches its destination. In this case, the actions that were the basis of the lawsuit all occurred after the towing ("movement") operation had ended.

Dan's City also argued that, whether or not the car was still being moved, the storage and disposal of the car were still "services related to movement" under the FAAAA and were still exempt from RSA chapter 262. The Court disagreed, finding that the transportation "service" in this case was the removal of the car from the parking lot. That service, which did involve the movement of property, ended months before the conduct on which the lawsuit was based. The FAAAA was intended only to create a uniform system of regulating transportation and interstate commerce across the country. The state laws in question don't affect participation in interstate commerce by requiring a motor carrier to abide by a

different set of laws than other states' laws. Therefore, the Court held, the FAAAA does not preempt state law claims stemming from the storage and disposal of a towed vehicle.

State laws may comprehensively regulate a particular field, but also contain provisions that expressly authorize limited municipal regulation. For example, RSA chapter 483-B, the Shoreland Water Quality Protection Act, contains a set of minimum standards that all landowners must meet, but the statute also expressly allows municipalities to enact more stringent shoreland protection regulations.

Significant preemption cases decided by the New Hampshire Supreme Court include:

- ***State of New Hampshire v. Wayne Bickford*, 167 N.H. 669 (2015) (regulation of taxi-cab business)**

The New Hampshire Supreme Court determined that a Manchester taxicab business must comply with the City's local licensing scheme and the United States Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA). In this case, there were several defendants: all were drivers for two Manchester taxicab drivers, and all had been cited by the City Police for operating a taxicab services without a City license, as required by ordinance. The defendants sought dismissal of the citations, arguing that the federal FMCSA preempts the City's ordinance and regulation of their transportation services. The trial court agreed with the defendants and dismissed the citations.

On appeal, the NH Supreme Court held that the local taxicab licensing scheme was not preempted by the FMCSA. First, while the federal law preempts a state's ability to regulate transportation services provided on an interstate route, Congress explicitly denied the federal government jurisdiction over motor vehicles providing purely intrastate taxicab services, leaving that regulation in the hands of state and local authorities. Second, there is no actual conflict between the federal law and City ordinance—in other words, it is not impossible for individuals to comply with both. A motor carrier that provides taxicab services under a state or local license would generally be exempt from federal regulation; however, if the transportation ceased to be local, it would also be subject to the jurisdiction of the FMCSA. So, here, the Court determined that while the defendants' FMCSA certification provides them with the authority to carry passengers in interstate commerce, it does not authorize them to provide purely intrastate services that are unrelated to their interstate services. Therefore, the City's local taxi licensing scheme was not preempted by the federal statute.

- ***Prolerized New England v. Manchester*, 166 N.H. 617 (2014) (Junk and Scrap Metal Dealers, RSA chapter 322)**

The NH Supreme Court ruled that a Manchester ordinance regulating scrap metal dealers was not preempted by RSA chapter 322, Junk and Scrap Metal Dealers. In 1995, the City of Manchester adopted an ordinance requiring all scrap dealers to maintain certain transaction records as a condition for obtaining a scrap dealer license. In 2012, the ordinance was amended to require dealers to maintain electronic transaction records and send the records to either the Police Department or an authorized data storage site. Prolerized, the operator of two scrap metal centers in the City, filed a Petition with the Court to declare that the ordinance was unenforceable because it was preempted by RSA chapter 322, which governs junk and scrap metal dealers. The Court determined that the State did not intend to occupy the entire field because RSA chapter 322 specifically grants authority to the governing bodies of towns and cities to establish rules for the granting of licenses and requires dealers to keep records "sufficient to the licensing authority." As a result, the Court found that the State intended to vest authority in the local governments

to regulate scrap and junk metal businesses. Second, the Court held that the City's ordinance was enforceable because it did not conflict with RSA chapter 322. Finally, the Court held that the fifty-cent transaction fee was not a license fee and was therefore not preempted by the statute.

- ***Carroll v. Rines*, 164 N.H. 523 (2013) (Local excavation regulations, RSA 155-E)**

This opinion is the third in a line of cases involving this issue. The first case was *Arthur Whitcomb, Inc. v. Carroll*, 141 N.H. 402 (1996), in which the Court found municipalities may not impose operational and reclamation standards more stringent than the “express” standards in the statute for excavations which are exempt from the state permit requirement in RSA chapter 155-E. The second case was *Guildhall Sand & Gravel, LLC v. Goshen*, 155 N.H. 762 (2007), in which the Court confirmed that municipal regulations for operation and reclamation may be more stringent than RSA chapter 155-E for excavations that do require a permit. This third case clears up some confusion generated by a broad statement included in the *Guildhall* opinion that any ordinance purporting to regulate permit-exempt excavations would be preempted. The Court held that while municipalities cannot alter the operational and reclamation standards for those types of excavations from what is set forth in the statute, other local regulations applicable to highway excavation are not preempted unless an exemption from those regulations is granted by a local land use board.

- ***Bond v. Martineau*, 164 N.H. 210 (2012) (suspension of local welfare assistance)**

The City of Manchester's local welfare guidelines provided that misrepresentation or omission of information by a welfare client was grounds for denial or termination of all assistance for up to six months. While willful failure to comply with local guidelines may lead to suspension from assistance, even if the person is otherwise eligible, RSA 165:1-b sets forth the permissible periods of suspension or termination of benefits. The law provides that the initial suspension period is seven days. If the suspension occurs within six months after the end of a prior suspension period, the new suspension period is fourteen days. The period of ineligibility or suspension may be longer if, at the end of the seven-or-fourteen-day suspension, the person continues to fail to carry out the specific actions required of him or her. In that case, suspension continues until the person complies. Given this statute, the City's guidelines could not provide for different suspension periods because they would conflict with the state law.

- ***Lakeside Lodge, Inc. v. New London*, 158 N.H. 164 (2008) (boating and boat docking on state waters)**

As the steward of public waters, the state safeguards the right to use and enjoy public waters by avoiding piecemeal on-water regulation. Therefore, the state's regulation of private recreational boating and boat docking under a variety of statutes including RSA chapter 233-A, RSA chapter 270, RSA chapter 271 and RSA chapter 483-B preempts local regulation. While towns and cities have been given specific statutory authority under RSA 47:17, VII to regulate public docks, this authority does not extend to private docks.

- ***Community Resources for Justice, Inc. v. Manchester*, 154 N.H. 748 (2007) (zoning of halfway house for federal correctional inmates)**

Consistent with the holding in *Region 10 v. Hampstead* (below) regarding developmentally impaired persons, the Court indicated that zoning provisions that could serve to ban all halfway houses in the state would be analyzed under the NH Constitution using intermediate scrutiny which requires the challenged legislation to be substantially related to an important governmental objective.

- ***Bio Energy, LLC v. Hopkinton*, 153 N.H. 145 (2005) (air emissions)**

The state's regulation of air emissions under RSA chapter 125-C preempts local regulation through zoning ordinances. Once the Department of Environmental Services (DES) issued a permit to allow the burning of construction and demolition (C&D) woodchips, the town was no longer allowed to issue a cease and desist order under the authority of local land use regulations to prevent the burning of C&D debris at the facility. Note that as of January 1, 2008, the statute was changed to prevent the burning of C&D debris anywhere in the state. RSA 125-C:10-c.

- ***Thayer v. Tilton*, 151 N.H. 483 (2004) (sludge regulation)**

The select board adopted a health ordinance, pursuant to authority granted them by RSA 147:1, which limited the land application of sewage sludge. Under the ordinance, Class A sludge was permitted and Class B sludge was prohibited. Class A sludge meets certain federal pathogen reduction requirements; Class B sludge does not. The health ordinance was challenged on the grounds that both federal and state laws preempt such local regulation. RSA 485-A:4, XVI-b and N.H. Code of Administrative Rules Env-Ws 801.02(e) require a permit from the DES before disposal of sewage sludge, while 40 C.F.R. §503.5(b) sets federal sludge requirements. However, both the federal and state laws expressly permit municipal regulation in addition to and more stringent than federal and state requirements. Therefore, the New Hampshire Supreme Court held that the state regulatory scheme is "not so comprehensive and detailed as to suggest a legislative intent to preempt all municipal regulation of sludge." The Court added, "Because the ordinance does not contradict State law or run counter to the legislative intent underlying the statutory scheme, we hold that the ordinance is not preempted by State law."

- ***Lyndeborough v. Boisvert Properties, LLC*, 150 N.H. 814 (2004) (site plan review of ATV trails on private property)**

RSA chapter 215-A, which regulates off-highway recreational vehicles (OHRVs), including all-terrain vehicles (ATVs), does not preempt municipal site plan review of ATV trails on private property. The New Hampshire Supreme Court held that the OHRV statute included criteria for creating ATV trails on state-owned land but is not a detailed and comprehensive statutory scheme with respect to OHRV trails on private land.

- ***North Country Environmental Services v. Bethlehem*, 150 N.H. 606 (2004) (landfills/solid waste)**

The facts and legal issues in this case are complicated, but the central issues focus on whether several provisions of the town's zoning ordinance are implicitly preempted by RSA chapter 149-M and administrative rules of the DES. The Court said implied preemption is found when the statutory scheme evinces legislative intent to supersede local regulation, or where local ordinances conflict with state statutes, thus frustrating the purpose of the statutes. However, the Court noted, "the mere fact that a state law contains detailed and comprehensive regulations of a subject does not, of itself, establish the intent of the legislature to occupy the entire field to the exclusion of local legislation." Because RSA 149-M:9, VII provided that a DES solid waste facility permit did not relieve the applicant from the obligation to obtain local permits and approvals, the Court determined that RSA chapter 149-M does not preempt local regulation if the regulations are not inconsistent with state law. The Court held that the town could not require the landfill operator to obtain a building permit for the expansion of the facility because DES extensively regulates the structural design of a landfill. However,

the Court said the town's zoning ordinance prohibiting expansion of the landfill was not preempted. Several other issues in the case were remanded to the superior court for further proceedings.

- ***JTR Colebrook, Inc. d/b/a/ The Colebrook House v. Colebrook*, 149 N.H. 767 (2003) (indoor smoking)**

The State Indoor Smoking Act, found at RSA 155:64–:77, preempts any local regulation of indoor smoking because it constitutes a comprehensive and detailed scheme that regulates smoking in restaurants. The municipality argued that it was entitled to regulate indoor smoking pursuant to its authority to protect public health, but the Court found that the municipality's authority was subordinate to the Indoor Smoking Act.

- ***Hooksett v. Baines*, 148 N.H. 625 (2002) (qualifications for office; term limits)**

A municipality cannot require a candidate for local office to meet additional qualifications for office not required by state law or the state constitution because the state has created a comprehensive scheme governing the field of elections. A town charter provision imposing term limits on locally elected officials was preempted by state law governing qualifications for office where the state had neither expressly nor impliedly granted towns authority to impose term limits.

- ***Casico, Inc. v. Manchester*, 142 N.H. 312 (1997) (liquor licenses)**

A Manchester ordinance required bars to be licensed but was preempted because the state's regulation of liquor constitutes a comprehensive scheme. The Court said the city's authority to license under RSA 47:17 is "suspended in operation" as long as the state statute remains in effect. However, the Court said the city could enforce other ordinance requirements regarding the operation of bars as long as they don't pertain to liquor licensing issues.

- ***Stablex v. Hooksett*, 122 N.H. 1091 (1982) (hazardous waste facilities)**

A municipality cannot zone out a hazardous waste plant because the siting of hazardous waste facilities is completely controlled by a state agency under RSA chapter 147-A. However, the town's site plan regulations, which did not conflict with the state's policy of siting hazardous waste facilities, could be applied to the facility.

- ***Region 10 Client Management, Inc. v. Hampstead*, 120 N.H. 885 (1980) (zoning of facilities for developmentally impaired persons)**

The state's statutory scheme of placing developmentally impaired persons in various locations throughout the state carried out a state policy that could not be frustrated by local zoning regulations.

In addition, although it is only binding on the parties involved, a decision by the Rockingham County Superior Court is instructive regarding preemption of local regulation of motorcycle noise. In *Seacoast Motorcycles, Inc. v. North Hampton*, No. 218-2010-CV-626 (December 14, 2011), the court examined a town ordinance prohibiting the operation of motorcycle without the federal Environmental Protection Agency exhaust system label certifying compliance with federal regulations that prohibit the manufacture of motorcycles after 1982 that produce noise in excess of certain decibel levels. The town enacted the ordinance under RSA 31:39, I(n) (authorizing towns to enact ordinances regulating noise). However, the superior court found that the state scheme for regulating motorcycle noise was so comprehensive and detailed that it showed an implied legislative intent to supersede any local regulation. The court applied the concept of "implied

preemption” and permanently enjoined the town from enforcing the ordinance. The town did not appeal.

III. RELATIONSHIPS WITH OTHER GOVERNMENTS

A. Intergovernmental Agreements: Cooperation Among Municipalities

RSA 53-A:1 authorizes towns and cities to contract with each other and with counties to provide services and facilities to the public. Any power or authority capable of exercise by a public agency of this state (defined to include municipalities) may be exercised jointly with any other public agency of this state. The agreement is initially reached through the governing bodies of the agencies or municipalities. From a practical standpoint, however, most intermunicipal agreements will require a legislative body (town meeting) vote of some kind, either because money will need to be appropriated to implement the agreement, or because the underlying subject matter requires a town meeting vote.

An intergovernmental agreement under RSA chapter 53-A must deal with the following issues: duration, precise organization, composition and nature of any separate legal or administrative entity created by the agreement and the powers delegated to it, the purpose of the agreement, the manner of financing the joint or cooperative undertaking and establishment and maintenance of a budget, how the agreement is terminated and the disposal of any property obtained under it, and “any other necessary and proper matters.”

The agreement may establish a separate legal entity to conduct the joint undertaking, but, if it does not, it must include a provision for an administrator or a joint board responsible for administering the undertaking. Municipalities should be aware that there appears to be a presumption in the law that a separate legal entity will be created. There is the option, under RSA 53-A:3, III, to appoint an administrator or joint-board, but that statute specifies that there must be representation from all involved municipalities for any joint-board. That requirement goes to the heart of municipal expenditures, which require that public funds be spent only for public purposes. *Clapp v. Jaffrey*, 97 N.H. 456 (1952). It would be improper for one municipality to fund an activity which may only benefit the citizens of another municipality. In order to prevent that from occurring, there is built into the statute a presumption of independence for the joint venture from either municipality, or, at the minimum, a sharing of responsibilities in governance. That’s why the original RSA chapter 53-A, passed back in 1963, probably required that both municipalities entering into an agreement retain their own lawyers.

No agreement under RSA chapter 53-A relieves a public agency of any duty or responsibility imposed on it by law except to the extent that the duty is actually performed in a timely manner by a joint-board or other entity created by the agreement. For example, the fact that a municipality has become part of a solid waste district does not relieve it of the obligation to provide access to a solid waste facility (RSA chapter 149-M) unless and until the district is operating such a facility.

All agreements made under RSA chapter 53-A must, before taking effect, be submitted to the Attorney General, who determines if the agreement is in proper form and compatible with the laws of the state. If the agreement does not comply with the law, the Attorney General must give a written statement of the legal flaws in the proposed agreement to the governing bodies of each party to the agreement. Any approved agreement must be filed with the clerk of each municipality and with the Secretary of State before it takes effect. Finally, if an agreement covers any services or facilities under the control of an officer or agency of the state government, it also must be submitted to that state officer or agency for approval.

RSA 31:134-:149 authorize the creation of water and/or sewer districts that are in more than one municipality. The legislative bodies in each of the municipalities may vote to enter an agreement and create a board of commissioners to manage the district. Commissioners would be chosen to give each participating municipality proportional representation. This sort of intergovernmental agreement is now one of the specifically authorized agreements listed in RSA 53-A:3.

Of course, some municipal departments have been working cooperatively for a long time. This is particularly true of emergency response departments and public works, because they are frequently required to respond to situations occurring across municipal boundaries. In 1998, several municipalities entered into an agreement to create the New Hampshire Public Works Mutual Aid Program, which was ratified by the legislature as of August 16, 2010. At the same time, RSA chapter 53-A was amended to specifically address public works mutual aid agreements. Among other things, RSA 53-A:3-a (1) allows the participation of private companies performing services that would otherwise be performed by a public agency (such as a privately-owned water or wastewater utility); (2) allows for the creation of a board of directors or other body to govern and administer the agreement and the mutual aid program; (3) allows the agreement to contain indemnification provisions; and (4) states that functions performed under the agreement are governmental functions, and the persons performing those functions are entitled to certain immunities and exemptions.

B. Counties

New Hampshire is divided into ten counties. Unlike many other states, counties perform limited services in New Hampshire and are not a superior level of government to the municipalities within their borders. The exception is for the unincorporated areas of the state. In these locations, the counties have all the powers and duties of towns. The powers and duties of counties are set forth in RSA chapters 22 through 30-B.

State legislators are elected from local districts and form the “county delegation” that is the legislative body for each county. For the municipalities within its borders, each county operates the registry of deeds and a long-term care facility for the elderly or others who need that level of care. Each county has a sheriff, with sworn law enforcement personnel, who serve civil legal process and perform other law enforcement tasks within the county. The county commissioners also have the authority to operate a county department of corrections, and they must appoint a correctional superintendent to supervise and manage the facility. Other services may be provided, such as the operation of a county farm, cooperative extension services in cooperation with the University of New Hampshire and direct human services to juveniles in need of services.

Municipalities interact with county government in several ways. Local governments collect property tax funds and remit their share to the county for the provision of services. Local police departments often establish agreements with the county sheriff for dispatch services, and for the provision of secure jail facilities for those awaiting bail or trial. Citizens in need of long-term care may be placed at the county facility for a significant length of time.

C. Village Districts

Village districts, sometimes called “precincts,” are best thought of as special or limited- purpose governmental units within municipalities. They are formed to provide one or more of the particular services authorized by RSA chapter 52 to the people within the district boundaries. To accomplish that goal, owners of property within the district may be assessed an additional property tax to finance the operation of the district. Like school districts, village districts are legal public entities, distinct from the municipalities within which they exist.

1. ESTABLISHMENT

Upon the petition of 10 or more legal voters who are domiciled in any village located in one or more municipalities, the governing body of the municipality defines, by suitable boundaries, a district. A district may be established for one or more of the following specific purposes: extinguishment of fires; lighting or sprinkling of streets; planting and care of shade and ornamental trees; supply of water for domestic and fire purposes; construction and maintenance of sidewalks and main drains or common sewers; construction, operation and maintenance of sewage and waste treatment plants; construction, maintenance and care of parks or commons; maintenance of activities for recreational promotion; construction or purchase and maintenance of a municipal lighting plant; control of pollen, insects and pests; impoundment of water; appointment and employment of watchmen and police officers; layout, acceptance, construction and maintenance of roads; or maintenance of ambulance services. RSA 52:1.

It is the responsibility of the voters and inhabitants of the village to make sure their petition and proceedings are recorded with the municipality. The governing body calls a meeting of the legal voters residing in the proposed district's boundaries to see if they will vote to establish the district. The voters may establish the district, name it, and choose officers. The district has all the powers that municipalities have in relation to the objectives for which it was established.

Upon dissolution of any village district, the municipality is not obligated to accept, layout or otherwise maintain any road established by the village district.

Some existing village districts or precincts were established by acts of the state legislature prior to enactment of RSA chapter 52. These legislative acts should be consulted for special provisions governing district purposes and other unique governance issues.

2. MEETINGS AND POWERS

RSA 52:12 requires annual meetings of village districts to be held between January 1 and May 1. However, a district formed for the purpose of water impoundment may vote to hold a meeting at some other time of year. If commissioners neglect or refuse to warn or hold a meeting, RSA 52:13 allows a meeting of the district to be called and warned in the same manner as in like cases in towns. Votes at district meetings are conducted according to the procedures established for town meetings in RSA 40:4-a, 40:4-b, and 40:6. See RSA 52:11-a.

Village districts may adopt the official ballot referendum form of meeting. RSA 40:13, I. A district may also establish a charter. Under RSA 52:2-a, village districts may vote to raise and appropriate money by official ballot, as provided in RSA 49-D:3, II-a, by following the charter procedures set forth in RSA chapter 49-B. That provision also allows a village district to include in its charter a plan for official ballot voting on other warrant articles pursuant to RSA chapters 49-B and 49-D.

For village districts, a ballot vote is required to raise or appropriate money at a special meeting, or to reduce or rescind a previous appropriation. When calling a special meeting of the village district, the commissioners must publish a copy of the warrant in a newspaper of general circulation in the district within one week after posting the warrant. Unless superior court permission to hold the special meeting has been secured, the total number of votes cast must equal at least one-half the number of legal voters at the previous district meeting. In the alternative, as is the case for towns, village district commissioners may petition the superior court for permission to hold a special meeting to vote on appropriations. Where a superior court petition is granted, the 50 percent voter

quorum requirement does not apply.

A village district may establish a contingency fund to meet the cost of unanticipated expenses and the district may vote to add any other authorized purposes to its original purposes. Upon a receipt of a petition to do so, the select board may change the boundaries of a district after notice and hearing. But this same provision requires district voters to ratify such a change in boundaries if the district was formed for impoundment of water, as must voters residing in any area proposed to be added to the district, just as is required for initial establishment of the district.

If any district cannot obtain for a reasonable price any land or easement in land required for its purposes, RSA 52:18 allows the district commissioners to institute eminent domain proceedings, which are handled through the municipality by the select board in the same manner as when land is taken for highways. Any village district may terminate its existence and dispose of its corporate property. Such vote may take place only at an annual meeting and requires a two-thirds vote.

3. OFFICERS AND ELECTIONS

The moderator, clerk, treasurer and commissioners qualify for office, possess the same powers and perform the same duties with respect to district meetings and business affairs as the moderator, clerk, treasurer, and selectpersons possess and perform in like matters for towns. Provisions for village district elections are set out in RSA chapter 670.

4. FINANCES

Whenever the district votes to raise money by taxation or otherwise for any of its purposes, the clerk, within 20 days thereafter, delivers a certified copy of the vote to the governing body (select board) of each municipality that contains any part of the district and to the commissioner of the state Department of Revenue Administration (DRA). The select board members assess the tax on that part of the district lying within their own municipality and commit it to the collector of taxes from their own municipality. The collectors then collect the tax as required by law. RSA 52:16. The power to abate and correct the assessment of taxes belongs to the board authorized to assess them. RSA 52:17 gives aggrieved parties the same remedies as in the case of municipal taxes. Taxes collected on behalf of a village district must be paid by the municipal treasurer to the district treasurer as follows:

- If the annual district budget is less than \$200,000, the municipal treasurer distributes to the district treasurer the amount of taxes collected no later than December 31 of each calendar year, unless otherwise agreed in writing by the municipal and district treasurers.
- If the annual district budget is \$200,000 or more, the municipal treasurer distributes to the district treasurer the amount of taxes collected in any given month by the end of the next month, unless otherwise agreed in writing by the municipal and district treasurers.

Furthermore, the law requires all interest earned on district tax revenues held by the municipality and all interest collected by the municipality on account of delinquent district taxes to be turned over to the district treasurer in the same manner as the tax revenues are distributed.

5. REPORTS

The governing body (select board) of every municipality that has a village district lying in whole or in part within its boundaries is required to file with the secretary of state the

following information concerning the village district or districts within the municipality: the name of the village district; the powers granted to the district; and the territorial boundaries of the district. Thereafter, within one year of any change, there shall be filed: any change in the name, powers or territorial limits of the district; and any notice of dissolution of the district. RSA 52:24.

IV. EDUCATION

A. School Districts

School districts are distinct governmental entities, legally separate from the municipality. RSA chapter 194. Each town constitutes a single school district under 194:1. For cities, establishment and governance of the district is dependent on the respective charter, but such districts are bound by the same educational standards and requirements regarding town school districts. The school board serves as the governing body, which is responsible for the management of the district. See, generally, RSA chapter 189; RSA 21:48. However, there are exceptions: nine cities are “dependent school districts,” where the council or board of mayor and aldermen has bottom-line budget authority. Some cities, such as Concord and Keene, have school boards which retain autonomous budget authority.

The revenue necessary to operate the school district is collected by the municipality as part of the property tax (a local and a state portion), and such amounts appear separately on the property tax bill. Although the municipality acts as a billing and collecting agent for the school district, it is the school district, acting through its legislative body (i.e., for towns and a couple of cities voters at a school district meeting, otherwise the city council) that raises and appropriates money for school district purposes, as outlined in RSA chapter 197. Under RSA 198:5, the municipality is directed to pay school moneys to the district “as the school board shall require...” See also RSA 194:7. The broad discretionary power of the school board as to timing is in part due to the fact that school districts are unable to borrow in anticipation of tax revenue, and are further limited in ability to carry funds from one fiscal year to the next.

Each municipality is a single district for school purposes. School districts are corporations by virtue of RSA 194:2 and have the power to sue and be sued; to hold and dispose of real and personal property for the use of the schools in the district; and to make necessary contracts. Further, RSA 194:3 contains a lengthy list of additional powers that school districts may exercise, including: powers to raise money; procure land; build, purchase, rent, repair or remove schoolhouses, buildings for educational administration or buildings for occupancy by teachers; procure insurance; plant and care for trees on schoolhouse lots; purchase vehicles for the transportation of children; provide for health and sanitation; provide furniture, books and apparatus for schools; pay debts; and provide for adult high school equivalency and continuing education programs.

B. Cooperative School Districts and Other Alternatives to Single District Operated Schools

Under RSA 189:1-a, each school boards/district is required to provide, education for every child residing in the district until the pupil graduates from high school or reaches the age of 21. For many districts, however, providing stand-alone schools for one or more grade levels would be cost prohibitive, and likely diminish the course or non-essential offerings available to students. For those districts, New Hampshire statutes provide a multitude of alternatives.

1. COOPERATIVE SCHOOL DISTRICTS

A cooperative school district is a district comprising two or more school districts. Under RSA 195:1, this may include elementary schools, secondary schools, or both. Cooperative school districts have the same authority as regular school districts for bonding purposes, construction of school facilities and other functions necessary to obtain proper facilities for a complete program of education. RSA 195:5 grants the cooperative district school board the same powers and duties as regular school boards under RSA chapter 189.

The procedure for forming a cooperative school district is set out in detail in RSA 195:18. The procedure for a school district to withdraw from a cooperative school district is governed by RSA 195:25--:31. The fundamental constraint on withdrawal is a minimum of 10 years of participation in the cooperative district, and withdrawal must be approved by a majority of the voters of the cooperative district itself, not simply by the voters of the district proposing to withdraw. Even if withdrawal is successful, the withdrawing district will continue responsibility for its share of the debt of the cooperative district incurred and outstanding for capital projects at the effective date of withdrawal.

2. TUITION AGREEMENTS AND AUTHORIZED REGIONAL ENROLLMENT AREA (AREA) SCHOOLS

AREA schools are covered in RSA chapter 195-A. and tuition agreements in RSA 194:3 for elementary and middle schools, or 194:22 and 27 for high schools. Both forms involve agreements between school districts under which a “sending” district pays a per pupil tuition to the “receiving” district. While tuitions and tuition formulas vary widely, they generally comprise three basic components: operating, capital, and special education. Transportation of the sending district’s students is often contracted for separately by the sending district. Under both types of arrangements, the receiving district owns, operates and, most importantly, governs, the schools and school district.

Although RSA 195-A sets out specific requirements for the establishment and content of AREA agreements, there are far fewer mandates for other tuition agreements. Among other things, an AREA agreement requires approval by the State Board of Education, while other tuition agreements do not. That said, unless a sending district receives approval from the State Board for a tuition agreement, a student within that district may attend any public school within the state and the sending district would be required to pay the full tuition to that school.

AREA agreements remain valid for a minimum of 10 years (unless otherwise mutually agreed), while tuition agreements terminate according to the terms set forth in the tuition agreement itself. AREA agreements require voter approval, while tuition agreements only require voter approval if the term is multi-year (prospective). AREA schools, once established, may convert to cooperative school districts. Tuition agreements, as well as AREA agreements, may be exclusive (requiring 100 percent of the sending district’s students to be tuitioned to the receiving district) or non-exclusive. For AREA agreements, statutory provisions authorize enlargement, withdrawal, review of the plan and the addition of other grade levels to the district. Districts which are parties to other tuition agreements are generally free to negotiate similar provisions within their agreements.

3. JOINT MAINTENANCE AGREEMENTS

Under RSA 194:21, school districts may join together to own, operate and govern a school or schools without forming a cooperative district. Rather, the school boards of the “pre-existing” districts jointly govern the JMA schools, but the budget must

be separately approved by each participating district. This statute predates both the cooperative district statute (RSA 195) and the AREA statute (RSA 195-A). As of 2019, the only JMA school in New Hampshire is Prospect Mountain High School, which operates under a Joint Maintenance Agreement between the Barnstead and Alton School Districts.

C. Chartered Public Schools

RSA chapter 194-B provides for the establishment of chartered public schools. A chartered public school, or “charter school”, is an open enrollment (students may come from within the district or outside of the district) public school that is operated independently of the local school board and is instead managed by non-profit entity through its board of trustees. A chartered public school operates as a nonprofit secular organization under a charter granted by the State Board of Education. They operate with freedom from many of the regulations that apply to traditional public schools, but are subject to more frequent institutional review by the State, including a comprehensive renewal process every five years. The charter establishing each school is a performance contract detailing the school’s mission, program, goals, students served, methods of assessment and ways to measure success.

The process of establishing a chartered public school starts when the prospective board of trustees submits an application and contract to establish a charter school to either the State Board of Education or to the school board of the district in which the charter school will be located. If the application is made to the local board first, it must still be forwarded and approved by the State Board. The State Board shall approve or disapprove the proposed chartered public school based upon whether or not the proposed application contains in specific detail over 30 criteria, ranging from educational mission, philosophy of pupil governance, to staff requirements, method of coordinating with the local education agency relative to special education, facilities, and disposition of the charter school’s assets upon dissolution. See RSA 194-B:3. A local application also requires approval of the voters of that district, while a charter application submitted first to the State Board does not require local approval. For this reason, almost all applications in the past 10 years have been made directly to the State Board. RSA chapter 79-H permits the legislative body to vote to appraise qualifying chartered public-school property at no more than 10 percent of its market value.

D. School Administrative Units

Each school board is required to provide “superintendent services” by personnel certified under rules established by the New Hampshire State Board of Education. See RSA 194-C:4 & 5. Multiple school districts (including either pre-existing single town school districts and/or cooperative districts) may join together to form a single “school administrative unit” (“SAU”) following a procedure established under RSA 194-C:2. That same section provides the processes for withdrawal, expansion, contraction or reorganization of the SAU.

Under RSA 194-C:3, single school districts (again, either single town or single cooperative), constitute independent, single district SAU’s, and while exempt from many of the provisions of chapter 194-C, are nonetheless required to provide all of the superintendent services enumerated in RSA 194-C:4.

While all districts are required to provide superintendent services, the statute allows for contracting as opposed to direct employment of a superintendent. Additionally, Dept. of Ed. Rule 506.06 allows SAUs with fewer than 400 students and only 1 or 2 schools, to provide such services through a “district administrator”, rather than a fully certified superintendent.

The list of superintendent services set out in RSA 194-C:4, together with other RSA provisions and administrative rules of the Department of Education (see Ed. 302.01-02)

establish the superintendent as the administrator, and the SAU as the administrative agency of each school district.

Multi-district SAU's are independent corporations under RSA 194-C:1, and while they have most corporate powers, they are specifically prohibited under that section from purchasing real estate, or constructing buildings, borrowing money for either, and from mortgaging any real estate otherwise acquired.

CHAPTER THREE

NEW HAMPSHIRE TOWN GOVERNMENT

I. FORMS OF TOWN GOVERNMENT

A. Town Meeting-Select Board

Town government in New Hampshire consists of a governing body and a legislative body. The majority of New Hampshire municipalities operate under the traditional town meeting-select board form of government. It is the form of municipal government prescribed by law unless a municipality has adopted a home rule charter or has adopted SB 2, RSA 40:13.

The town meeting may exercise all powers of the town except those that are assigned specifically by statute to the select board or other officers or boards. In the absence of specific town meeting action on an issue, the select board may often act to protect the interests of the town under its power “to manage the prudential affairs of the town.”

B. Definitions

1. ‘TOWN’ MEANS TOWN MEETING

Statutes that grant “towns” or the “legislative body” authority to act require a vote of the town meeting. There are many such statutes. RSA 31:3, for example, authorizes towns to purchase or sell real estate. It means that a town meeting vote is required for the town to acquire or sell real estate. However, the town meeting can delegate the authority to acquire and sell real estate to the governing body under certain circumstances. RSA 41:14-a requires a warrant article vote by town meeting to delegate this authority to the governing body. There are many similar statutes authorizing the town meeting to delegate a particular power to the governing body.

2. LEGISLATIVE BODY AND GOVERNING BODY

When a statute uses the term “legislative body,” it is referring to the town meeting. RSA 21:47. When a statute uses the term “governing body,” it is referring to the select board. RSA 21:48. Some traditional town meeting-select board towns have adopted the provisions of the town manager statute, RSA chapter 37, and some have adopted the official ballot referendum town meeting, although neither action alters the distribution of authority between the governing and legislative bodies.

In cities and towns with charters, for most purposes the legislative body and governing body are the same: the town council or city council is both the governing and the legislative body.

C. Local Charters

A municipality can, by adopting or revising a charter, choose or change the form of its legislative body without any action by the state legislature.

If the voters decide to call their municipality a city, they must choose either the council city manager form of government or the mayor-aldermen form of government, as outlined in RSA chapter 49-C. Thirteen New Hampshire municipalities have adopted city charters. In cities, the council or board of aldermen is both the governing and legislative body of the city.

For towns, the local charter options for the legislative body, as outlined in RSA 49-D:3, are the town council, town council with budgetary town meeting, representative town meeting, official ballot town council, and official ballot town meeting. Several New Hampshire towns have adopted charters that specify a town council-town manager form of government. Some of these charters retain an annual town meeting with budgetary authority; otherwise, both governing and legislative authority resides with the town council.

RSA 49-B:3 includes another process for adopting or changing a city or town charter. In 2014, this statute underwent a massive overhaul. Some of the changes include: (1) reducing the number of signatures required to place a charter question on the ballot in a town that has not already adopted a charter; (2) eliminating the need for a petitioners' committee to place a question about electing a charter commission on the ballot; (3) allowing a charter commission to continue for a second year if it does not complete its work in the first year; (4) clarifying the difference between a "revision" and an "amendment"; (5) allowing a charter revision commission to propose charter amendments if it determines that a revision is not needed; and (6) increasing the majority required to approve a new charter or a charter revision to 60 percent. This new version of the law applies to any charter process that begins after the effective date.

In 2016, a number of changes were made to RSA 49-B through HB 1293. Those changes affect the procedures for amending a municipal charter. Among other things, HB 1293 clarified the processes for amendments submitted by the municipal officers and those submitted by citizen petition; reduces the number of signatures required on a citizen petition to place an amendment on the ballot; prohibits substantive changes to a petitioned amendment after the required public hearing; and eliminates the requirement that a proposed amendment be accompanied by a legal opinion as to its compliance with state law. See 49-B:5, I; 49-B:5, II; 49-B:5, III (a); 49-B:5, V.

In adopting a charter, a municipality may change only the form of its government; it cannot alter or add to its authority to govern or legislate by incorporating new authority into the charter or excluding provisions a charter is required to have. *Manchester v. Secretary of State*, 161 N.H. 127 (2010) (statute requires elected body to adopt budget by a simple majority vote, so charter amendment requiring two-thirds vote to override a spending cap was illegal and unenforceable); *Accord Teeboom v. City of Nashua*, 172 N.H. 301 (2019); *Hooksett v. Baines*, 148 N.H. 625 (2002) (a municipality may not require in its charter that a candidate for office meet additional qualifications for office not otherwise required by state laws or Constitution because municipalities have no authority to add qualifications). A town or city with a charter continues to be bound by the fundamental rule of municipalities in New Hampshire, which is that towns and cities derive their authority to act from the legislature through statutes. *Girard v. Allenstown*, 121 N.H. 268 (1981).

For more information on the charter process and governance in municipalities with charters, see NHMA's publication *Guidebook for New Hampshire City and Town Councilors, Mayors, and Aldermen*, 2018 (available as a free digital download at the NHMA Online Bookstore).

D. Checks and Balances

As we discuss the roles of the governing body and legislative body, remember that most decisions made by one are in some manner checked and balanced by some authority assigned to the other by statute. For example, although select boards have the authority to spend town funds, they may only spend the funds if the legislative body has appropriated them to that purpose. The checks and

balances system was intentionally built into the relationship between the bodies to prevent either body from assuming too much power and acting against the will or best interest of the majority of citizens.

II. THE ROLE OF THE GOVERNING BODY

A. How Does the Select Board Function?

1. THE BOARD ACTS COLLECTIVELY

Authority rests with the board acting as a whole. RSA 41:8. An individual member of the board does not have any authority outside that authority granted to him or her by the whole board. *Id.* The same is true in council towns. All actions taken by the select board or council must be voted on by a majority of the board at a public meeting that complies with the Right to Know Law, RSA chapter 91-A, or the actions may later be invalidated by a court.

2. ONE GOVERNING BODY MEMBER HAS NO AUTHORITY

It is all too common for one select board member or council member to think his or her individual action is final so long as a second board member later agrees, either in a private conversation or by telephone or email, to ratify the action. At other times, board members think that any action is valid if at least a majority of the members have put their signatures on a piece of paper, even if the signatures are collected over a period of several days. These practices violate the right of any remaining board members to participate in decisions, as well as the public's right under RSA chapter 91-A to observe the decision being made at a public meeting. See Chapter Five for more information on the Right to Know Law. If a single member acts alone, or if some or all of the board violate the requirements of the Right to Know Law, the actions taken are subject to court scrutiny, and may subject either the local official or the town or both to a range of remedies under that law.

B. What Do Select Boards Do?

“The selectmen shall manage the prudential affairs of the town and perform the duties by law prescribed.” RSA 41:8.

1. PRUDENTIAL AFFAIRS

Under RSA 41:8, in addition to a host of specific statutory duties, the select board's duty is to “manage the prudential affairs of the town.” “The particular duties comprehended by the phrase ‘prudential affairs’ are not easily enumerated.” These powers are limited to what is “required to meet the exigencies of ordinary town business.” *Moulton v. Beals*, 98 N.H. 461, 463 (1954); *DeRochemont v. Holden*, 99 N.H. 80, 82 (1954). In *Moulton v. Beals*, the select board members were directing certain litigation for the town. The town meeting voted specifically to assign control of the litigation to a special appointed committee. The Supreme Court upheld the town meeting action, finding that the select board was authorized to act in the absence of action by the town meeting, but the select board's prudential affairs authority was superseded by a specific directive of the town meeting.

The select board is the executive, managerial and administrative body that does what is necessary to carry out the votes enacted at town meeting. For example, the town meeting appropriates money, but under authority given them in RSA 41:9, the select board spends it. If the town meeting votes to buy or sell land, it is the select board members who sign the deed. Most policy choices rest with the legislative body-town meeting, but the select board manages facilities and personnel and administers contracts to implement those policies. This doesn't mean that the select board performs all the tasks on a day-to-day basis. Most municipalities hire staff, such as a town administrator, to deal with citizen questions, communicate with others, and prepare documents for the select board members to discuss and act upon at a scheduled meeting. It is appropriate for the board to delegate the performance of day-to-day tasks to employees.

This power to manage, while broad, is not unlimited. The select board does not have broad authority to act with the full power of the town. When challenges and opportunities present themselves during the year, the select board cannot always proceed alone and may be required to call a special town meeting to resolve an issue.

In addition to the prudential affairs powers, the select board has many specifically assigned roles and powers, which are discussed below.

2. CALLING THE TOWN TO MEETING

The select board calls the town voters to annual or special meetings by drafting and posting the document called the "warrant." The warrant is the legal document that creates the agenda for the meeting and contains written statements of the issues to be considered by the voters, known as "warrant articles." While articles may be placed on the warrant at the initiation of citizens by petition under RSA 39:3, most of the articles are created by the select board. The select board's authority over the warrant under RSA 39:2 and preparation of the budget under RSA 31:95 and RSA 32:5 requires the board to act as an advisor to the town meeting.

- a. Budget advice.** The select board's budgetary advice is presented to the town meeting in the form of the proposed operating budget and other appropriations articles. In towns with official budget committees, the select board's budgetary advice goes to the budget committee; the amounts shown in the warrant on the annual budget as "recommended" by the select board constitutes its advice to the town meeting of the levels of funding required to deliver town services. RSA 32:5. In town manager towns, the manager advises the select board on the budget. The governing body and the budget committee, if there is one, are required to include notations on special warrant articles, stating whether the board/committee recommends these articles. In addition, the town meeting may vote to require inclusion of numeric tallies of the governing body and budget committee's (or advisory budget committee's) votes on whether to recommend the budget and other money warrant articles. RSA 32:5, V-a. Even if the town meeting has not voted to require these numeric tallies, the governing body or official budget committee may decide to include them, as long as there has been no town meeting vote to the contrary. The town may also vote to require that the annual budget and any special warrant articles having a tax impact contain a notation of the estimated tax impact of the article. This calculation is performed by the governing body. RSA 32:5, V-b.
- b. Reports.** As part of its advisory role, the select board prepares an annual financial report of the town and is responsible for publishing the reports of all other officers. The annual report must be available seven days before town meeting. RSA 41:13 and 41:14.

RSA chapter 21-J requires towns to send specific reports to the state Department of Revenue Administration (DRA). The DRA uses the information to administer various tax laws and to assure that municipalities comply with the budget and finance laws, RSA chapters 32 and 33.

- c. **Zoning ordinance protest petitions.** If a proposed change to the zoning ordinance is protested by affected landowners, the select board is responsible for ascertaining the validity of the protest petition under the provisions of RSA 675:5 and for warning the voters of the existence of the petition by posting it at the polling place prior to the beginning of the meeting.
- d. **Select Board Warrant Article Recommendations On Non-Money Articles.** In *Olson v. Town of Grafton*, 168 N.H. 563 (2016), the N.H. Supreme Court ruled that the select board can state its recommendations on all articles on the warrant. This means the select board can state its approval or disapproval towards any warrant article on the warrant, and that ability to express its opinion on each warrant article is not limited to articles just containing appropriations.

3. OTHER SPECIFIC STATUTORY DUTIES

In addition to its advisory and prudential functions, the select board has some independent authority, meaning it can act without town meeting approval. These substantive powers are set forth specifically in statute. They include:

- a. **Regulation of town highways and commons.** The power granted to the select board by RSA 41:11 includes setting speed limits, enacting winter storm parking controls, and regulating sidewalks and bridges. See Chapter Ten for more information about regulating highways.
- b. **Layout of highways.** Authority is granted in RSA 231:8 – :19 to the select board to create and alter highways by layout. However, the select board does not have general authority outside of the layout process to make a judicial determination about the status of a highway. In one case, the select board held a hearing to determine whether a road had become a public highway by prescription. The New Hampshire Supreme Court held that this sort of judicial decision could not be made by a select board, but rather through a petition to the superior court. *Gordon v. Rye*, 162 N.H. 144 (2011). See Chapter Ten for more information.
- c. **Hazardous and dilapidated buildings and excavations.** The select board can order dilapidated buildings repaired or demolished and hazardous excavations filled or protected as provided in RSA chapter 155-B.
- d. **Licensing.** The select board issues licenses for many different purposes. These include community events (RSA 31:100), transient vendors (RSA 31:102-a), and parades and other types of shows (RSA chapter 286). In addition, anyone who wants to operate a junkyard in the town must receive a licensing permit from the select board as outlined in RSA 236:111–:129. In a town without a police chief, the select board issues pistol permits or may designate the county sheriff to do so. RSA 159:6, I.
- e. **Health regulations.** The select board and the health officer, acting jointly under authority of RSA chapter 147, make up the town’s board of health, which can enact health regulations without town meeting approval. This is a powerful tool for dealing quickly with public health issues. It includes the ability, for example, to repair sewage systems that have failed and includes authority for the town to collect its costs for such repairs from a landowner in the same manner as taxes are collected. See RSA 147:7-a and :7-b.

- f. **Setting fees.** If the town meeting has adopted the provisions of RSA 41:9-a, the select board may set fees for regulatory programs such as building permits, or for revenue-producing facilities such as the solid waste facility. The select board must post notice of its proposed action and hold a public hearing before imposing or changing such fees.
- g. **Establish and amend local welfare guidelines.** The select board adopts guidelines to administer the general assistance program as provided in RSA 165:1. The town can elect or appoint a local welfare administrator, but if it does not, the welfare assistance duty falls to the select board. See Chapter Seven for more details on the local welfare obligation of municipalities.
- h. **Manage and regulate use of town property.** The select board has general authority to manage town land, which includes the authority to rent or lease town property for a public or private use for up to one year, or, if such authority is granted to the select board by town meeting, up to five years. RSA 41:11-a. Leases of longer duration require a town meeting vote. However, some statutes grant managerial authority over certain town property—library property or conservation land, for example—to boards other than the select board.
- i. **Financial accounting and safeguarding.** Select boards have important financial duties under RSA 41:9. They must establish procedures to receive and deposit town revenue promptly, authorize the treasurer to make payments properly approved by them, and keep fair and accurate accounts of all their financial transactions. Select boards must prepare financial reports to the state and to the town meeting and annually review and adopt an investment policy for investment of public funds in accordance with standards established by statute. They must establish internal control procedures for “safeguarding” all town assets and properties, including the transactions and assets maintained by other elected officials such as the town clerk.
- j. **Cemetery trustees.** RSA 289:6, II-a allows the town meeting to delegate the duties of the cemetery trustees to the select board. These functions fall to the town manager, if there is one. RSA 289:6, II.
- k. **Election duties.** While RSA 659:9 designates the moderator as the chief election official of the town, under other statutes and the New Hampshire Constitution, Part II, Article 32, the select board members are election officials with a role at the polling place during all elections. Under RSA 658: 9 and :9-a, the select board members are responsible for the physical setup of the polling place for elections, including reserving the polling place, providing voting booths and making sure all of these comply with the requirements for accessibility for persons with disabilities and the elderly. RSA 658:21-a allows a select board member to appoint a select board member pro tem to perform the select board member’s duties at any state election.
- l. **Adoption and amendment of town codes and ordinances in larger towns.** Under RSA 41:14-b, towns with populations greater than 10,000 may give the select board the power to establish and amend town ordinances and codes after two public hearings held at least 10 but not more than 21 days apart. This power does not apply to zoning, historic district, or building code ordinances adopted under the provisions of RSA chapter 675.
- m. **Taxation.** Select board members are responsible for assuring that all taxable real property in the town is inventoried and appraised and that a warrant is issued to the tax collector for the collection of such taxes. See RSA chapters 72 through 76. Once

taxes have been assessed, the select board deals with requests to abate the taxes when filed by taxpayers. See Chapter Eight for details.

- n. **Perambulation.** Every seven years, the select board members, or persons appointed by them in writing, are required by RSA chapter 51 to perambulate the lines between adjoining towns and renew the marks and bounds. A report must be made, signed by the select board members or their appointed perambulation agent, and filed with the town clerk and secretary of state. The select board may be fined for neglect of these duties.

4. APPOINTING OTHER OFFICIALS

The select board is responsible for appointing persons to serve in various town positions. It may supervise the work of these persons and, if specifically permitted by statute, the board may remove them from office.

- a. **Direct appointment.** The town meeting has the option to create any elected (RSA 41:2) or appointed position it deems necessary to perform the work of the town. In addition to those positions, the select board has the authority under other statutory provisions, such as RSA 41:10-a providing for the appointment of a “Municipal Prosecutor,” to appoint other town officials. Note, of course, that for some appointed positions, such as members of land-use boards (i.e. members appointed to a planning board or , zoning board of adjustment), state law assigns them duties and they are not subject to the direct supervision of the select board members when they perform their statutory duties. Appointed officials are not treated as town employees.
- b. **Approval of appointment.** A deputy tax collector is appointed by the tax collector subject to the select board’s approval under RSA 41:38. The process is the same for the deputy town clerk (RSA 41:18) and deputy treasurer (RSA 41:29-a). Once they have approved the appointment, the select board has no direct supervisory role over these officials.
- c. **Nomination.** The health officer is recommended by the select board to the state Department of Health and Human Services (DHHS) but is appointed by the DHHS commissioner under RSA 128:1.
- d. **Filling vacancies.** A vacancy in an elective office is defined in RSA 652:12 and results from, among other things, death, resignation, and cessation of domicile in the town. Note that vacancy doesn’t include a temporary absence from the town. RSA 669:61 – :75 spells out how vacancies in each office are filled, whether by the select board or other board or officer empowered to deal with the vacancy.

III. ROLE OF A TOWN MANAGER

A. Adoption

The adoption of the town manager law, RSA chapter 37, is one of the most significant alterations to the form of town government that can be made without adopting a home rule charter. The question is presented to the voters on the official ballot either by action of the select board or by petition of at least 10 voters. The town manager provisions cannot be voted on at a special town meeting. The question must be: “Do you favor adoption of the town manager plan as provided in

chapter 37 of the Revised Statutes Annotated?” “Yes” and “No” boxes must follow the question. A similar method is used to discontinue the town manager plan. See RSA 37:11 – :15.

B. Hiring

The select board is responsible for hiring the town manager. In town-council towns, the council-manager form of government is required and is adopted as part of the town’s charter.

A manager must be hired on the basis of “education, training, and experience to perform the duties” of manager and “without reference to political belief.” The manager serves at the will of the select board or council and can be terminated at any time for cause. RSA 37:3. A town charter or written employment contract may have other provisions affecting this employment relationship. The select board or council remains responsible for managing the town’s prudential affairs but has the assistance of the town manager in carrying out those responsibilities.

C. Duties

By statute, the town manager is the administrative head of all town departments, but the manager works under the supervision and direction of the select board or council in the performance of the duties of the office, which include:

1. DEPARTMENTS

The manager is responsible for organizing town departments as the select board directs.

2. REVENUES AND EXPENDITURES

The manager is charged with keeping, and submitting to the select board, detailed reports of revenues and expenditures.

3. SUPERVISION

The manager has charge, control, and supervision of the following, subject to the direction of the select board:

- municipal water, lighting, and power systems;
- construction and maintenance of all town buildings, roads, sidewalks and bridges, unless otherwise voted by the town;
- purchase of supplies;
- police and fire departments;
- sewers and drainage;
- parks, commons and playground maintenance;
- cemeteries;
- letting, making and performance of all contracts;
- welfare; and
- other duties assigned by the select board

IV. TOWN MEETING

A. 'Pure' Democracy

Unless specifically assigned by statute to a certain board or official, most of the policy-making authority resides in the voters at town meeting—the legislative body. Cities and towns with councils are representative democracies. Voters in these municipalities only have power to choose their representatives. However, a town meeting town is a direct or “pure” form of democracy. Thus, when officials in traditional town meeting towns are in doubt about authority to take a particular action, the conservative approach is to put the question to a vote at town meeting.

On the other hand, in some instances, town meeting is prohibited from infringing on authority given specifically by statute to certain officers and boards. For example:

- Town meeting cannot usurp select board’s statutory authority to assess property for taxation, *Winchester Taxpayers’ Ass’n v. Winchester*, 118 N.H. 144 (1978), or to abate taxes, *Hampstead v. Plaistow*, 49 N.H. 84 (1869).
- Town meeting cannot prescribe subdivision regulations, which must be adopted by the planning board. *Levasseur v. Board of Selectmen of Hudson*, 116 N.H. 340 (1976).
- Town meeting cannot overturn decisions of a sewer commission. *Cloutier v. Epping Water and Sewer Comm’n*, 116 N.H. 276 (1976).
- Town meeting cannot restrict select board’s statutory authority to transfer unexpended funds within the adopted budget. *McDonnell v. Derry*, 116 N.H. 3 (1976).

Town meeting, like all legislative bodies, may be “lobbied” by voters or other interested parties to take certain actions and not take others. Campaigning for and against particular warrant articles may become spirited. However, the New Hampshire Supreme Court has found that, even when businesses campaign negatively against one another by “employing unethical and deceptive methods” to attempt to sway town voters, it does not violate the law. RSA 358-A:2 prohibits the use of any unfair or deceptive act or practice in the conduct of commerce. In *Green Mountain Realty Corp. v. Fifth Estate Tower, LLC*, 161 N.H. 78 (2010), one company conducted a very negative campaign against a competitor’s request to lease town-owned land for a cell tower. Although the company alleged that the campaign was fraudulent and deceptive, the Court held that it was, at its core, a political action rather than “commerce.” In other words, lobbying is not an unfair trade practice.

B. Basic Principles of Town Meeting

1. WHEN

RSA 39:1 requires towns to hold an annual meeting. This occurs on the second Tuesday in March, although RSA 39:1-a permits towns by warrant article vote to adopt a July 1–June 30 fiscal year, which would permit holding town meeting in May. If the official ballot referendum method, also known as SB 2, is chosen, it does not change the date of the annual meeting, it merely splits the meeting into two portions with official ballot voting to occur on the annual meeting day. More details on SB 2 are provided in other sections of this chapter.

2. SPECIAL TOWN MEETINGS, NO APPROPRIATION REQUESTED

RSA 39:1 permits the select board to call a special meeting anytime it finds “occasion” for one. In addition, RSA 39:3 permits the voters to petition for a special town meeting. If the

petition has the signatures of at least 50 voters, or one-quarter of the voters in the town, whichever is less, the select board is required to call the special meeting, as long as the petition is presented to the select board at least 60 days before the next annual meeting.

All special town meetings require the same posting as annual meetings, plus publication of the warrant in a newspaper of general circulation within one week *after* posting. RSA 39:4.

For the most part, a special town meeting has the same authority to act on any matter as an annual meeting. There are some exceptions.

- a. Where prohibited by statute.** Some actions can only be taken at an annual meeting. For example, an increase in the membership of the select board from three to five members can occur at the annual meeting only. RSA 41:8-b.
- b. Exception for collective bargaining.** RSA 31:5, III allows a town to have a special meeting to act on collective bargaining cost items without superior court permission, but only if a collective bargaining agreement was submitted to and rejected by the annual meeting, and the annual meeting has passed a conditional vote allowing the special meeting. The form of the question is: “Shall (the local political subdivision), if article _____ is defeated, authorize the governing body to call one special meeting, at its option, to address article _____ cost items only?”
- c. Exception for official ballot referendum towns.** RSA 40:13, X allows towns that have adopted the official ballot referendum form of town meeting (SB 2) to hold a special meeting without court permission to take up the issue of a revised operating budget if the proposed budget has been rejected by the voters.

3. SPECIAL TOWN MEETINGS, APPROPRIATION REQUESTED

- a. Appropriations of money.** Unless they are sure that at least 50 percent of all voters on the checklist will attend a special meeting, the select board must seek permission of the superior court to call a special town meeting in order to appropriate money. Since that level of attendance is unlikely in the majority of towns, court intervention is usually required. The court must find that an “emergency,” as defined in RSA 31:5, exists before granting the petition, and approval is not automatic.
- b. Emergency.** RSA 31:5 defines “emergency” as a situation that is sudden or unexpected, is serious and urgent, or requires prompt action, including an expenditure of money. It does not always involve a crisis, however. The court will consider various factors to determine whether an emergency exists, including:
 - the severity of the harm to be avoided;
 - the urgency of the petitioner’s need;
 - whether the claimed emergency was foreseeable or avoidable;
 - whether the appropriation could have been made at the annual meeting; and
 - whether there are alternative remedies not requiring an appropriation.

Additional steps to provide notice are necessary for a special town meeting to approve an appropriation. When the select board members decide to petition the superior court for permission to hold the meeting, a notice of the vote must be posted within 24 hours after the vote. Then, they must wait at least ten days before filing the petition in court. On or before filing with the court, the select board must send a copy of the petition and warrant to the DRA by certified mail. Another notice must be posted within 24 hours of receiving notice of the court hearing date. Both notices must be posted at the select board’s office

and two other conspicuous public places, and the notices must also be published in the next available edition of a local newspaper with wide circulation in the town. RSA 31:5. The purpose of all these additional forms of notice is to make citizens aware of the issue and provide them with an opportunity to oppose the request for permission to hold the special meeting.

For more information, see NHMA's publication, *Town Meeting & School Meeting Handbook*.

C. Warrant Articles

1. GENERAL SUBJECT MATTER

RSA 39:2 requires the basic subject matter of all business to be taken up at a town meeting to be stated in the warrant. This means that a vote taken under a warrant article for "other business" cannot add purposes of appropriation which have not been previously warned to the voters. The purpose of warrant articles is to warn voters of the subject matter of the articles to be taken up at the meeting, so they may make an informed decision about whether or not to attend the town meeting. This rule does have limits:

- There is no legal requirement for the main motion made under a warrant article to reflect the exact wording of the article as printed in the warrant. However, if the article is moved with significant changes to the article as printed in the warrant, the better practice is first move the article as printed in the warrant; thereafter, a proposed amendment can be made. The Department of Revenue Administration has indicated that where an article as printed in the warrant differs significantly from the article as adopted by the meeting, with no indication in the town meeting minutes the article was amended by way of a motion to amend approved by the meeting, DRA might disallow that article. Although this would apply to only those articles containing appropriations, it is better to have a consistent practice for all warrant articles.
- Any warrant article, including a petitioned warrant article, can be amended as long as the amendment also pertains to the same general subject matter.
- The amendment can change the intent of the original article but cannot alter its basic subject matter. The warrant requirement does not limit what can be discussed at the meeting. Even subjects not on the warrant can be discussed or voted on, as long as they aren't intended to be legally binding, or appropriate funds. A vote for "volunteer of the year" or a vote to "strongly urge the select board to create a no parking zone on Main Street," although not legally binding, may serve to advise the select board of a sense of the voters. It is up to the moderator to rule whether a discussion is out of order, subject to being overruled by the voters.

2. CONTROL OF WARRANT

The select board prepares the warrant for the town meeting. RSA 39:2. The select board members may place any article they wish on the warrant, right up to the moment the warrant is posted (14 days before the meeting). RSA 31:131 (empowering select board members to insert any article that a statute authorizes by petition of voters). However, if the article seeks an appropriation, the purpose and amount must have been "disclosed or discussed" during a budgetary public hearing, or the vote at town meeting on the appropriation may later be invalidated by the state Department of Revenue Administration. RSA 32:5, II.

3. PETITIONED ARTICLES

For annual meetings, petitioned articles presented to the select board (or one of the selectpersons) not later than the fifth Tuesday prior to the meeting must be added to the warrant if signed by 25 or more voters, or two percent of the voters, whichever is less, but in no case fewer than 10 voters. RSA 39:3. RSA 39:3-b subjects the board to a criminal penalty if the board fails to place petitioned articles on the warrant. Keep in mind that there are different deadlines established in official ballot referendum (SB 2) towns. Petitioned articles cannot be altered or amended by the select board members before going on the warrant, except for “minor textual changes as may be required.” “Such corrections shall not in any way change the intended effect of the article as presented in the original language of the petition.” These phrases generally mean the select board is limited to correcting typographical errors and to putting the petition in the form of a question. But once petitioned articles are on the warrant, they no longer have any special status. They are then in the hands of the meeting voters and can be amended or defeated to the same extent as any other warrant article.

4. ‘ILLEGAL’ WARRANT ARTICLES

There will be times when the select board receives a petition for a warrant article that attempts to take actions which a town may not legally take, or that uses language which could cause legal problems, or that will be ineffective to correct an issue that the petitioners have identified. NHMA’s advice is to place the article on the warrant, because RSA 39:3-b subjects the select board members to a criminal penalty for failure to do so if the article was properly petitioned. In the alternative, and with the assistance of the municipal attorney:

- It is possible to petition the superior court for a ruling that the proposed article is legally defective and an order that the language may be left off of the warrant.
- When the article comes up for discussion at town meeting, voters can be advised of the reasons why it won’t be legally binding, and someone can move to defeat it or, if possible, to amend it to make it legally binding.
- The voters may wish to take some non-binding advisory action on the article.

D. Control of the Meeting

1. THE MODERATOR

RSA 40:4 gives the moderator authority to preside at all annual and special town meetings, decide questions of procedure, and declare results of votes taken. However, except on matters of state law, the meeting can vote, by simple majority, to overrule procedural rulings and decisions of the moderator.

2. NOT BOUND BY PRIOR MEETINGS

No town meeting is bound by votes on procedural matters approved at prior town meetings. *Exeter v. Kenick*, 104 N.H. 168 (1962). Even substantive votes can be rescinded at a later meeting, unless some action already has been taken giving someone a vested right, in which case the town will be bound by its past actions. *Preston v. Gillam*, 104 N.H. 279 (1962). For example, if a multi-year labor contract has been previously ratified by the voters, a subsequent town meeting cannot vote to rescind the contract.

3. OPTIONAL LIMIT ON RECONSIDERATION

Any vote taken during the meeting may be reconsidered later in the meeting. Voters who leave a meeting early often complain bitterly when they find out that late in the meeting

a small group of voters managed to change the outcome of a vote more to their liking. Perhaps because of the seeming unfairness of such tactics, the legislature enacted RSA 40:10, which allows voters, *after* an article has been acted on, to restrict reconsideration of that article. This means that if there is a later motion to reconsider and that motion passes, the actual reconsideration cannot take place until an adjourned (recessed) session of the meeting is held at least seven days later with proper notice. If the warrant article is for a bond of \$100,000 or more, RSA 33:8-a automatically restricts reconsideration until a recessed session at least seven days later. These rules are modified in an official ballot referendum (SB 2) town, as will be discussed in the following section.

4. POSTPONING TOWN MEETINGS

In 2019, Senate Bill 104 was passed. This bill made changes to a variety of statutory sections to clarify the process for a moderator to postpone either the deliberative/business session or the official ballot voting(election) session of a town meeting. The moderator may postpone either session if the National Weather Service has issued a weather event warning and the moderator believes the event may cause the roads to be hazardous or unsafe, or if an accident, fire, natural disaster, or other emergency renders use of the meeting location unsafe. The moderator must consult, to the extent practical, with certain other town officials before deciding to postpone; and in the case of postponement of an official ballot voting session, the moderator must notify the secretary of state within two hours of the decision to postpone.

If the official ballot voting session is postponed, it must be rescheduled to the Tuesday two weeks following the originally scheduled date. In the case of a school district or village district election that is coordinated with town elections in two or more towns, the moderators of the towns involved must consult with each other, and the election may be postponed only if a majority of the moderators vote to postpone. The new law defines the terms “business session,” “deliberative session,” and “official ballot voting day,” and contains special provisions for the use of absentee ballots at postponed elections. Statutes amended or added: RSA 40:4, 40:13, 44:11, 652:16-e through :16-g, 657:1, 669:1 and :1-a, 670:1-a, 671:22-a.

a. City Election Postponement Provisions.

Amended RSA 44:11 provides that “In the event of a weather or other emergency as described in RSA 669:1, the election may be postponed and rescheduled in the manner provided in that section, except that all references to the moderator shall be deemed to refer to the city clerk.” The following is a synopsis of the statutory changes and clarifications on town meeting and election postponement.

b. First, Determine What Kind of Meeting/Election is Involved.

The law now supplies new definitions for business session, deliberative session and official ballot voting day, and each type of meeting has varying procedures for how a moderator decides whether to postpone and then reschedules the postponed meeting or election:

- (1) Business Session (RSA 652:16-e): The meeting of voters in a traditional town meeting (where the town has not adopted SB 2) where voters discuss, deliberate, and vote on matters other than the election of officers by official ballot and other questions placed on the official ballot.
- (2) Deliberative Session (RSA 652:16-f): The first session of a town meeting that has adopted the provisions of SB 2, the Official Ballot Referendum form of

meeting, where the voters discuss, debate and amend warrant articles, leaving all final decisions to the official ballot voting day, see below.

- (3) Official Ballot Voting Day (RSA 652:16-g): The day when voters in a town vote using the official ballot to elect officers, or to vote on other matters placed on the official ballot, subject to the requirements pertaining to absentee voting, the polling place and polling hours.

c. SB 104 Employs a Term from the National Weather Service for a Weather Event Warning, What Does That Mean?

According to a glossary published on the National Weather Service website a Weather Event Warning is defined as “A warning is issued when a hazardous weather or hydrologic event is occurring, is imminent, or has a very high probability of occurring. A warning is used for conditions posing a threat to life or property. People in the path of the storm need to take protective action.”

d. How Does a Moderator Postpone a Business Session?

A business session may be postponed for two (2) reasons, one dealing with an event that may occur in the future (i.e., a Weather Event Warning) and the other dealing with already occurring, dangerous circumstances arising out of an accident, natural disaster, or other emergency:

First, if the National Weather Service issues a weather event warning, where the town is within the geographic region of the weather event warning for the date of the business session, and, the moderator reasonably believes the weather event may cause the roads to be hazardous or unsafe, the moderator may postpone the business session up to two (2) hours but not more than 48 hours prior to the scheduled business session.

Second, if an accident, natural disaster, or other emergency has occurred which the moderator reasonably believes may render use of the meeting location unsafe the moderator may, at any time prior to the scheduled business meeting reschedule the business meeting.

e. What Steps Must a Moderator Take to Postpone a Business Session for Either a Weather Event Warning, or, an Unsafe Meeting Place?

First, consult with appropriate local officials: Prior to making the decision to postpone, and to the extent it is practical, the moderator shall consult with the governing body, the clerk, and as appropriate for the circumstances the police chief, the fire chief, the road agent, and the local emergency management director.

Second, provide notice to residents: The moderator shall employ whatever means are available to inform citizens of the postponement, and, reschedule the business session to another reasonable date, time and place (as necessary).

f. How Does A Moderator Postpone a Deliberative Session?

The same reasons and procedures for postponement of a business session apply for the postponement and rescheduling of a SB 2 deliberative session, except that the date for the rescheduled deliberative session shall not delay that session by more than seventy-two (72) hours.

g. Are Statutory Town Meeting Deadlines Affected by a Postponement?

The date of the originally scheduled meeting continues to be deemed to be the business session or deliberative session for the purposes of satisfying statutory meeting date requirements.

h. How Does a Moderator Postpone an Official Ballot Voting Day?

An Official Ballot Voting Day may be postponed for two (2) reasons; for a Weather Event Warning, or dangerous circumstances arising out of an accident, fire, natural disaster, or other emergency:

First, if the National Weather Service issues a weather event warning, where the town is within the geographic region of the weather event warning for the date of the official ballot voting day, and, the moderator reasonably believes the weather event may cause the roads to be hazardous or unsafe, the moderator may postpone the official ballot voting day.

Second, if an accident, fire, natural disaster, or other emergency has occurred which the moderator reasonably believes may render use of the election location unsafe, the moderator may postpone the official ballot voting day.

i. What Steps Must a Moderator Take to Postpone an Official Ballot Voting Day for Either a Weather Event Warning or an Unsafe Meeting Place?

First, consult with appropriate local officials: Prior to making the decision to postpone, and to the extent it is practical, the moderator shall consult with the governing body, the clerk, and as appropriate for the circumstances the police chief, the fire chief, the road agent, and the local emergency management director.

Second, document the decision to postpone and notify the Secretary of State: The moderator must document the decision to postpone the Official Ballot Voting Day, and then must notify the Secretary of State by telephone or electronic mail within two (2) hours of the decision to postpone.

It is recommended that the moderator also transmit a statement documenting the decision to postpone to the secretary of state via electronic mail, and then reprint the statement in the annual town report.

The moderator must make the decision to postpone an official ballot voting day before 6:00 p.m. on the day immediately prior to the election.

j. What Date Is the Official Ballot Voting Day Rescheduled to?

Any postponed election must be rescheduled to the Tuesday two (2) weeks following the original date of the election. In addition, all other applicable statutory provisions associated with elections under RSA chapter 669 are extended for the same 2 weeks.

k. Supervisors of The Checklist Meetings.

The supervisors of the checklist shall not be required to meet again until the postponed town election day.

l. Notice to Voters.

The moderator and the governing body shall employ all reasonable means to provide voters with notice of the postponement, the date on which the postponed election shall be conducted, and information on obtaining absentee ballots for those voters who qualify to vote by absentee ballot at the postponed election. To the extent practical given the circumstances of the postponement, notice shall be posted at the location of the scheduled election, at the municipal offices, and on the website of each town, school district, and village district whose election is postponed.

m. Procedures for Handling Absentee Ballots.

All ballots prepared for the original date of the election shall be used for the postponed election.

A notice explaining the deadline for returning an absentee ballot shall be issued to voters who request and are sent an absentee ballot during the period between the original date and the postponed date of the election.

All absentee ballots submitted to be counted on the date of the original election, all absentee ballots submitted for the original date of the election which arrive after that date but before 5:00 p.m. on the date of the postponed election, and all absentee ballots submitted to be counted at the postponed election shall be submitted to the moderator for processing in accordance with RSA 659.

To the extent practicable, the town clerk may decide to be at the location of the originally scheduled election to receive applications for absentee ballots, to provide voters the opportunity to complete absentee ballots, and to receive returned ballots during what would have been normal polling hours. The town clerk may designate a deputy clerk or assistant to provide this service, provided the individual has taken an oath of office and has been trained in the requirements for using an absentee ballot and the procedures for issuing and receiving absentee ballots. The absentee ballot of a voter who qualified to vote by absentee ballot because he or she expected to be absent or unable to appear at the polls on the original date of the election and who submitted an absentee ballot which otherwise satisfies the requirements for voting by absentee ballot, shall be counted even if the voter is present in the town or able to appear at the polls on the date of the rescheduled election. All absentee ballots shall be processed as provided for by RSA 659.

n. Procedure for Multi-Jurisdiction Official Ballot Day Postponement.

For Town Elections: The moderators of the towns involved, after consultation with respective town officials, shall communicate with each other to reach a consensus on the proposed postponement. If a consensus cannot be reached, the election shall be postponed if a majority of the moderators vote to postpone. In such instances, one of the moderators shall be selected to document the communications and notify the secretary of state. When a ballot to be used at an election which has been postponed contains questions that are to be voted on simultaneously by more than one town, such as those relating to village, school, or water districts, the postponement of an election shall apply to all towns voting on that issue at the election.

For School District Elections: In the case of a school district that comprises one or more preexisting districts and holds its elections in conjunction with the town elections in the component towns, in the event of a weather or other emergency the town moderators in each town shall attempt to reach consensus on whether to postpone. In the absence of a consensus, the election shall be postponed if a majority of the moderators vote to postpone.

For Village District Elections: In the case of a village district that includes voters from 2 or more towns and holds its elections in conjunction with town elections, in the event of a weather or other emergency as described in RSA 669:1, V, the town moderators in each town shall, as described in RSA 669:1, coordinate to reschedule the town and village district elections as provided in that section.

o. Moderator of Venue Imposed Safety Guidelines at Town Meeting or Polling Place

If safety concerns exist, but the town plans on going forward with the town meeting or official ballot voting day instead of postponing, Part 2, Art. 32 of the N.H. Constitution provides that elections “shall be . . . governed by [the] moderator;” and, as such, the moderator has the authority to manage the polling place, including the authority to choose whether to require safety precautions such as a mask requirement at the polling place.

Additionally, governing bodies also have a role if the election takes place in a municipal building. A building may make itself available to outside groups subject to rules, such as requiring users to wear masks, and RSA 41:11-a gives governing bodies authority over town buildings.

However, regardless of the rules imposed by the moderator or the venue, every qualified voter must be given an opportunity to cast a ballot. Therefore, moderators who have created a rule that may exclude someone from a place of polling, such as a mask mandate, must establish alternative means of participation for voters who do not wish to comply.

V. OFFICIAL BALLOT REFERENDUM FORM OF TOWN MEETING

A. Adoption

In 1995, towns, village districts, and school districts were given authority to adopt the official ballot referendum form of government, commonly known as SB 2. This form of government is codified in the statutes at RSA 40:12 – :16. It requires the final votes on warrant articles to be taken by use of the official ballot. While RSA 40:14 contains all the details on the method of adoption or rescission, the general requirements, as modified by the Laws of 2019, are:

- Adopted by a three-fifths majority of those voting on the question.
- Voting on the question shall be by ballot, but the question shall not be placed on the official ballot used to elect officers.
- The wording of the question is prescribed by statute.
- Polls shall remain open and ballots shall be accepted by the moderator for a period of not less than one hour following the completion of discussion on the question.
- The select board must conduct a public hearing on the question at least 15 days, but not more than 30 days, before the vote.

Rescission of the official ballot referendum form of government, unlike enactment, takes place on the official ballot because once SB 2 is adopted, there is no other means of voting on a town meeting question.

B. Two Sessions

Following adoption of SB 2, the annual town meeting will consist of two sessions: deliberative and official ballot voting day. The first session, or deliberative session, is conducted like the traditional town meeting, and consists of the explanation, discussion, and debate of each warrant article. Articles may be amended, with the exception of warrant articles whose wording is prescribed by law, and all articles must appear on the ballot. Warrant article amendments cannot eliminate

the subject matter of the article and cannot add purposes of appropriation which have not been previously warned.

Following the 2008 case of *Grant v. Barrington*, 156 N.H. 807 (2008), it became increasingly common for a first session to amend an article by removing the substance of the article, leaving only the words “To see...” However, RSA 40:13, IV(c) was amended in 2011 to prohibit this practice. The first session may not amend any article to “eliminate the subject matter of the article.” An article may still be amended to change the dollar amount of an appropriation in the article (including reducing an amount to zero), but the subject matter may not be deleted entirely.

The New Hampshire Supreme Court further clarified what it means to “eliminate the subject matter” of a warrant article. *Cady v. Town of Deerfield*, 169 N.H. 575 (2017). In that case, the Court determined that voters have wide latitude to amend the language and intent of a warrant article, as long as the subject matter of the warrant article was not effectively “eliminated.”

The second session, or official ballot voting day, takes place several weeks later and consists of day-long official ballot voting, including the absentee voting process. The results of the official ballot determine who has been elected to office and which warrant articles have been approved or defeated.

In the case of a special meeting held solely to consider adopting, amending, or repealing a zoning ordinance, historic district ordinance or building code, no deliberative session is held. In that instance only one session is required for voting by official ballot on the proposed action. RSA 40:13, XVII. This elimination of the need for two sessions of town meeting also applies to a special meeting for consideration of the adoption of an emergency temporary zoning and planning ordinance pursuant to RSA 675:4-a.

In the past, the full text of any proposed ordinance or amendment to an existing ordinance was required to be printed on the official ballot. In 2013, Chapter 116 amended RSA 40:13 such that a topical description of the substance of the ordinance or amendment, which shall be neutral in its language, may be placed on the official ballot instead of the full text of the ordinance or amendment. With respect to proposed changes to a zoning ordinance, the provisions of RSA 675:3 provide the procedure to be used to consider those issues. In all cases, the proposed text of the ordinance or amendment must be placed on file and made available to the public at the office of the clerk of the political subdivision not later than one week prior to the date of the second session of the annual meeting. An official copy of the proposed ordinance or amendment shall be on display for the voters at the meeting place on the date of the meeting.

C. Operating Budget

The operating budget is defined by RSA 40:13, IX(a). It includes the various purposes of appropriation, but it does not include special warrant articles (petitioned appropriations articles, bond issues, capital reserve and trust fund appropriations, and any article the select board designates as nonlapsing), nor does it include “other appropriations voted separately.” Language for the operating budget warrant article is included in RSA 40:13, XI(c).

D. Default Budget

If the operating budget is rejected by ballot, a “default budget” based on the prior year’s operating budget takes effect, unless the select board or school board, at their discretion, calls one special meeting, without the need for court permission, to have one more try at adopting a revised operating budget different from the prior year’s. RSA 40:13, X. The “default budget” is defined as “the amount of the same appropriations as contained in the operating budget authorized for the

previous year, reduced and increased, as the case may be, by debt service, contracts, and other obligations previously incurred or mandated by law, and by reduced one-time expenditures contained in the operating budget and by salaries and benefits of positions that have been eliminated in the proposed budget.” RSA 40:13, IX(b). It goes on to define “one-time expenditures” as “appropriations not likely to recur in the succeeding budget, as determined by the governing body.” Essentially, the default budget freezes the budget at the previous year’s level except for amounts which the town is legally obligated to pay or which were one-time expenses.

Determination of the default budget, including one-time expenditures, capital projects appropriations, and water/sewer default amounts, rests with the governing body and cannot be altered by the meeting. However, town meeting voters may vote to delegate determination of the default budget to the budget committee, if one exists, instead of the governing body. RSA 40:14-b. Several amendments to RSA 40:13 were adopted in 2018 that expound upon the definition of and requirements for calculating the “default budget.” 2018 NH Laws Chapter 313 and 2018 NH Laws Chapter 241. Now, not only must last year’s budget be reduced by one-time expenditures, it must also be reduced “by salaries and benefits of positions that have been eliminated in the proposed budget.” The amendment further clarifies that “eliminated positions shall not include vacant positions under recruitment or positions redefined in the proposed operating budget.” Chapter 313 settles the question whether the default budget may be higher than the proposed operating budget: In calculating the default budget amount, the governing body shall follow the statutory formula which may result in a higher or lower amount than the proposed operating budget.

Chapter 241 also added new subparagraph (c) to RSA 40:13, IX to define the term “contracts” found in the definition. The term “contracts” means “contracts previously approved, in the amount so approved, by the legislative body in either the operating budget authorized for the previous year or in a separate warrant article for a previous year.” Accordingly, employee raises should not be included unless they are required by a legally binding and previously ratified contract obligating the municipality to fill particular positions or employ particular people at certain wages.

The default budget must be disclosed at the first public hearing on the budget held under RSA 32:5. Unless determination of the default budget has been delegated to the budget committee, the governing body must complete the default budget form created by DRA. The purpose of the default budget form is to demonstrate how the default budget amount was calculated.

The 2018 amendments also amplified the notice requirements for the default budget. Adding onto the long-standing requirement that the default budget be disclosed at the first budget hearing, RSA 40:13, XI(a), as amended, further explains the default budget must be “presented for questions and discussion” at that hearing, although many towns already do this. The form used for presenting the default budget must now include the “specific items that constitute a change by account code, and the reasons for each change,” as well as “reductions for eliminated positions and benefits.” Towns will be required to make the “line item details” for these changes available for inspection by the voters.

Finally, Chapter 241 has clarified the default budget’s role at the deliberative session. RSA 40:13, IV will now expressly permit voters to discuss and debate the default budget, along with other articles on the warrant. That being said, RSA 40:13, XI(b) still prohibits the voters from amending the default budget at the deliberative session.

E. Special Meetings

If the operating budget article fails, the select board may, without court permission, call a special meeting to consider a proposed revised operating budget. RSA 40:13, X and XVI. Other special meetings are possible with court permission, provided that no more than one special

meeting (not counting the one permitted if the operating budget article fails) is permitted seeking “to raise and appropriate money for the same question or issue” in any single budget year. All special meetings also require two sessions, one for discussion and amendment, and one for official balloting.

F. Schedule

Under RSA 40:14, X, official ballot referendum towns have the option of holding town meeting in March, April, or May, and the voters must choose one of those options when voting to adopt the official ballot referendum form of government.

RSA 40:13 establishes the precise dates for posting notice of and holding budget hearings; deadlines for submission of petitioned warrant articles, including a 2014 amendment setting an earlier deadline for petitioned warrant articles containing bonds; the last day for the budget committee to deliver copies of the final budget and recommendations to the governing body; the budget submission date for cost items involved in collective bargaining agreements; and the date for posting the warrant. These dates are inflexible and some are different from the deadlines for these actions under the traditional town meeting process. For example, under the March option, RSA 40:13, II-a(b) requires petitioned warrant articles to be submitted by the second Tuesday in January and RSA 40:13, III requires the first session to be held “between the first and second Saturdays following the last Monday in January, inclusive of those Saturdays.”

In addition, due to another 2014 amendment to RSA 32:5, if the operating budget warrant article is amended at the deliberative session, the governing body and the budget committee, if one exists, may each vote on whether to recommend the amended article, and the recommendation or recommendations shall appear on the ballot for the second session of the meeting. RSA 32:5, VII(c).

G. Voting on Bond Articles

In 1999, the legislature amended RSA 33:8, which requires a two-thirds majority vote for passage of bond articles, to reduce the supermajority requirement in official ballot referendum towns and districts to three-fifths majority. Legal challenges to this legislation based on equal protection claims failed in state and federal court.

H. Reconsideration and Restricting Reconsideration

As described above, RSA 40:10 permits voters to restrict reconsideration of warrant article votes, thus requiring reconsideration to be held at least seven days later at a recessed session of the meeting. In official ballot referendum towns and districts, reconsideration of votes is permitted at the first session unless a vote to restrict reconsideration passes, in which case the article will go onto the ballot as written because a vote to restrict reconsideration is deemed to prohibit any further action on the restricted article until the second session (i.e., the ballot voting day). RSA 40:13, IV. Moreover, RSA 40:13, XV prohibits reconsideration of second session votes.

I. Bad Weather Postponement

The moderator cannot delay the first session of an official ballot referendum meeting due to bad weather by more than 72 hours, presumably because it might jeopardize preparation of the official ballots in time for the second session. See RSA 40:4, II. Review the “Postponing town meeting” section above for a detailed explanation on the postponement process.

J. Charter Method for Enacting Official Ballot Referendum Voting

Under RSA 49-B:3, V, an SB 2 town can establish a charter commission for the purpose of amending or adopting a charter relative to official ballot referendum voting. This charter process can be used by SB 2 towns and districts as a way of “customizing” the official ballot referendum procedures they adopted under RSA 40:13. The law says that the charter commission question placed on the ballot should read: “Shall a charter commission be established for the sole purpose of establishing official ballot voting under the current form of government?” That precise wording is not required, however. RSA 49-B:3 III sets out the manner in which the question is submitted to voters. See the statute, as amended in 2014, for details.

VI. CHECKLIST FOR ORDINANCES ENACTED BY THE LEGISLATIVE BODY

A. Authority

A warrant article proposing an ordinance for enactment by town meeting should cite a statute that authorizes the action. For example: “Pursuant to RSA _____, the Town of _____ hereby ordains as follows:” In general, for a municipal ordinance to be valid, it must be properly enacted and rationally related to a legitimate governmental interest. *Boulders at Strafford, LLC v. Strafford*, 153 N.H. 633 (2006).

B. Preemption

It should be determined whether state or federal law preempts the field. If the issue involves a field that the state regulates heavily, check to see if the state or federal law authorizes or limits the scope of additional municipal regulation. If so, the local ordinance must be limited to the extent of municipal regulation that is permitted. It is always a good idea to consult with the town attorney because preemption is often not expressly stated, but must be inferred from the statutory scheme of federal or state regulation.

C. Who Votes

A proposed ordinance usually requires action—a vote—by the town meeting, unless a statute grants authority to act to the governing body.

D. Procedure

Failure to follow all procedural steps may invalidate an ordinance. For example, building codes and zoning ordinances must be enacted under the detailed procedure in RSA 675:3. Keep a record of how these steps were followed. However, five (5) years after enactment, municipal legislation will be considered presumptively compliant with statutory enactment procedures. RSA 31:126. If the ordinance is one that can be passed by the select board, such as highway regulations under RSA 41:11, there are no procedural requirements spelled out in statute, but NHMA recommends holding an advertised public hearing at a regular select board meeting in order to receive potentially useful information and to forestall claims of a denial of procedural due process. It is further recommended that notice of adoption be published in a newspaper of general circulation in the town.

E. Enforcement

It should be determined in advance how the ordinance will be enforced; otherwise, it will never be very effective. Add a penalty clause. For most town ordinances, the maximum fine is \$1,000. RSA 31:39, III. There are some exceptions, however. Examples include solid waste facility violations, up to \$3,000, RSA 149-M:17, II (b); and planning, zoning and building code violations, \$275 per day civil penalty, no local penalty clause needed. RSA 676:17.

- Find a statute that authorizes the action.
- Determine whether state or federal law preempts the field.
- Find out who can act.
- Follow all procedural steps.
- Determine in advance how the ordinance will be enforced.

CHAPTER FOUR

THE SELECT BOARD'S RELATIONSHIP WITH OTHER LOCAL OFFICIALS

I. THE SELECT BOARD AS THE GOVERNING BODY

As mentioned in Chapter Three, the statutes assign to various town officials and boards authority over certain aspects of town business. The select board as the governing body is unusual in the scope of its statutory duties and unique in the power to “manage the prudential affairs of the town”; that is, to carry out the policies adopted by town meeting and to attend to ordinary town business. The select board’s broad role necessarily involves interaction with the other boards and officials. This chapter will describe the roles of other key boards and officials and, in particular, their relationship with the select board.

A. The Select Board Must Act as a Board

Although the select board often exercises administrative and executive powers, one select board member acting alone has no authority. The select board must act as a board, by majority vote at public meetings that comply with the Right to Know Law, RSA chapter 91-A and RSA 41:8.

Generally, if a majority of the select board is present, the board may act. There is no provision for alternate members for the select board. However, when conducting hearings pursuant to RSA chapter 43 (laying out or altering highways, or for the purposes of deciding any question affecting the conflicting rights or claims of different persons), a disqualified select board member must be replaced by a former select board member designated by the remaining select board. RSA 43:7.

B. Choosing a Five-Member Board

The traditional select board has three members. RSA 41:8. RSA 41:8-b allows towns to elect a select board of five members upon a majority vote on a question placed on the official ballot (if the town uses the official ballot to elect officers). The question may be initiated by the select board (see RSA 31:131), or by petition of 25 or more registered voters, or by petition of not less than 2 percent of the legal voters (but in no case fewer than 10 voters). RSA 41:8-b requires the petition to be delivered to the select board no later than the fifth Tuesday before the annual meeting. (Presumably, in a jurisdiction operating under the official ballot referendum [SB 2] form of town meeting, the deadline to submit the petition would be the same as the petitioned warrant article deadline.) When a petition is submitted, the select board shall, within 10 days, designate a place and a time for a public hearing. The hearing shall be held no later than the Thursday before the annual meeting to discuss the proposed change in the size of the select board. (It is unclear for SB 2 jurisdiction whether this deadline is counted from the deliberative session or from voting day.) A town that has voted to enlarge its select board may rescind the action in the same manner. Neither change takes place until the first annual meeting following the meeting at which the question was acted upon. See RSAs 41:8-a – 41:8-e for more information.

C. Administrative Staff

The position of town administrator, administrative assistant or similar title is not specifically referenced in statute. (Note that the position of town manager is governed by RSA chapter 37). However, it is common for New Hampshire municipalities to employ someone in this type of position and towns are largely free to mold it to fit their needs.

The decision to hire an administrative person, and the duties and responsibilities of the administrator, are generally determined by the select board acting as the governing body. However, in some circumstances, such a position could be created by a town meeting vote. Assuming the position was not defined by town meeting, the select board may change the scope and duties of the administrator as it sees fit without further vote of town meeting. The administrator often prepares information statements that serve as the basis for policy decisions made by the select board and is frequently given authority to make routine or recurring administrative decisions without specific approval by the select board. Project research, grant writing, organizing, advising and public relations are some of the many duties often assigned to the administrator.

D. Organizational Suggestions

1. MUNICIPAL LIBRARY

Copies of all useful reference materials and guidebooks, such as the NHMA publications *New Hampshire Town and City* magazine, handbooks and *The Basic Law of Budgeting*, should be kept in a central location so they are available for all officials.

2. ORDINANCE COMPILATION OR CODIFICATION

The town should have a one-book compilation containing all ordinances, codes and regulations ever passed in the town. Otherwise, it will be difficult to remember or to conveniently find all the ordinances or regulations that have been enacted. Make sure all copies are certified by the appropriate official and that the enactment procedure is recorded with the ordinance itself. There are several commercial services that do this type of codification. For more information on this subject, see the Legal Q&A in the March/April 2014 issue of NHMA's *Town and City* magazine entitled *Managing Municipal Records*. Please note there have been some changes in the law since publication of that article.

3. TOWN RECORDS

The select board is part of the required municipal records committee responsible for the disposition of municipal records under RSA chapter 33-A with the responsibility to retain certain records and permanently preserve them. Good records make the work of the board much easier over time, and the records preserve both the wisdom and the errors of those who have come before. This task is now more challenging than ever because of the volume of the records and the multiple paper and electronic formats of the records. Preservation of the records in the correct format and for the proper length of time is important in order to avoid violations of the Right to Know Law. See Chapter Five for more information on municipal record keeping under the Right to Know Law.

II. WORKING WITH OTHER OFFICIALS

A. Management Duties of the Select Board that Affect Officials and Boards, Generally

In addition to its own duties, the select board continuously oversees the activities of many other boards and officials:

1. FINANCIAL DUTIES

Pursuant to RSA 41:9, the select board is responsible to ensure that proper vouchers are prepared for payment of all accounts and claims allowed by it. The board must keep accurate accounts of all moneys received; accounts and claims settled; orders drawn by it; and all other financial transactions made on behalf of the town. The select board must prepare annual reports for the state and town.

The select board must establish and maintain appropriate internal control procedures to ensure the safeguarding of all town assets and properties, including the transactions and assets controlled by other elected or appointed officials, such as the town clerk.

The select board must annually review and adopt an investment policy for the investment of public funds in accordance with statutory standards and advise the treasurer of such policies.

2. BUDGETARY CONTROL

Under RSA chapter 32, the select board is charged with presenting a proposed annual budget to the town meeting. (If the town has an official budget committee, the committee's proposed budget is presented to the town meeting along with the select board's recommendations). This requires months of work with department heads to gather and analyze the facts, establish priorities for expenditure and advocate for the appropriations required to carry out the business of the town. Once the budget is passed, the select board must closely monitor expenditures as part of its financial duties and make adjustments during the fiscal year by appropriate transfers of appropriations. For details, see Chapter Six and the NHMA publication, *The Basic Law of Budgeting: A Guide for Towns, Village Districts and School Districts*.

3. MANAGEMENT OF PUBLIC PROPERTY

RSA 41:11-a gives the select board authority to manage, care for and control town property that has not been placed in the care of another board, officer or department by state statute or by vote of town meeting. As examples of property under the care of other officials, see RSA 36-A:4, which places management and control of certain town land with the conservation commission, and RSA chapter 202-A, which grants the library trustees broad powers over library property.

The select board's authority over town property includes the authority to rent or lease that property for up to one year. A lease of more than one year requires town meeting approval. RSA 41:11-a, II. However, if town meeting authorizes it, the select board may rent or lease town property for up to five years until town meeting rescinds that authority. RSA 41:11-a, III.

4. MANAGEMENT OF EMPLOYMENT

Some municipal officials are given express authority over hiring and supervising town employees, but the select board is typically responsible for most hiring, discipline and

firing, determining employee compensation and monitoring compliance with the long list of federal and state laws applicable to the employment relationship. For details, see Chapter Twelve.

B. Other Elected Officials, Generally

Town elected officials are independent of the select board and are generally not subject to the select board's supervision or control in the performance of their duties. The mandatory and optional elected positions are listed in RSA 669:15 – :17 and include town clerk, moderator, treasurer, tax collector, road agent, and trustees of trust funds, among others.

The relationship between the select board and other elected officials may be the subject of dispute and uncertainty if either the select board or the official fails to clearly understand his or her roles and responsibilities assigned by law.

1. NO INTERFERENCE

The select board cannot interfere with the exercise of functions that, by statute, are delegated to these other officials. The other elected officials are not present in the town offices as employees of the select board and should not be asked to perform duties properly assigned to other town departments, such as secretarial duties for a land use board.

On the other hand, the select board members, in the exercise of their budgeting, spending and asset-safeguarding authority under RSA 41:9, have the right to obtain information from these other officials; to hire personnel working under them; to set the salaries of these additional persons (subject to the limits of town meeting appropriations); to approve purchasing of supplies and equipment; to maintain the buildings and grounds; and to establish internal controls and set rules governing the safeguarding of all town property and financial assets.

2. COOPERATION

To the extent that elected officials can agree upon the hours of operation of town offices and the nature of the duties that each should perform, the best interests of the public are served. The reality is that an elected town clerk will often help a town employee perform his or her duties when available, and the town employee will often help the elected official during busy times. This spirit of cooperation should be fostered where possible, with emphasis on the larger purpose of serving the community.

C. Supervisory Authority Over Certain Key Officials

The statutes call for the select board to supervise some positions directly. The job of supervising people at work is no less difficult in the field of public administration than in the private world of business. In most cases, the board will be most effective if it sets clear goals for the officials it supervises and measures performance toward the goals, rather than involve itself deeply in the details of the day-to-day tasks performed by these officials.

1. ROAD AGENT

RSA 231:62 – :65 permits the select board to supervise the road agent, even if the road agent is elected. The road agent performs his or her duties “under the direction of the selectmen,” which may adopt written general policies, such as the winter maintenance snow and ice policy. The select board evaluates the work of the road agent in achieving

the financial goals it has set, the satisfaction of the public with the condition of roads, and the physical maintenance of town roads, bridges and sidewalks. The Supreme Court has analogized the relationship to that of an owner and independent contractor. *Grimes v. Keenan*, 88 N.H. 230, 234-35 (1936) (city charter with language similar to RSA 231:62).

Towns have several choices when it comes to determining who will carry out the construction, repair and maintenance of their highways and bridges. Towns can elect or appoint road agents, or they can vote to establish boards of public works commissioners, but only if they also have municipal gas, electric, water or sewer systems. RSA 231:62.

The highway agent position can be filled by election every year at the annual meeting, or RSA 231:62 allows the term to be expanded to two or three years. RSA 231:62-a and :62-b. The vote must be a ballot vote. Oddly, the statutes require an official ballot vote only if the town's population is more than 4,500. RSA 231:62-b contains the wording that must be on the official ballot.

The position can be appointed by the select board, if this has been authorized by a town meeting vote, also subject to expansion by town meeting to a two- or three-year term. In addition, the town meeting can vote to authorize the select board to appoint an "expert highway agent" under RSA 231:64. Although the definition of "expert" agent has never been clarified, the difference between an appointed agent and an expert agent is, most likely, that the expert agent has no fixed term of office, making the expert agent an employee or contractor hired by the select board. The expert agent will be able to use his or her own equipment and employees without being subject to the competitive bidding requirements of RSA 95:1, which are applicable to those holding "public office."

According to RSA 231:62, the highway agent has charge of the construction, maintenance and repair of highways, bridges and sidewalks and other activities as voted by the town. Additional duties that may be authorized by a vote of town meeting include charge of rubbish collection, public dumps, parks, cemeteries, playgrounds, beaches, forests and shade and ornamental trees. RSA 231:63. Highway agents are sworn to the faithful discharge of their duty and give bond to the satisfaction of the select board for the faithful performance of the duties of office, pursuant to RSA 231:65. The select board may supervise the methods and manner of performance of road agents. RSA 231:65. Agents must keep accurate accounts showing all moneys received and paid out by them and shall settle their accounts before January 1. RSA 231:68. The agent should give the select board weekly expenditure statements and should receive money from the treasurer only on the order of the select board. According to RSA 231:66, compensation of the road agent is set by the town or the select board.

The highway agent, even an elected one, is subject to the direction of the select board members, and is responsible to them for the expenditure of money and the discharge of their duties generally. If any agent refuses or neglects to comply with lawful instructions of the select board, or intentionally refuses or neglects to carry out the duties prescribed by law for highway agents after written request by the select board, the board may remove the agent from office. Before exercising their authority to remove under RSA 231:65, the board members should consult the town's legal counsel. In general, a road agent is not entitled to a pre-termination hearing, although providing an opportunity to request a meeting with the select board to get an explanation of the reasons for the termination is recommended. *Conkey v. Town of Dorchester*, N.H. Supreme Court, No. 2014-0343, 2015 WL 11077804 (March 16, 2015).

A municipality with a municipal gas, electric, water or sewer system that also has a road agent may combine any two or more of the following into one board of public works

commissioners: board of sewer commissioners; board of commissioners of a gas, electric or waterworks system; or road agent. The board, consisting of at least three members, may be appointed by the select board and shall have the powers and duties as the town may prescribe. See RSA Chapter 38-C for more details.

2. CHIEF OF POLICE

According to RSA 105:2-a, an appointed police chief is “subject to such written formal policies as may be adopted by the appointing authority,” which is the select board unless there is a police commission or a town manager. There is no statutory definition of the authority of the elected police chief (RSA 41:2, part-time, or 41:47, full-time), but by common law the police chief directs all law enforcement activity. *Foster v. Hudson*, 122 N.H. 150 (1982). The police chief, whether appointed or elected, is subject to dismissal or suspension by the select board only for cause, justified in writing. After being suspended or dismissed, the police chief has the right to receive a hearing in superior court. However, a police chief hired under a written contract for a two-year term may have his contract terminated at the end of the two-year term without being provided reasons for the non-renewal. *Kassotis v. Fitzwilliam*, 166 N.H. 648 (2014). Removal procedures differ for elected and appointed chiefs. Because of the crucial role and political sensitivity of this position, any personnel actions involving the police chief should be taken only after review by the municipality’s legal counsel. See Chapter Eleven for more information on police chiefs and officers.

3. APPOINTED FIRE CHIEF

The relationship between a town and its appointed fire chief is like that of the appointed police chief. RSA 154:5. An appointed fire chief has control over his or her department but is subject to any written formal policies adopted by the appointing authority. Suspension or dismissal can occur only for good cause and only with a written statement of reasons. Although the dismissal or suspension can take effect immediately, without a local hearing, the fire chief has the right to a hearing in superior court if applied for within 45 days.

RSA 154:1 permits municipalities to organize their fire departments in other ways, including creating a fire commission or electing the fire chief. As with the police chief, personnel actions should be taken against a fire chief only following careful consideration of the issues with legal counsel for the municipality. See Chapter Eleven for more information.

D. Town Clerk, Tax Collector and Treasurer

The town clerk must be elected. Towns may choose to elect or appoint tax collectors and treasurers.

1. OPTIONAL THREE-YEAR TERM

All three positions, including the optional combined office of town clerk-tax collector, may be elected for a three-year rather than a one-year term. The annual meeting may vote by ballot to adopt or rescind an article establishing a three-year term. A change in the terms of any of these offices takes effect at the next annual town meeting. The relevant statutes are: RSA 41:2-b, tax collector; RSA 41:16-b, town clerk; RSA 41:26- b, treasurer; and RSA 41:45-a, town clerk-tax collector.

2. BOND

The town treasurer, town clerk, tax collector and their deputies, as well as agents authorized to perform treasurer functions under RSA 41:29, VI, must be bonded at town

expense. The purpose of the bond is to protect the town against loss through the failure of the officers to faithfully perform their duties, failure to account properly for all moneys or property received by virtue of their positions, or against fraudulent acts committed by them. The DRA determines the amount of the bond. RSA 41:6.

3. VACANCY

If a vacancy occurs (the term “vacancy” is defined in RSA 652:12) in any of the positions of tax collector, clerk, treasurer or town clerk-tax collector and there is no appointed deputy to fill the position, the select board appoints an individual to serve until the next annual town election. In case of temporary absence of an officer, the deputy may perform the duties of the office. The statutes relevant to filling vacancies are RSA 669:61, RSAs 669:65 – :67 and RSA 669:69. See also RSA 41:55 regarding the appointment of a temporary treasurer where there is no deputy treasurer.

4. REMOVAL

RSA 41:12 gives the select board authority to remove from office any collector of taxes, town clerk or treasurer who, in the select board’s judgment, has become insane or otherwise incapacitated to discharge the duties of the office. The select board may also initiate removal proceedings against the town clerk (RSA 41:16-c), elected treasurer (RSA 41:26-d) or tax collector (RSA 41:40) when the accounts of these officers are found to contain an “irregularity or material error,” or if timely deposit of funds has not been made. An examination of the accounts by a certified public accountant or an accountant licensed by the state must first be made. The select board then must notify the clerk, elected treasurer or tax collector by certified mail, as well as the DRA commissioner, and must provide a written explanation and justification for removal. The officer then has 20 days to make a written response, after which the select board must decide whether or not to proceed with removal. If the officer does not respond within that time, the select board may vote to remove the officer at any time upon written notice. If the officer does respond and the select board decides to proceed, the officer has a right to a hearing before the select board. After the officer’s written response and hearing, if any, the select board determines if removal is justified and gives written notice of the decision to the officer and the DRA commissioner.

5. DUES

Towns are to pay dues, not to exceed \$20, for annual membership for its officials in the clerks, tax collectors and assessors associations. In addition, these officials are entitled to reimbursement for actual expenses incurred in attending the annual convention of their respective organization. RSA 31:8.

6. TOWN CLERK

RSA 41:16 requires the clerk to be chosen by ballot at town meeting. The clerk is responsible under a variety of statutes for keeping all town records, certifying the actions of select board and other town officials, making official reports, collecting fees and serving as an election official. The clerk shall record all votes passed by the town.

The town clerk may appoint a deputy, with the approval of the select board. The deputy must be “qualified in the same manner” as the clerk. RSA 41:18. However, if the deputy is not a resident of the town, he or she cannot fill the vacancy of town clerk. In that case, the select board appoints a replacement who is a resident. RSA 669:65. According to RSA 41:18, the deputy performs all the duties of the town clerk in the clerk’s absence. RSA 41:17 states that if the town clerk is absent from any town business meeting and there

is no deputy clerk, the town chooses by unofficial ballot a town clerk *pro tempore*, who performs all the duties of the town clerk for that business meeting.

The town clerk may be authorized by the state Department of Safety to register motor vehicles. The clerk must remit all motor vehicle permit fees to the treasurer or the treasurer's designee under RSA 41:29, VI, at least on a weekly basis, or daily whenever receipts total \$1,500 or more. RSA 261:165.

The annual meeting determines compensation for town clerks which may be in the form of fees, salary in lieu of fees or salary combined with fees. RSA 41:25. The town clerk is not subject to a personnel manual or other employee policies adopted by the select board for those town employees under their direct supervision, and receives full compensation as approved by the annual meeting regardless of who is holding the position. RSA 31:9-b.

7. TAX COLLECTOR

A tax collector is either elected by annual meeting voters or appointed by the select board, according to RSA 669:17 and RSA 41:2 and RSA 41:33. A tax collector is responsible for collecting property taxes and other sums as provided by statute, such as the land use change tax under RSA 79-A. The tax collector must keep a complete and accurate account of taxes due, collected and abated and all property sold for nonpayment of taxes. The tax collector must remit all funds to the treasurer at least on a weekly basis, or daily whenever receipts total \$1,500 or more. Failure to make timely remittances is cause for removal. A tax collector must submit his or her books for inspection by the treasurer and select board upon its request. RSA 41:35. When the term of office of a tax collector ends, for whatever reason, RSA 41:36 requires the select board to have the accounts audited promptly and to commit new warrants to the successor.

The tax collector must be at his or her usual place of business for at least two hours continuously at least one day each month for the transaction of tax business, according to RSA 41:35, and the time and place shall be printed on the tax bills.

The tax collector shall appoint a deputy, with the approval of the select board, who shall be sworn, give bond, have the powers of tax collectors and may be removed at the pleasure of the tax collector. The deputy shall perform such duties as are assigned by the tax collector. RSA 41:38 provides that if the tax collector is temporarily incapacitated, the deputy tax collector shall serve during such incapacity, possess the powers, perform the duties and be paid as the select board or town meeting shall decide.

The annual town meeting determines compensation for the elected tax collector in the form of fees, salary in lieu of fees or salary combined with fees. If the select board appoints a tax collector, appointment must be before April 1, and the select board must enter into a written contract as to compensation. RSA 41:33.

8. TOWN CLERK-TAX COLLECTOR

The office of tax collector and the office of town clerk may be combined if approved by the voters at a town meeting. Approval must be by ballot vote on an article placed in the warrant. If approved, RSA 41:45-a provides that one individual will hold the combined elective office for a term of one year or three years, as determined by the warrant article, beginning with the next annual meeting following the vote.

9. TREASURER

Every town must elect a treasurer by ballot vote at the annual meeting, according to RSA 41:26, unless the town meeting votes under RSA 41:26-e for the treasurer to be appointed

by the select board according to RSA 669:17-d. If the treasurer is appointed, compensation is fixed by the select board. If the town meeting fails to elect a treasurer or provide for the position to be filled by appointment, the select board must appoint one within six days to hold office at its pleasure or until another treasurer is chosen or appointed and qualified, and the select board must set the treasurer's pay in a written contract. RSA 41:27. The town treasurer is responsible for the custody, deposit and disbursement of town funds in compliance with detailed statutory standards. RSA 41:29. The treasurer submits books, vouchers and statements to the select board and to the town auditors whenever requested.

With the approval of the select board, the treasurer appoints a deputy, who shall be sworn and who shall perform the duties of the treasurer when the treasurer is absent due to sickness, resignation or otherwise. RSA 41:29-a. If the treasurer is elected, the deputy must also be a resident of the town. RSA 669:6. The treasurer may delegate deposit, investment, recordkeeping or reconciliation functions to other town officials or employees provided such delegation is in writing and includes written procedures acceptable to the select board or town manager. RSA 41:29, VI. However, the treasurer continues to be responsible to comply with all statutory duties of the office.

The treasurer invests excess funds in accordance with the select board's investment policy. RSA 41:29, IV.

The treasurer pays out town money only on orders of the select board, with some exceptions:

- Conservation commission fund—RSA 36-A:5, II authorizes the money to be paid out only upon order of a majority of the conservation commission.
- Heritage commission fund—RSA 674:44-d authorizes the money to be paid out upon order of a majority of the heritage commission established pursuant to RSA 674:44-a.
- Agricultural commission fund—RSA 674:44-g authorizes the money to be paid out upon order of a majority of the agricultural commission established pursuant to RSA 674:44-e.
- Recreation revolving fund—RSA 35-B:2 authorizes the money to be paid out upon order of a recreation or park commission established pursuant to RSA 35- B:4, or by the board or body designated by town meeting.
- Nonlapsing land use board fund—RSA 673:16, II creates a nonlapsing fund for certain fees imposed by a local land use board. The money is paid out by the treasurer upon order of the local land use board.
- Revolving funds for recycling, ambulance service, public safety service, afford- able housing, PEG channels or energy conservation and efficiency financing—RSA 31:95-h authorizes town meeting to designate a board to order payment by the treasurer.

E. Health Officer

Every town must have a health officer, who is appointed by the commissioner of the state Department of Health and Human Services (DHHS) upon recommendation of the select board. RSA 128:1. The health officer may serve several towns. RSA 128:6. A health officer may serve temporarily (less than 30 days) in another town upon the request of that town's governing body. RSA 128:5, V. The health officer is appointed for a three-year term and may be removed for cause after notice and hearing by DHHS. A vacancy is filled in the same manner as an original appointment is made. RSA 128:4. The health officer, with the approval of the select board and DHHS, may appoint one or more deputies. The compensation of the health officer and deputy is

set by the select board or the town. RSA 128:5–:6.

The health officer and the select board together are the town board of health, but it is the health officer who is given statutory power as the secretary and executive officer of the board of health. RSA 128:3. The health officer has the general power to enforce public health laws and rules. RSA 128:5, I. The health officer may make local regulations relative to nuisances, subject to approval by the select board, and regulations relative to food service establishments, subject to approval by DHHS. RSA 147:1. RSA chapter 147 details the powers and remedies available to health officers to abate various kinds of public health nuisances and, in some cases, to recover the costs of abatement.

The health officer is immune from liability for civil damages resulting from a decision made in good faith and within the scope of his or her authority, and may further be indemnified by the municipality from the expenses of a defense if a lawsuit is brought against the officer arising out of his or her activities in office. See RSA 31:104 and :105.

F. Welfare Officer

RSA chapter 165 creates the duty of the “overseers of public welfare” in each town to relieve and maintain those who are unable to support themselves. RSA 165:1. “Overseer of public welfare” is an optional elected office. RSA 41:2. Towns that do not elect a welfare overseer either assign the responsibility to the select board as a whole, or to an individual employee as welfare director. RSA 165:1, II requires the governing body to adopt written guidelines relative to general assistance, and RSA chapter 165 details many features of eligibility, procedure and recovery of expenses. The “general assistance program” is a complex matter, and individual applications for assistance may be very difficult to administer. See Chapter Seven and the NHMA publication, *The Art of Welfare Administration*. The welfare officer has the same immunity from liability as other officials under RSA 31:104–:106.

G. Auditor

All municipalities must conduct an audit of the accounts of any officer or agent handling funds of the municipality on at least an annual basis. See RSA 41:31-a – :31-d, which replaced the former RSA 41:31. The municipality may employ a certified public accountant, or it may employ a licensed public accountant, See RSA 21-J:19; or, it may elect one or more auditors by a majority vote at town meeting. The option to elect auditors is discussed in RSA 41:31-b and RSA 41:32-c. Both sections must be read to see the details of how persons are elected to this office.

The auditors’ duties are to examine the accounts of any officer or agent handling funds of the municipality in accordance with procedures set forth in administrative rules adopted by the commissioner of the Department of Revenue Administration. All audit reports and any accompanying management letter shall be provided to the commissioner and shall also be available to the public.

H. Moderator

For detailed information about the position of moderator and the town meeting process, please consult NHMA’s *Town Meeting & School Meeting Handbook*.

1. ELECTION

The election of a town moderator under RSA 40:1 is done at the annual meeting in every

even-numbered year by ballot by plurality vote. The moderator does not assume office until the adjournment of the regular town business meeting held that year.

2. DUTIES

RSA 40:4 gives the moderator the duty to preside at the town meeting, decide questions of order and make a public declaration of every vote passed. The moderator may prescribe rules of procedure for the town meeting, but these rules “may be altered by the town.” Most of the moderator’s rulings can be legally overruled by majority vote of the voters if they question that ruling. See *Exeter v. Kenick*, 104 N.H. 168 (1962). Even if the voters have previously adopted rules of procedure, they can still vote to overrule the moderator on the issue of whether those rules are being followed. However, where the moderator is simply applying a requirement of state law that controls town meeting procedure, the voters cannot validly overrule the moderator. For example, if the moderator rules that a three-fifths majority vote is needed to authorize the issuance of bonds, the meeting cannot legally overrule the moderator because the three-fifths vote is mandated by RSA 33:8.

3. OTHER DUTIES

Under the Municipal Budget Law, the moderator appoints the members-at-large of the budget committee if they are not elected. Under RSA 32:15, the moderator also appoints to fill mid-term vacancies on appointed budget committees within five days of notification. The moderator may appoint an assistant moderator who holds office at the pleasure of the moderator. The assistant moderator has all the duties and powers of the moderator, subject to the control of the moderator. See RSA 40:3-a. According to RSA 669:62, vacancies in the office of town moderator are filled by appointment made by the supervisors of the checklist, or by the select board if no board of supervisors exists. If the moderator is absent from any meeting or is unable to perform the moderator’s duties, but there is no vacancy, a moderator pro tempore may be appointed by the supervisors of the checklist under the authority of RSA 40:3. However, if the moderator is absent from any state election or is unable to perform his duties, a moderator pro tem may be appointed by the moderator under RSA 658:19. The salary of the moderator is set by town meeting vote pursuant to RSA 31:9-b.

III. WORKING WITH MUNICIPAL LAND USE BOARDS

A. Land Use Boards, Generally

The establishment and composition of local land use boards is controlled by RSA chapter 673. The land use boards that may be established by the local legislative body include planning board, zoning board of adjustment, building code board of appeals and historic district commission. Heritage commissions, agricultural commissions and housing commissions may also be established under RSA chapter 673, but their role is advisory, not regulatory, except that heritage commissions may also be given the powers of the historic district commission.

RSA chapter 673 provides limited options for the legislative body in establishing land use boards regarding the number of members; whether members are elected or appointed; members’ terms of office; appointment, numbers and terms of alternates; filling vacancies; and removal of members.

1. ROLES OF THE SELECT BOARD

The select board has certain designated roles, including:

- Appointment of an ex officio member to represent the select board on the planning board. RSA 673:2, II. Note: The select board must also appoint another select board member to serve as the alternate to the regular ex officio member. Under RSA 673:6, III, the alternate must be appointed by the select board in the same manner and subject to the same qualifications as the ex officio select board member under RSA 673:2.
- Appointment of all planning board members unless they are elected. RSA 673:2, II.
- Appointment of the members of the zoning board of adjustment, RSA 673:3; building code board of appeals, RSA 673:3; and if authorized by town meeting historic district commission, RSA 673:4; heritage commission, RSA 673:4-a; agricultural commission, RSA 673:4-b; and housing commission, RSA 673:4-c.
- Appointment of an ex officio member on the historic district commission, RSA 673:4, II, and heritage commission, RSA 673:4-a, II.
- If authorized by town meeting, appointment of the alternate members of appointed land use boards, RSA 673:6, and filling of vacancies. RSA 673:12.
- Removal of land use board members appointed by the select board, or alternates, or elected members, after public hearing, for inefficiency, neglect of duty or malfeasance in office. RSA 673:13.
- If authorized by town meeting, administration of innovative land use controls. RSA 674:21, II.

2. LAND USE BOARD STAFF AND FINANCES

Under RSA 673:16, each land use board may hire employees who shall be subject to the employment rules applicable to other town employees. Boards may also contract with consultants. Expenditures shall be within applicable budget appropriations.

Land use boards also have certain other financial powers under RSA 673:16. They may accept and use “gifts, grants or contributions” for their functions in accordance with procedures for expenditure of funds by the town. Boards may collect money from applicants for expenses of notice and consultants’ studies under RSA 676:4, I(g) and money paid as off-site improvement fees imposed as a condition of approval. This money is held in separate nonlapsing accounts by the treasurer and paid out for proper purposes, without approval of the town meeting, upon order of the land use board. Fees established by ordinance or by the select board under RSA 41:9-a are not covered by RSA 673:16.

B. Planning Board

The planning board has a variety of functions and duties, including developing and updating the town’s master plan; working on a town capital improvements program; adopting subdivision, site plan review and driveway regulations; and proposing zoning ordinances.

1. MASTER PLAN

The planning board must adopt a master plan “to guide the development of the municipality.” See RSA 674:1(I). The master plan is adopted and amended pursuant to RSAs 674:2 – :4. The purpose of the master plan is to aid the planning board in the performance of its duties. It cannot be used to regulate development unless an ordinance is passed to implement it. *Rancourt v. Barnstead*, 129 N.H. 45 (1986).

2. CAPITAL IMPROVEMENTS PROGRAM (CIP)

Once the planning board has adopted a master plan, the local legislative body may vote to authorize the planning board to prepare and amend a CIP. As an alternative, the local legislative body may vote to authorize the governing body to appoint a capital improvement program committee. The CIP is a recommended plan of municipal capital improvements projected over a period of at least six years. The “sole purpose and effect of the capital improvements program shall be to aid the mayor or selectmen and the budget committee in their consideration of the annual budget.” RSA 674:5. A CIP is advisory only. In *Zukis v. Fitzwilliam*, 135 N.H. 384 (1992), the Supreme Court held that a planning board could properly disapprove a subdivision plan due to inadequate roads even though it did not have a CIP with a schedule of road improvements.

The purpose of a CIP is planning—that is, to know in advance when a capital expenditure is on the horizon. Therefore, a good CIP process updates the plan every year based on revised estimates of future needs. The planning board or CIP committee has complete control over the CIP, but the statute requires the board or committee to confer with the select board, budget committee and other local officials in the preparation of the CIP.

3. SUBDIVISION AND SITE PLAN REVIEW

The local legislative body must vote to authorize the planning board to regulate the subdivision of land and to review and approve or disapprove site plans. RSA 674:35 and :43. Once the town meeting has authorized subdivision and site plan review, the planning board must adopt subdivision and site plan regulations. *See* RSA 674:36, I & RSA 674:44, I. The original vote to establish the planning board is not sufficient to vest the board with this type of authority. Furthermore, a municipality must have enacted a zoning ordinance before it can vote to allow the planning board to review site plans. RSA 674:43. The local legislative body may also authorize the planning board to require preliminary review of subdivisions and site plans.

Subdivision and site plan regulations are adopted and amended by the planning board according to the procedures set forth in RSA 675:6, which enables the planning board, not the voters, to adopt such regulations following a public hearing. *Levasseur v. Board of Selectmen of Hudson*, 116 N.H. 340 (1976). The planning board’s power to regulate subdivision does not include the power to control improvements to land that has been subdivided. *Lemm Dev. Corp. v. Bartlett*, 133 N.H. 618 (1990). This requires site plan review.

4. THE ZONING ORDINANCE

In towns, the adoption and amendment of zoning ordinances is a multi-step process governed by RSA 675:3. The final step is always a town meeting ballot vote. The procedure must be followed in detail for the zoning ordinance to be valid.

If the town does not have a zoning ordinance, only the planning board may propose one. RSA 675:3, I. A zoning ordinance may not be proposed, in the first instance, by the select board or by petition. A zoning ordinance cannot be enacted unless the planning board has adopted the mandatory sections of the master plan described in RSA 674:2 (the vision and the land use sections). RSA 674:18. Adoption of a zoning ordinance requires both a planning board and town meeting vote.

Once the initial zoning ordinance has been adopted, the select board may propose amendments. RSA 675:3, I. The planning board must hold hearings on any such proposal. In addition, 25 or more voters may petition for an amendment to a zoning ordinance. The petition must be submitted to the select board during the period between 120 and 90

days prior to the annual town meeting. RSA 675:4. Finally, the planning board itself can propose amendments. RSA 675:3, I.

5. CONDITIONAL USE PERMITS FOR INNOVATIVE LAND USE CONTROLS

Under RSA 674:21, a zoning ordinance may include so-called innovative land use controls, such as phased development, cluster development, performance standards, environmental characteristics zoning and impact fees. The ordinance must contain adequate standards to guide administration, which the ordinance may delegate to the planning board, zoning board of adjustment, select board or other person or board by means of “conditional or special use permits.” If the planning board is not the administrator, the statute gives it a special review and comment function for every proposal.

6. STATE BUILDING CODE

Formerly, municipalities had the option of adopting a building code. In 2002, the legislature amended RSA chapter 155-A to enact a state building code comprised of the International Building Code and certain other related codes also adopted by reference. The state building code is applicable throughout New Hampshire. Towns may enact a local enforcement mechanism for the state code and may adopt by ordinance additional standards, no less stringent than those of the state building code, including the ability to adopt by reference other codes published by the International Code Conference. RSA 674:51 and :51-a. The procedure for enactment of local codes still follows the procedures prescribed for zoning ordinances. *See* Chapter Eleven for a more detailed discussion of the State Building Code statutes.

C. Excavation Under RSA Chapter 155-E

Although not technically a land use control adopted under Title LXIV of the statutes, regulation of excavation under RSA chapter 155-E is frequently associated with the powers of the land use boards. Subject to several exceptions, RSA chapter 155-E prohibits landowners from excavating on their property without first obtaining a permit from the planning board or, if the town meeting so designates, the select board or zoning board of adjustment. Minimum operation and reclamation standards for the excavation of earth materials are established by RSA chapter 155-E. Municipalities are permitted to adopt more stringent regulations effective against all excavations requiring a permit. *See* RSA 155-E:11, I; *Carroll v. Rines*, 164 N.H. 523 (2013); *Guildhall Sand & Gravel, LLC v. Goshen*, 155 N.H. 762 (2007); *Whitcomb v. Carroll*, 141 N.H. 402 (1996). The most commonly litigated issue relating to this statute has been the question of which types of excavations are exempt from the general requirement of obtaining a local permit. Exempt from the permit requirements are excavations existing as of August 24, 1979, stationary manufacturing plants and highway excavations, according to RSA 155-E:2, I, III and IV. Operational standards (RSA 155-E:4-a) and reclamation standards (RSA 155-E:5 and 155-E:5-a) still apply.

Municipalities may use their zoning and site plan review powers to regulate excavations, but RSA 155-E:4, III places limits on this power in order to balance the health, welfare and aesthetic concerns of zoning with the practical need to utilize this nonrenewable earth material resource. In *Whitcomb*, the Court held that RSA chapter 155-E preempts local zoning ordinances and regulations “that would have the effect or intent of frustrating State authority.” The Court found that the statute preempted the town from regulating a blasting operation at Whitcomb’s stationary plant, but that local regulations relating to “traffic and roads, landscaping and building specifications, snow, garbage and sewage removal, signs,” and other similar concerns, “if administered in good faith and without exclusionary effect,” may be applied to an excavation. In addition, while municipalities cannot alter the operational and reclamation standards for

excavations exempt from the statutory permit requirements, other local regulations may still apply. *Carroll v. Rines*, 164 N.H. 523 (2013) (other local requirements regarding highway excavation is not preempted by statute unless an exemption is granted by a State agency, and a zoning ordinance may prohibit excavation in certain zones making a variance mandatory even for a permit-exempt excavation).

In *KMO Associates, LLC v. Fitzwilliam*, No. 213-2013-CV-00107 (Cheshire County Superior Court, September 25, 2014) the Superior Court ruled that due to the comprehensive scheme for state regulation of mining found in RSA chapter 12-E, the coexistence of municipal regulation of mining was precluded. However, this outcome was reversed by the adoption of HB 233 and HB 451 in 2015, amending RSA chapter 12-E, clarifying that mining operations are subject to local zoning regulations and must obtain any necessary site plan approval.

Unlike land use enforcement actions, even if a municipality is successful in an enforcement action against an operator, there is no guarantee that the municipality will be awarded attorney's fees for its efforts. *Bedard v. Alexandria*, 159 N.H. 740 (2010).

D. Zoning Board of Adjustment

If a town adopts a zoning ordinance, it must also create a zoning board of adjustment (ZBA). The role of the ZBA is to consider certain types of cases concerning the applicability of the zoning ordinance to particular parcels of land. RSA 674:33.

1. VARIANCES

RSA 674:33, I(b) provides that the ZBA authorizes, in specific cases, variances from the terms of the zoning ordinance. A variance is permission to the owner of land to use the land in some way that would otherwise be a violation of the zoning ordinance. *Stone v. Cray*, 89 N.H. 483 (1938). In order to justify a variance an owner must establish all elements of a five-part test, as set forth in RSA 674:33, I(a)(2):

- a.) the variance will not be contrary to the public interest;
- b.) the spirit of the ordinance is observed;
- c.) substantial justice is done;
- d.) the values of the surrounding properties are not diminished; and
- e.) literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

Under the amended statute, "unnecessary hardship" means that, owing to the special conditions of the property that distinguish it from other properties in the area, (1) no fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and (1) the proposed use is a reasonable one. RSA 674:33, I(b)(1)(A)(B). If that definition cannot be satisfied, the applicant may demonstrate unnecessary hardship if, owing to special conditions of the property that distinguish it from other properties in the area, it cannot be reasonably used in strict conformance with the ordinance and thus a variance is necessary to enable reasonable use of the property. RSA 674:33, I(b)(2). Zoning variances expire if not exercised within 2 years of the date of final approval. RSA 674:33, I-a (a). Zoning ordinances may also be amended to provide for the termination of all variances that were authorized before August 19, 2013 that have not been exercised. RSA 674:33, I-a (b).

After RSA 674:33, I(a)(b) was amended in 2010, the New Hampshire Supreme Court decided the first case applying the new statutory test which eliminated the prior

system involving different standards for so-called “use” and “area” variances. The Court discussed each of the five elements of the test in the opinion and how they may be applied. Each ZBA should review this case carefully, as well as the cases cited with approval by the Court in this opinion, as this is the most current statement of the law of variances in New Hampshire. *Harborside Associates, L.P. v. Parade Residence Hotel, LLC*, 162 N.H. 508 (2011). Given the changing state of the law in this area, it is often advisable to consult with the town attorney when the board of adjustment is considering a difficult variance application.

2. SPECIAL EXCEPTIONS

The zoning ordinance may provide for special exceptions. These are uses that are permitted subject to certain conditions set forth in the ordinance, as determined on a case-by-case basis by the ZBA. RSA 674:33, IV(a). Special exceptions also expire if not exercised within 2 years of the date of final approval. RSA 674:33, IV (b). Zoning ordinances may also be amended to provide for the termination of special exceptions that were authorized before August 19, 2013 that have not been exercised. RSA 674:33, IV (c).

3. APPEALS OF ADMINISTRATIVE DECISIONS

Any decision of the “administrative officer” charged with responsibility for issuing permits or certificates or enforcing the zoning ordinance can be appealed to the ZBA. RSA 676:5. Depending on who has been given authority, the administrative officer may be a building inspector, select board or other official or board. RSA 676:5, II. Under RSA 674:33, the ZBA possesses all of the powers of the administrative officer whose decision has been appealed, and the ZBA has authority to affirm, reverse or modify the decision of the administrative official.

4. EQUITABLE WAIVERS OF DIMENSIONAL REQUIREMENTS

The ZBA can legalize existing violations of the zoning ordinance relative to physical layout or dimensional requirements where the violation occurred unknowingly and is discovered later. “Physical layout or dimensional requirements” refers to such zoning provisions as frontage, setbacks and building height. The landowner has the burden of proving four elements set forth in RSA 674:33-a in order to receive an equitable waiver. Applicants for dimensional waivers are eligible even when they are aware of a mistaken lot dimensional measurement, provided, they relied upon a mistaken interpretation by the local official. Applying for and being denied a variance is not a prerequisite to qualifying for a dimensional waiver. *Dietz v. Tuftonboro*, 171 N.H. 614 (2019).

5. ZBA DECISIONS

The concurring vote of any three members of the ZBA is necessary to take any action on any matter on which it is required to pass. RSA 674:33, III. If the ZBA finds in favor of the applicant, all other municipal officials dealing with the property must recognize the decision. The ZBA decision is binding unless overturned on appeal.

E. Historic District Commission

Towns may establish historic district commissions (HDCs) for the purpose of preserving the municipality’s cultural resources, particularly the structures and places of historic, architectural and community value. The goals of the historic district commission are to preserve districts in the town that reflect its cultural, social, economic, political, community and architectural history; conserve property values in such districts; foster civic beauty; strengthen the local

economy; and promote the use of historic districts for “the education, pleasure and welfare” of the town’s citizens. RSA 674:45.

Towns are granted authority by RSA 674:46 to enact an historic district ordinance, which regulates construction, alteration, repair, moving, demolition and use of structures and places within defined historic districts. The HDC has the authority to establish the legal basis for such districts through research and to prepare the content of the historic district ordinance prior to its adoption by the town. RSA 674:46-a. The HDC is responsible for administering the ordinance and regulations within the historic district by reviewing applications for building permits within the historic district and filing with the building inspector either a certificate of approval or notice of disapproval under the procedures outlined in RSA 676:8 – :10.

If authorized by town meeting, the HDC may also assume the composition and duties of the heritage commission. If a town chooses to have both a heritage commission and an historic district commission, the HDC may request assistance from the heritage commission in performing research and preparing the content of the historic district ordinance. RSA 674:46-a, I and V.

F. Court Review of Land Use Board Decisions

1. REHEARING OF AND APPEAL OF ZBA DECISIONS

The governing body, a party to the proceedings, or any other person directly affected by a ZBA decision may challenge the decision by requesting a rehearing. The request must be made within 30 days of the decision and must contain all reasons for the request for rehearing. RSAs 677:2 and 677:3. Reasons not contained in the request for rehearing cannot be relied upon if the case goes to court. *Rochester City Council v. Rochester ZBA*, NH, 194 A.3d 472 (2018). The ZBA has 30 days to grant or deny the request or to suspend the decision for further consideration. RSA 677:3. Any person aggrieved by the ZBA decision upon rehearing may appeal to the superior court. RSA 677:4. Only the select board has authority to appeal a ZBA decision to the superior court. *Hooksett Conservation Comm’n v. Hooksett Zoning Board of Adjustment*, 149 N.H. 63 (2003). The ZBA may also, on its own initiative, prior to expiration of an appeal period, reconsider a decision it decides was erroneous. *74 Cox Street, LLC v. Nashua*, 156 N.H. 228 (2007). The Court upholds the ZBA decision unless it is unlawful or unreasonable. RSA 677:6.

2. PLANNING BOARD APPEALS

There is no statutory process for the rehearing of planning board decisions. However, the logic of the *74 Cox Street LLC* case suggests that the planning board can reconsider an erroneous decision on its own initiative or at the request of a party before the expiration of any appeal period. Care should be taken to provide notice to all affected parties of any action contemplated by the planning board so that their right to be heard can be protected. Appeals from planning board decisions based solely on the terms of the zoning ordinance are made to the ZBA. Based upon a recent decision by the Housing Appeals Board, if a planning board is to deny a plan due to non-compliance with a zoning ordinance, they must be objectively clear zoning non-conformities, and not generalized statements of a zoning ordinance’s purpose. *Ronald Shattuck v. Town of Frankestown*, Housing Appeals Board Case No. PBA-2021-01 (decision dated May 7, 2021). This process is controlled by RSA 676:5, III and RSA 677:15, I-a, and the appeal period begins to run as soon as the planning board has made such a decision at any point in the proceedings. See *Atwater v. Plainfield*, 160 N.H. 503 (2010), and *Saunders v. Kingston*, 160 N.H. 560 (2010). The length of the appeal period is as set forth in the ZBA’s rules of procedure, or is a “reasonable time” as determined by the ZBA.

An appeal from a planning board decision on other grounds is to the Superior Court and, in accordance with RSA 677:15, must be filed within 30 days after the date on which the board grants *final approval or disapproval* to the application. The 30 day time period for appealing a planning board decision is calculated starting with the day after the date of the decision. *Krainewood Shores Assoc. V. Moultonborough*, 174 N.H. 103 (2021). The court upholds a planning board decision unless the decision is illegal or unreasonable in whole or in part. All planning board decisions must be in writing. If the decision is unclear, or the reasoning behind the decision is not made plain, the board risks having its decision returned by the court for further proceedings. See *Motorsports Holdings, LLC. v. Tamworth*, 160 N.H. 195 (2010). In the context of cellphone tower reviews, the Federal District Court has the authority to remand the matter, or even grant approval to an applicant, if the board's decision is unclear. See *New Cingular Wireless PCS, LLC v. Candia*, No. 09-CV-387 (D.N.H. August 11, 2010), and *New Cingular Wireless PCS, LLC v. Greenfield*, No. 09-CV-399 (D.N.H. September 9, 2010). *New Cingular Wireless, PCS, LLC v. City of Manchester*, No. 2014 DNH 044, (D.N.H. February 28, 2014). *T-Mobile Northeast v. Town of Bedford*, 2018 WL 6201717 (D.N.H., November 28, 2018).

As of August 31, 2013, the risk of appealing in the wrong place has been removed. Previously, if an appeal that should have been brought to the ZBA was brought in the Superior Court instead, or vice versa, the appeal would simply be dismissed. By that time the appeal period had usually lapsed and the appellant had no way to have an appeal heard and decided. The new RSA 677:15, I-a provides that if the appeal is filed with the Superior Court but should have been filed with the ZBA, the Court will issue an order to that effect and the Superior Court case will be “stayed” (*i.e.*, put on hold) until matters are finished at the ZBA level. If the matter was filed with the ZBA but should have been filed with the Superior Court, it may still be appealed to the Superior Court within 30 days after the ZBA's denial of a motion for rehearing. In that case, presumably, the ZBA will refuse to hear the appeal, the appellant will ask for a rehearing, and upon denial of the rehearing the appellant will file with the Superior Court. This prevents parties from having to file in both places simultaneously just in case one of the petitions is in the wrong place.

3. HOUSING APPEALS BOARD

Under RSA chapter 679, a three-person housing appeals board has been established to hear appeals from local land use board decisions involving “questions of housing and housing development.” The party appealing a local board decision will have the option of appealing either to the housing appeals board or to the superior court. Appeals to the board will be governed by the same procedures and the same standard of review as in the superior court. Decisions of the board are appealable to the New Hampshire Supreme Court. The Housing Appeals Board has rules of procedure that are available at this location: https://hab.nh.gov/documents/HAB-Administrative-Rules_Hab-100-300.pdf. More information about the Housing Appeals Board is available at the Board's website, <https://hab.nh.gov/>.

G. Enforcement

1. INJUNCTIVE RELIEF UNDER RSA 676:15

RSA 676:15 provides the remedy of an injunction, that is, a specific court order, against a land use or a structure in violation of a zoning ordinance, building code, subdivision regulation or site plan regulation. An injunction is also appropriate against a violation of the conditions of a permit issued under such an ordinance or regulation. *Laconia v.*

Becraft, 116 N.H. 786 (1976). An injunction is an equitable remedy that must be sought by petition to the superior court. A request for injunction may be coupled with a request for civil penalties discussed below.

2. FINES AND PENALTIES PURSUANT TO RSA 676:17

RSA 676:17 provides authority by which municipalities may prosecute local land use violations and seek criminal sanctions and civil penalties. It provides:

- I. Any person who violates any of the provisions of this title, or any local ordinance, code, or regulation adopted under this title, or any provision or specification of any application, plat, or plan approved by, or any requirement or condition of a permit or decision issued by, any local administrator or land use board acting under the authority of this title shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person; and shall be subject to a civil penalty of \$275 for the first offense and \$550 for subsequent offenses for each day that such violation is found to continue after the conviction date or after the date on which the violator receives written notice from the municipality that the violator is in violation, whichever is earlier.

Importantly, the statute was amended in 2009 to clarify that each day of a continuing violation constitutes a separate offense for which the civil penalty may be imposed. RSA 676:17, I. While this seems to be a straightforward rule, it is not so in practice. *See e.g. Town of Atkinson v. Malborn Realty Trust*, 164 N.H. 62 (2012) where the Supreme Court declined to find that each of the 200 days involved in the matter to be a separate offense.

The maximum penalty for a Class A misdemeanor is a term of imprisonment not to exceed one year and/or a fine not to exceed \$2,000. The maximum criminal fine for a corporation that is guilty of a felony is \$100,000. Although not specifically mentioned in RSA 676:17, a municipality may also charge a land use violation as a violation. The maximum penalty that can be imposed following conviction of a violation is \$1,000. All of the above criminal sanctions are in addition to any civil penalty of \$275/\$550 per day for each day that the violation(s) persists.

RSA 676:17 may be used to prosecute a broad range of land use violations, including violations of zoning ordinances and building codes, historic district ordinances, subdivision regulations, site plan regulations and decisions of planning boards and zoning boards. The statute may even be used to prosecute violations of the terms of building permits.

3. RECOVERY OF ATTORNEY'S FEES AND LITIGATION EXPENSES UNDER RSA 676:17, II

The statute provides that municipalities shall recover reasonable attorney's fees and litigation expenses incurred if the municipality prevails in an enforcement action under RSA 676:15 or :17. However, if the municipality does not prevail, a private party may recover its costs from the municipality, even if a court finds that the enforcement action was commenced in good faith. *See Portsmouth v. Boyle*, 160 N.H. 534 (2010).

4. CEASE AND DESIST ORDERS

The building inspector, code enforcement officer or other designated enforcement official may issue a cease and desist order against the same types of violations that are prosecuted under RSA 676:17. Whereas RSA 676:17 provides for civil and criminal penalties for local land use violations, RSA 676:17-a provides a mechanism by which the municipality may halt the illegal conduct itself. Consult the statute (and your town attorney) for details.

5. LOCAL LAND USE CITATIONS

The building inspector or other local enforcement official authorized to prosecute land use violations may choose to charge an offense as a violation and issue a local land use citation pursuant to RSA 676:17-b. This procedure, designed to be similar to a traffic ticket, permits the defendant to plead guilty or *nolo contendere* (no contest) by mail. If the court accepts the plea, the defendant is not required to appear in court.

Prior to serving the local land use citation, the municipality must give the defendant written notice of the violation. If the notice of violation includes a decision that may be appealed to the ZBA, and the defendant chooses to appeal the decision, the matter must first proceed to the ZBA as an appeal from an administrative decision. If the notice of violation is not appealed, then a local land use citation may issue. RSA 31:39-d permits a local official to prosecute an offense and serve a local ordinance summons to appear in the district court. RSA 31:39-c is non-judicial enforcement process administered by either the Police Department or other Municipal Department that must be adopted by the town meeting in order to enforce a municipal code or bylaw.

6. REVOCATION OF PLANNING BOARD APPROVAL

In situations where the violation is characterized as a failure to comply with the terms or conditions of a planning board (site plan or subdivision) approval, the approval itself may be revoked pursuant to RSA 676:4-a. Prior to such revocation, the planning board must give notice to the public, the applicant or applicant's successor in interest, and all abutters. The notice must include the board's reasons for the revocation. A revocation hearing may be held at the discretion of the planning board, or at the request of any party receiving notice. If the planning board revokes all or any portion of a prior approval, a declaration of revocation must be filed with the County Registry of Deeds. The remedy under RSA 676:4-a is in addition to any other remedy, including RSAs 676:15, :17, :17-a and :17-b described above.

IV. WORKING WITH OTHER MUNICIPAL BOARDS CONCERNED WITH LAND USE AND ENVIRONMENTAL PROTECTION

A. Conservation Commission

The conservation commission is sometimes mistakenly categorized as one of the town's land use boards. However, the conservation commission has no authority to enact land use regulations, nor does it have authority to enforce regulations or police violations of local or state laws or regulations.

1. POWERS AND DUTIES

The basic purpose of the conservation commission is found in RSA 36-A:2, which defines its mission as "the proper utilization and protection of the natural resources and... the protection of watershed resources ... of the town." To accomplish these goals, the conservation commission shall:

- conduct research into local land and water areas;
- seek to coordinate the activities of unofficial bodies organized for similar purposes;

- keep an index of all open space and natural, aesthetic or ecological areas within the town and plan to obtain information pertinent to proper utilization of such areas;
- keep an index of all marshlands, swamps and all other wetlands;
- keep accurate records of its meetings and actions; and
- file an annual report printed in the annual town report.

In addition, the conservation commission may:

- advertise, prepare, print and distribute books, maps, charts, plans and pamphlets it deems necessary for its work;
- recommend to the select board or to the Department of Resources and Economic Development a program for the protection, development or better utilization of marshlands, swamps and other wetlands; and
- appoint such clerks and other employees or subcommittees as it may require.

The conservation commission also has other powers provided for in RSA 36-A:4, as follows:

- It may receive gifts of money, personal property, real property and water rights, both within and outside of the town's boundaries, subject to the approval of the select board, managed and controlled by the commission for its purposes.
- It also may acquire by purchase in the name of the town, subject to the approval of the select board, the fee in land or water rights or any lesser interest, such as development rights (that is, a right to prevent development on land owned by someone else), easements, etc., as may be necessary to conserve and properly utilize open spaces and other land and water areas within the town. The commission has the authority to manage and control these property interests.
- The conservation commission does not have the power of eminent domain to accomplish any of these purposes.

A conservation commission may also be granted certain optional powers by town meeting under RSA 36-A:4-a:

- If town meeting approves a specific warrant article authorizing it under RSA 36-A:4-a, II(a), the conservation commission may expend funds for the purchase of interests in land outside the boundaries of the town, subject to the approval of the select board; and
- If town meeting approves a specific warrant article authorizing it under RSA 36-A:4-a, II(b), the conservation commission may expend funds for contributions to "qualified organizations" as defined in Section 170(h)(3) of the Internal Revenue Code of 1986 for the purchase of property interests or facilitating transactions relative thereto to be held by the qualified organization, when the transaction furthers conservation purposes. This section resolves prior uncertainty about whether a conservation commission may spend money to facilitate a conservation easement if the town holds no interest in the property or the easement.
- The 2013 Legislature amended RSA 36-A:4 to prohibit Conservation Commission members from entering private property in order to gather data for use in wetlands designation, prime wetlands designation, or natural resource mapping unless the Conservation Commission obtained the consent of the property owner or an administrative search warrant.

2. ESTABLISHMENT

A town conservation commission is established under RSA 36-A:1 by a vote of a duly warned town meeting to adopt the provisions of RSA chapter 36-A. The article adopted

by the meeting should specify the number of conservation commission members, not less than 3 nor more than 7 all of whom would be appointed by the select board. One of the members may also be a member of the planning board. Members serve for three years. When a commission is first established, the terms of members may be for one, two or three years, arranged so that approximately one-third of the terms expire each year. The select board may also appoint alternate members, who serve in the absence or disqualification of a regular member. Vacancies occurring other than by the expiration of a member's term are filled by the select board for the unexpired portion of that term. Conservation commission members may also serve on other municipal boards, including a historic district commission established under RSA 673:4 and a heritage commission established under RSA 673:4-a.

3. REMOVAL

A member of a conservation commission, after a public hearing, if one is requested, may be removed from office for cause by the select board. No examples of cause are suggested in RSA 36-A:3, but an example may be repeated failure to attend conservation commission meetings.

4. FINANCES

The town meeting is authorized to appropriate money as it deems necessary for conservation commission purposes, but two rather unusual features of the conservation commission's finances are set out in RSA 36-A:5. When the town meeting votes to adopt RSA chapter 36-A and establish a Conservation Commission, that vote should also specify whether the town will create a Conservation Fund.

All or any part of the money appropriated by town meeting in any year, as well as any gifts of money received by the conservation commission under RSA 36-A:4, may be placed in a conservation fund and allowed to accumulate from year to year. This is an exception to the normal rule of municipal finance that appropriations not spent or legally encumbered lapse at the end of the fiscal year. The conservation commission can spend accumulated money at some time in the future without further approval from town meeting.

Money in the conservation fund shall be paid out by the town treasurer only upon order of a majority vote of the conservation commission. The select board has no authority to approve or disapprove expenditure of this money, which is an exception to the broad authority of the select board set out in RSA 41:9. However, the select board has the authority to refuse permission for the acquisition of property under RSA 36-A:4, and the vote of the conservation commission would not be sufficient to support an expenditure in that instance.

The conservation commission is required to hold a public hearing, with notice to the public and interested parties in accordance with RSA 675:7, before using conservation fund money to purchase any interest in real estate or making a contribution to a qualified organization for the purchase of property interests under RSA 36-A:4-a.

B. Heritage Commission

Although established under RSA chapter 674, the heritage commission does not have regulatory power unless it is also given the powers of an historic district commission. The core functions of the heritage commission resemble those of the conservation commission. RSA 674:44-a enables towns to establish a heritage commission for the recognition, use and protection of primarily man-made resources valued for their historic, cultural, aesthetic or community significance.

The heritage commission has the authority to receive gifts of money and property, both real and personal, subject to the approval of the select board, and can acquire in the name of the town, also subject to the select board's approval, a fee or lesser interest in property in order to maintain, improve, protect, limit the future use of or otherwise conserve and properly use the cultural resources of the town. The commission has the authority to manage and control such property but does not have the right to condemn property for these purposes. Other duties include surveying and inventorying the cultural resources of the town; assisting the planning board, if it requests, with sections of the master plan that deal with cultural and historic resources; assisting the historic district commission, if one exists, with research to establish the legal basis for an historic district ordinance; coordinating activities with service organizations and nonprofit groups; holding meetings and hearings as necessary; and publicizing its activities. RSA 674:44-b.

If authorized by town meeting, the heritage commission may assume the composition and duties of the historic district commission. RSA 674:44-b, III. A town may choose to establish a separate heritage commission and historic district commission. In that case, the heritage commission serves in an advisory capacity to the historic district commission, as well as to the planning board and other local boards and residents. RSA 674:44-c.

C. Agricultural Commission

In 2007 the legislature enabled towns to establish another commission with functions similar to those of the conservation commission—the agricultural commission. An agricultural commission may be established by the local legislative body for the proper recognition, promotion, enhancement, encouragement, use, management, and protection of agriculture and agricultural resources, tangible or intangible, which are valued for their economic, aesthetic, cultural, historic or community significance within their natural, built or cultural contexts. RSA 674:44-e.

The agricultural commission has authority to survey and inventory agricultural resources; promote and encourage agriculture; advise and assist the planning board and other boards and agencies, and other organizations on matters affecting agricultural resources; and publicize and report its activities. It may hire consultants and contractors. RSA 674:44-f. The agricultural commission may receive gifts, which, together with town appropriations, shall be placed in a nonlapsing fund. However, the statute expressly prohibits use of the fund to purchase any interest in real property. RSA 674:44-g.

D. Housing Commission

In 2008 the legislature authorized towns to establish a housing commission. The purpose of the commission, established by town meeting vote, is for the proper recognition, promotion, enhancement, encouragement and development of a balanced and diverse supply of housing to meet the economic, social and physical needs of the town and its residents, viewed in the context of the region in which the town is located. A town with a housing commission may still establish a housing authority under RSA chapter 203. RSA 674:44-h.

The housing commission has authority to conduct a housing needs assessment (alone or in cooperation with the regional planning commission); conduct activities to recognize, promote, enhance and encourage the development of housing, particularly affordable and workplace housing; assist the planning board as it requests with relevant portions of the master plan, zoning ordinance and regulations; advise other boards and agencies as they request regarding housing issues; and hire consultants and contractors. RSA 674:44-i, I.

The housing commission may receive gifts of money and property, both real and personal, in the name of the town. Such gifts of money, along with town appropriations, shall be placed in

a nonlapsing fund. RSA 674:44-j. In addition, the housing commission may, by purchase or otherwise, acquire real property in the name of the town as necessary to conserve and properly use the affordable housing of the town, or dispose of such property, all with approval of the governing body. Before spending money to purchase such property, the housing commission must hold a public hearing pursuant to RSA 675:7. The housing commission shall manage and control such property. However, neither the commission nor the town has authority under this statute to take land by eminent domain. RSA 674:44- i, II.

V. WORKING WITH OTHER MUNICIPAL BOARDS

A. Recreation/Park Commission

Towns have authority under RSA chapter 35-B to acquire and use land as a park or recreation area. The select board usually exercises this authority but the town may decide instead to establish a recreation or park commission to exercise it. RSA 35-B:3. The commissioners must be citizens of the municipality and are appointed by the governing body. The number of members is determined by the town meeting vote, and there is no provision for alternate members. Commissioners serve for staggered terms of three years; vacancies are filled by the select board. The town may also choose to have one selectperson serve as an ex-officio member of the commission. RSA 35-B:4.

A recreation or park commission has the authority to acquire, hold, manage and dispose of real and personal property (although the select board must approve the disposal of any real property). The commission may also make contracts, grant concessions, charge fees for participation and use of facilities, make and enforce rules regarding the use of property, facilities and equipment and the conduct of persons thereon, and contract with and/or operate jointly with other governmental units or agencies on programs, facilities or property. RSA 35-B:3. The contracting authority is utilized in conjunction with the authority of the select board to manage internal controls pursuant to RSA 41:9.

Towns may raise and appropriate money for the support and operation of park and recreational activities and lands by taxation or by bonding. RSA 35-B:2, I. Funding may also come from fees and charges for recreation park services and facilities. The legislative body may vote to place all revenue from such fees and charges in a special revenue fund established under RSA 31:95-c. However, money in a special revenue fund may only be spent upon later specific vote of the legislative body. This can make it a cumbersome method for managing recreation money. As a more flexible alternative, the legislative body may vote to place fees and charges in a recreation revolving fund, which does not lapse and is not considered part of the town's general revenue fund. The treasurer has custody of the fund and pays it out upon the order of the commission (or other board or body designated by the voters). Funds may be used only for the purposes of the park/ recreation authority granted under RSA chapter 35-B and may not be made in such a way as to require the expenditure of other town funds that have not been appropriated for that purpose. RSA 35-B:2, II.

B. Board of Cemetery Trustees

RSA 289:2 requires that "every town shall provide one or more suitable public cemeteries for the interment of deceased persons within its limits[,]" which shall be under the control of a board of cemetery trustees. The board of cemetery trustees consists of three or five members elected for

staggered three-year terms. Vacancies are filled by appointment by the select board. RSA 289:6, I. The town may choose to delegate the powers and duties of the cemetery trustees to the select board, RSA 289:6, II-a, or the town manager. RSA 37:6, VII(i); RSA 289:6, II.

The cemetery trustees operate and maintain the cemeteries using a combination of town appropriations, RSA 289:4, and income from cemetery trust funds held by the trustees of trust funds. RSA 289:2-a authorizes the town meeting to determine whether funds received from the sale of cemetery lots will be deposited in the general fund as a sale of town property or deposited with the trustees of trust funds for the maintenance of cemeteries under RSA 31:19-a.

The trustees of trust funds have custody and investment responsibility for the cemetery trust funds and pay available interest to the cemetery trustees for proper expenditures. RSA 289:7. See Chapter Fourteen for additional details.

New cemeteries may be laid out under RSA 289:3, subject to zoning regulations and various setback requirements stated in the statute.

RSA 289:4 authorizes towns to appropriate money for the care and maintenance of deserted and abandoned cemeteries within its borders after a formal declaration of abandonment under RSA 289:19–:21. Private persons and organizations may petition the select board for permission to clean, maintain, restore and preserve a burial ground which has not been maintained and the owner of which is unknown, at their own expense. This permission may be granted even if the burial ground has not been declared “abandoned” under RSA 289:19–:21. RSA 289:14-a. RSA 289:14-b authorizes cemetery trustees to provide information about the location of historic burial grounds and cemeteries to non-governmental organizations for inclusion in their on-line and other databases.

See Chapter Fourteen for additional information on cemetery trustees.

C. Board of Library Trustees

Public libraries are under the control of the local elected boards of library trustees. The board shall consist of any odd number of members that the town may decide to elect; members serve staggered three-year terms. Vacancies are filled by appointment by the select board unless the town meeting provides otherwise. RSA 202-A:6; RSA 669:75.

The board of library trustees shall have the “entire custody and management of the public library and of all the property of the town relating thereto, including appropriations,” RSA 202-A:6, which must be turned over to them by the treasurer on a schedule agreed to by the select board. RSA 202-A:11. RSA 202-A:4 provides that the town “shall annually raise and appropriate a sum of money sufficient to provide and maintain adequate public library services therein or to supplement funds otherwise provided.” The library trustees also expend money from unanticipated funds from government and private sources, money from income-producing equipment and income from library trust funds. RSA 202-A:11, III; :4-c; :11-a; :22. With rare exceptions, the trustees of trust funds have custody and control of the library trust funds. RSA 202-A:23. See Chapter Fourteen.

The high degree of independence of the board of library trustees is highlighted by the case of *Littleton v. Taylor*, 138 N.H. 419 (1994), in which the Supreme Court held that the public librarian could simultaneously serve as selectperson despite RSA 669:7, which prohibits any “full-time town employee” from holding the office of selectperson. The Court held that she was a library employee, not a town employee.

See Chapter Fourteen for more information on library trustees.

D. Board of Assessors

RSA 41:2-c – :2-f allows towns the option to elect a three-member board of assessors to perform all duties that would otherwise be performed by the select board in connection with inventory, appraisal, assessment and abatement for property taxation. The annual meeting may determine the rate or amount of compensation for assessors. RSA 41:2-g. If a vacancy occurs in the office of assessor, it shall be filled by appointment by the select board. RSA 669:75.

E. Sewer Commissions

Where a town votes under RSA 149-I:24 to adopt the provisions of RSA chapter 149-I, relative to construction and maintenance of a public sewer system, RSA 149-I:19 authorizes the town to establish a board of three sewer commissioners with all the powers and duties of RSA chapter 149-I otherwise conferred on the select board. The sewer commissioners may be elected for staggered three-year terms, RSA 149-I:20, or appointed by the select board. RSA 149-I:20-a. In either case, their compensation is determined by the select board. RSA 149-I:21.

The sewer commissioners (or select board, if the town so chooses) may construct, operate and maintain waste treatment works as it deems necessary for public convenience, health and welfare, and may use eminent domain when necessary. RSA 149-I:1, :2. The board may also lawfully discontinue municipal sewer service when it is in the public interest to do so. *Adams v. Bradshaw*, 135 N.H. 7 (1991). The administrative authority of sewer commissioners cannot be circumvented by town meeting. *Cloutier v. Epping Water and Sewer Comm'n*, 116 N.H. 276 (1976).

In addition to ordinary appropriations, sewer systems may be funded by proportional special assessments on benefited property for new construction, RSA 149-I:7, and sewer “rentals” (user fees) for construction, operation and maintenance, based on consumption or some other equitable method. RSA 149-I:8. Sewer rentals are kept in a separate, non-lapsing sewer fund. RSA 149-I:10. To collect special assessments and rentals, towns are given priority liens. RSA 149-I:11. RSA 149-I:4-a allows municipalities to permit the sewer commissioners, or the appropriate governing body, to enter into a contract with a private, nongovernmental entity for the design, construction, and funding of a new sewer or sewerage system and to provide for the repayment of the cost of funding using sewer rentals.

F. Electric, Gas or Waterworks Commissions

Municipalities may own and operate electric, gas or waterworks under RSA chapter 38. RSA 38:18 grants municipalities authority to vest the management of any municipal gas, electric or water system in a board of three or more citizens of the municipality. The commissioners, who serve three-year staggered terms, may be elected or appointed. RSA 38:18, :19. The commissioners have powers and duties as prescribed by the municipality. RSA 38:18. RSA chapter 38 establishes powers to construct, maintain and operate gas, electric or water systems and to impose liens for collection of charges to customers. RSA 38:22. In the case of water systems, funds received from collection of water “rates” shall be kept in a separate, nonlapsing water fund. RSA 38:29.

CHAPTER FIVE

THE RIGHT-TO-KNOW LAW, RSA CHAPTER 91-A

This chapter serves as a basic overview of RSA chapter 91-A, The Right-to-Know Law. For a comprehensive guide, refer to NHMA's publication, *New Hampshire's Right-to-Know Law*.

I. PURPOSE

Part I, Article 8 of the New Hampshire Constitution reads:

All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.

Section 1 of RSA chapter 91-A, the Right to Know Law, reflects this purpose:

Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.

The legislature has decided that the benefits of open government outweigh any inconveniences posed by the Right to Know Law, so compliance should be considered part of the cost of governmental operations.

II. PUBLIC MEETINGS

General Rule: A meeting of a public body must have proper notice and be open to the public.

A What Is a Meeting?

A meeting is defined as “the convening of a quorum of the membership of a public body, ... or the majority of the members of such public body if the rules of that body define ‘quorum’ as more than a majority of its members, whether in person, by means of telephone or electronic communication, or in any other manner such that all participating members are able to communicate with each other contemporaneously, ... for the purpose of discussing or acting upon a matter or matters over which the public body has supervision, control, jurisdiction, or advisory power...” RSA 91-A:2, I.

Whether a gathering is called a meeting, a work session, or anything else, it is a “meeting” for purposes of RSA 91-A if it meets the definition of meeting and must comply with all requirements for meetings.

What is a quorum? A majority of any board or committee constitutes a quorum, unless an applicable statute states otherwise. RSA 21:15. A majority of a quorum is all that is needed to take

action—again, unless there is a statute to the contrary (for example, RSA 674:33, which requires the concurring vote of any three members of a ZBA to take any action on any matter on which it is required to pass). In the rare case that the rules of that body define a quorum as something more than a majority of the members (for example, if a city charter defines a quorum of the city council as two-thirds of the members), the presence of a simple majority will constitute a “meeting” under the Right to Know Law.

What is *not* a meeting (often referred to as a “non-meeting”)? The law makes it clear that certain gatherings of public officials are not meetings subject to the Right to Know Law. RSA 91-A:2, I. They include:

- Chance, social or other encounters “not convened for the purpose of discussing or acting upon” matters over which the public body has supervision, control, jurisdiction or advisory power, “if no decisions are made regarding such matters.” Even if the gathering was not held for the purpose of discussing official matters, general conversation may drift into the area of official business. This should be scrupulously avoided, and if it begins, should stop immediately.
- Strategy or negotiations relating to collective bargaining.
- Consultation with legal counsel. This provision does **not** apply to a discussion among a quorum of a public body of a legal memorandum prepared by or at the direction of the body’s attorney unless the attorney is available at the time of the discussion. At the very least, the body must have the ability to have a contemporaneous exchange of words and ideas with the attorney (for instance, when the attorney is present or is on the telephone with the public body). *Ettinger v. Madison Planning Board*, 162 N.H. 785 (2011). This is distinguished from consideration and discussion of legal advice previously provided by counsel, which may only occur in a nonpublic session. See Section III.A. *Reasons for Nonpublic Sessions*, below.
- A caucus of members of a public body of the same political party who were elected on a partisan basis by a municipality that has adopted a partisan ballot system.
- Circulation of draft documents which, when finalized, are intended only to formalize decisions previously made in a meeting.

It is important to distinguish between gatherings which are “meetings” but which may be held in nonpublic session (discussed in Section III below), and gatherings which are not “meetings.” If the gathering falls within one of the exceptions listed above and is not a meeting, it does not require notice, the public does not have a right to attend, and no minutes are required. Gatherings which are not “meetings” are simply not subject to RSA 91-A.

In 2017, the law was amended to allow a member of a public body to object to a discussion that the member believes violates The Right-to-Know Law. RSA 91-A:2, II-a says that if a member of the public body believes that any discussion in a meeting of the body, including in a nonpublic session, violates RSA chapter 91-A, the member may object to the discussion. If the public body continues the discussion despite the objection, the objecting member may request that his or her objection be recorded in the minutes and may then continue to participate in the discussion without being subject to the penalties. Upon such a request, the public body must record the member’s objection in its minutes of the meeting. See Section III. *Nonpublic Sessions*, below, for additional requirements when the member is objecting to a nonpublic session.

B. What Is a Public Body?

All public bodies are required to have open meetings under the law. A “public body” includes, among other things, “any legislative body, governing body, board, commission, committee, agency, or authority of any county, town, municipal corporation, school district, school administrative unit, charter school, or other political subdivision, or any committee,

subcommittee, or subordinate body thereof, or advisory committee thereto.” RSA 91-A:1-a, VI(d). In short, virtually all official groups that perform a governmental function in a municipality – such as subcommittees, advisory committees, and other bodies designated by the governing body or other public body – are considered public bodies and subject to the requirements of RSA chapter 91-A. See *Bradbury v. Shaw*, 116 N.H. 388 (1976); *Union Leader Corp. v. N.H. Housing Finance Authority*, 142 N.H. 540 (1997); *Professional Firefighters of N.H. v. HealthTrust, Inc.*, 151 N.H. 501 (2004); see also RSA 202-A:3-a (public library boards of trustees are “public bodies”).

Where, however, a committee of public officials only provides advice to planning board applicants, and not to the planning board, that committee is not an advisory committee subject to the Right-to-Know Law. In *Paul Martin v. City of Rochester*, 173 N.H. 378 (2020) the NH Supreme Court narrowly interpreted the definition of “advisory committee” in RSA 91-A:1-a, ruling that the City of Rochester’s Technical Review Group (TRG) was not a public body subject to the public meeting rules of the Right-to-Know Law. The Rochester City Manager appointed city employees to the TRG to provide advice to planning board applicants on their proposed projects. Each member of the TRG would suggest changes in accordance with city regulations, laws, and policies. After the TRG meeting the city planner prepared a summary of the comments made by each TRG member that was provided to the applicant, placed in the planning board file, and made available for public inspection. The plaintiff sought access to the TRG meetings claiming they were held in violation of RSA 91-A because members of the public were not permitted to attend. The Supreme Court concluded that because the TRG’s primary purpose was to provide advice to planning board applicants, not to the planning board, it was not an advisory committee as defined in RSA 91-A:1-a, I.

C. What Notice Is Required?

Notice of the time and place of every public meeting must be given at least 24 hours in advance (not including Sundays or holidays). That notice shall be posted in 2 appropriate places one of which may be the public body’s Internet website, if such exists, or shall be printed in a newspaper of general circulation in the city or town. RSA 91-A:2, II. The law does not require the meeting agenda to be included in the notice (although it certainly may be).

The law was amended in 2017 to create additional posting of notice requirements. If a public body chooses to post meeting notices on the body’s Internet website, it must do so in a consistent and reasonably accessible location on the website. If it does not post notices on the website, it must post and maintain a notice on the website stating where meeting notices are posted. RSA 91-A:2, II-b.

The 24 hours’ notice is only a minimum under the Right to Know Law. A public body may establish a procedural rule requiring more notice, and other statutes also may require more notice. For example, planning board hearings require 10 days’ notice under RSA 676:4, I(d); ZBA hearings require five days’ notice under RSA 676:7; and select board’s hearings on highway petitions require 14 days’ notice under RSA 43:2 and RSA 43:3. Whichever law, ordinance, or rule requires the most notice is the one the public body must follow.

There is one important exception to the general notice requirement: ***Emergencies***.

If there is a “situation where immediate and undelayed action is deemed to be imperative by the chairman or presiding officer of the public body,” a meeting may be held with less than 24 hours’ notice. The chairman or presiding officer is required to post a notice of the time and place of the meeting as soon as practicable, and “shall employ whatever further means are reasonably available to inform the public that a meeting is to be held.” The nature of the emergency must be stated clearly in the minutes of the meeting (and minutes are, of course, required). RSA 91-A:2, II. This portion of RSA 91-A does not override other statutory or local notice requirements.

D. Open to the Public

Anyone, not just local residents, can attend any public meeting. They may take notes, tape record, take photos, and videotape the meeting. As the New Hampshire Supreme Court has affirmed, a public body may not totally exclude recording devices from a public meeting because the law specifically states that “any person shall be permitted to use recording devices, including but not limited to tape recorders, cameras and video equipment, at such meetings.” RSA 91-A:2, II; *WMUR Channel Nine v. N.H. Dep’t of Fish and Game*, 154 N.H. 46 (2006).

However, “open to the public” does not mean that the Right to Know Law grants anyone the right to speak at the meeting. Nobody has a right to disrupt a meeting or to speak without being invited. The chair is in control of who speaks and when. RSA chapter 91-A assures a right to attend only, not a right to participate. *State v. Dominic*, 117 N.H. 573 (1977). Clearly, public participation must be allowed at meetings that are public hearings. In certain circumstances, certain parties may have a legal right to speak, such as at a public hearing where the applicant, abutters, or other parties whose rights are being determined have the right to participate. There may be other reasons to allow public input at specifically designated portions of the meeting. For example, the constitutional due process right to be heard on regulations that may affect citizens’ property rights, or even the political wisdom of being sure that voters’ concerns are heard and addressed, are both strong reasons to designate a “public comment” period.

It is important to note that when public comment is permitted at a public meeting, the public body has created a “limited or designated public forum” under federal and state court decisions interpreting the First Amendment to the U.S. Constitution. This means comments may only be limited by neutral “time, place, and manner” restrictions. Most particularly, both positive and negative comments about the subject at hand must be permitted.

Except for town meetings, school district meetings, and elections, no vote while in open session may be taken by secret ballot. RSA 91-A:2, II. The public has the right to know how each member of a public body votes on an issue before it in order to hold that member accountable for his or her actions. Voting by secret ballot would frustrate the public’s right to this information. *Lambert v. Belknap County Convention*, 157 N.H. 375 (2008).

E. Minutes of Public Meetings

Minutes must be kept of all public meetings and must be available to the public upon request not more than five business days after the public meeting. A business day means the hours of 8 a.m. to 5 p.m. on Monday through Friday, excluding national and state holidays. The minimum content of meeting minutes includes: (1) names of members present; (2) other people participating (although it is not necessary to list everyone present); (3) a brief summary of subject matter discussed, including recording the names of the members who made or seconded each motion; and (4) any final decisions reached or action taken. RSA 91-A:2, II. There is no legal requirement for the public body to accept or approve the minutes. Even if minutes have not yet been approved, they still must be made available not more than five business days after the public meeting. When the five business day deadline is reached before the minutes are approved, they can be made available to the public with a notation that they are a draft version.

In 2017, new website posting requirements for minutes were added to the statute. If a public body maintains an Internet website or contracts with a third party to maintain an Internet website on its behalf, it must either (1) post its approved minutes in a consistent and reasonably accessible location on the website or (2) post and maintain a notice on the website stating where the minutes may be reviewed and copies requested. RSA 91-A:2, II-b(a).

III. NONPUBLIC SESSIONS: EXCEPTIONS TO THE PUBLIC MEETING REQUIREMENT

Nonpublic sessions are meetings or portions of meetings that the public does not have the right to attend. **Nonpublic sessions are allowed only for the reasons specified in RSA 91-A:3, II.** A public body cannot meet in nonpublic session simply for the purpose of deliberation. All deliberations must occur in a public session unless one of the reasons for nonpublic sessions applies. RSA 91-A:2-a, I.

Caution: Resist the temptation to enter a nonpublic session simply because you do not want interruptions from the public. Remember, as discussed in section II, D, while the public has the right to attend public meetings, they do not have the right to speak unless recognized by the chair. If a public body does not wish to accept public comment during a meeting, it does not have to. (As noted above, public hearings are a different matter).

A. Reasons for Nonpublic Sessions

A public body may hold a nonpublic session and may receive evidence and information, deliberate and decide in private only on the matters listed in RSA 91-A:3, II.

Caution: Members of the public commonly and mistakenly believe that they may request the select board – or other boards – to enter nonpublic sessions to discuss matters which they believe are private. Nothing in RSA chapter 91-A allows a board to enter nonpublic session merely upon the request of a member of the public.

The only permissible reasons for entering nonpublic session include:

1. EMPLOYEE REVIEW

The dismissal, promotion, or compensation of any public employee or the investigation or disciplining of such employee is grounds for a nonpublic session. Further, neither the public nor the employee has the right to attend a meeting regarding an investigation of any charges against an employee, unless the employee affected (1) has a right to a meeting and (2) requests that the meeting be open, in which case the request shall be granted. RSA 91-A:3, II(a). This section does not create a right to a meeting for an employee. The right to a meeting must arise from some other source, such as a collective bargaining agreement, a personnel policy, or a state statute. Only if the employee has that right must the board notify the employee in advance that the matter will be discussed at the meeting so the employee has the opportunity to be present and request an open meeting. *Johnson v. Nash*, 135 N.H. 534 (1992). In any case, the employee does not have a right under RSA 91-A to attend or require a board to hold a nonpublic session; the law only permits affected employees with the special right to a public meeting to require a meeting to be public.

2. HIRING

The hiring of a public employee. RSA 91-A:3, II(b). However, appointments to fill vacancies in elected positions are not “hiring” for purposes of this section. *Lambert v. Belknap County Convention*, 157 N.H. 375 (2008).

3. REPUTATION

Matters that would affect someone’s reputation in a negative way (other than a member of the board holding the hearing) if made public. However, if the person requests it, the meeting must be public. RSA 91-A:3, II(c). This exemption includes any application for assistance or tax abatement or waiver of a fee, fine or other levy, if based on inability to

pay or poverty of the applicant. As with employee review discussed above, the person affected does not have the right to attend or require a nonpublic session. In a recent NH Supreme Court decision, *Tejasinha Sivalingam v. Newton*, 2021 N.H. Lexis 150 (2021)) the Court ruled that notice of a nonpublic session based on harm to reputation need not be provided to the person whose reputation could be adversely affected.

4. REAL ESTATE OR PERSONAL PROPERTY

Buying, selling, or leasing of real or personal property, where public discussion would give someone an unfair advantage adverse to the general public. RSA 91-A:3, II(d). For example, it would not be fair for a landowner to hear the select board or council say, “Let’s offer \$50,000, but we might go as high as \$75,000.”

5. LAWSUITS

Consideration or negotiation of pending claims or litigation which has been threatened in writing or filed by or against the public body or any subdivision thereof, or by or against any member thereof because of his or her membership in such public body, until the claim or litigation has been fully adjudicated or otherwise settled. Importantly, an application for tax abatement is not a basis for a nonpublic session. RSA 91-A:3, II(e).

6. EMERGENCY PREPARATIONS

Consideration of matters relating to the preparation for and the carrying out of emergency functions, including training to carry out such functions, developed by local or state safety officials that are directly intended to thwart a deliberate act intended to cause widespread or severe damage to property, widespread injury or loss of life. RSA 91-A:3, II(i).

7. LEGAL ADVICE PROVIDED BY LEGAL COUNSEL

RSA 91-A:3, II(l) allows a public body to enter non-public session to consider advice received from legal counsel, either orally in writing, even if legal counsel is not present. This is distinguished from a “non-meeting” for the purpose of consultation *with* legal counsel. See Section II.A. *What is a Meeting?*, above.

8. DISCLOSURE OF MINUTES

RSA 91-A:3, II(m) allows for a nonpublic session to consider whether to disclose minutes of a nonpublic session due to a change in circumstances. However, any vote on whether to disclose those minutes shall take place in a public session.

B. How to Enter Nonpublic Session

The following outlines the process for entering nonpublic session:

- The body must first meet in a properly noticed public meeting, even if the only reason for the meeting is to hold a nonpublic session.
- During that public session, a motion to go into a nonpublic session must be made by a member of the body and seconded, stating which specific reason listed in RSA 91-A:3, II is relied upon as justification for a nonpublic session. RSA 91-A:3, I(a).
- A roll call vote must be taken to adopt the motion, and a majority of those present must vote “yes.” RSA 91-A:3, I(b). Only the matters specified in the motion can be addressed in the nonpublic session. RSA 91-A:3, I(c). The public body may do anything in a nonpublic session it could do in a public session, including discussion, debate, and voting, as long as it is limited to the subject matter(s) for which the nonpublic session is being held. RSA 91-A:3, I(c).

C. Objecting to Nonpublic Session

In 2017, the law was amended to allow a member of a public body to object to a discussion that violates The Right-to-Know Law. RSA 91-A:2, II-a says that if a member of the public body believes that any discussion in a meeting of the body, including in a nonpublic session, violates this chapter, the member may object to the discussion. If the public body continues the discussion despite the objection, the objecting member may request that his or her objection be recorded in the minutes and may then continue to participate in the discussion without being subject to the penalties that could be imposed under RSA 91-A:8, IV and V. Upon such a request, the public body must record the member's objection in its minutes of the meeting. If the objection is to a discussion in nonpublic session, the objection must also be recorded in the public minutes, but the notation in the public minutes must include only the member's name, a statement that he or she objected to the discussion in nonpublic session, and a reference to the provision of RSA 91-A:3, II, that was the basis for the discussion.

D. Minutes of Nonpublic Sessions

The statute requires that minutes be kept of the proceedings and actions of nonpublic sessions. Minutes shall include the names of members, persons appearing before the public bodies, and a brief description of the subject matter discussed and final decisions. In addition, non-public meeting minutes must record all actions in such a manner that the vote of each member is ascertained and recorded. These minutes must be released to the public within 72 hours, unless two-thirds of the members present, in a recorded vote, decide to seal the minutes because the reasons justifying the need for a nonpublic session still remain, such as the concern for injury to somebody's reputation (other than a board member), or concern that public release of the minutes would make the action just taken ineffectual (for example, the property offer example given above). RSA 91-A:3, III. The vote to seal the minutes of a nonpublic session must be taken in public session.

If the decision is made not to disclose minutes from a nonpublic session, a list of such minutes or decisions shall be kept and this list shall be made available to the public as soon as practicable. The list shall identify the public body and include the date and time of the meeting in nonpublic session, the specific exemption under RSA 91-A:3, II which is relied upon as foundation for the nonpublic session, the date of the decision to withhold the minutes from public disclosure, and the date of any subsequent decision, if any, to make the minutes available for disclosure. RSA 91-A:3, III.

Caution: Unless a two-thirds vote is taken to seal the minutes of a nonpublic session, those minutes are public and must be released. *Orford Teachers Ass'n v. Watson*, 121N.H. 118 (1981). In other words, the fact that the session itself was nonpublic does not automatically make the minutes nonpublic.

Sealed minutes remain sealed until a majority of the current body votes to unseal them. Minutes should be unsealed when the reason for sealing them no longer exists. RSA 91-A:3, III. Although not required by law, it is a good practice for sealed minutes to be reviewed periodically and unsealed by a vote of the board if the reason for sealing no longer exists.

A court can order some or all of sealed minutes to be disclosed. The Hillsborough County Superior Court North applied the three-part *Lamy* test (described more below) to see if the minutes should remain confidential because disclosing them would constitute an invasion of privacy. Finding that the public interest in disclosure outweighed an individual privacy interest in the information, the court ordered some of the minutes to be disclosed. *Union Leader Corp. v. Wilton-Lyndeborough Coop. School Dist.*, No. 216-2012-CV-00450 (May 30, 2012). It is important to note that that this opinion is not binding on any other court or parties, but it leaves open the interesting possibility that portions of sealed meeting minutes are not, in fact, exempt from disclosure and may be examined *in camera* (by the court alone) in a manner

similar to a court's examination of records where the governmental body's assertion of an exemption from disclosure is challenged.

IV. REMOTE PARTICIPATION IN PUBLIC MEETINGS

A public body *may*, but *need not*, allow one or more members to participate in a meeting by telephone or other electronic communication—but only if the member's attendance is “not reasonably practical.” See RSA 91-A:2, III. The reason that in-person attendance is not reasonably practical must be stated in the minutes of the meeting. Although the law does not indicate what situations would qualify, some obvious examples include physical incapacity and out-of-state travel.

Except in an emergency, at least a quorum of the public body must be physically present at the location of the meeting. An “emergency” means that “immediate action is imperative, and the physical presence of a quorum is not reasonably practical within the period of time requiring action.” The determination that an emergency exists is to be made by the chairman or presiding officer, and the facts upon which that determination is based must be included in the minutes. RSA 91-A:2, III(b).

All votes taken during such a meeting must be by roll call vote. Each part of a meeting that is required to be open to the public must be audible “or otherwise discernable” to the public at the physical location of the meeting. All members of the public body, including any participating from a remote location, must be able to hear and speak to each other simultaneously during the meeting and must be audible or otherwise discernable to the public in attendance. No meeting may be conducted by electronic mail or “any other form of communication that does not permit the public to hear, read, or otherwise discern meeting discussion contemporaneously at the meeting location specified in the meeting notice.” RSA 91-A:2, III(c). Meetings held in this manner must comply with all other requirements for public meetings, and this option may not be used to circumvent the spirit or the purpose of the Right to Know Law.

V. COMMUNICATIONS OUTSIDE A MEETING

RSA 91-A:2-a limits the use of communications outside a public meeting held in compliance with the law.

A. No Deliberations Outside a Public Meeting

Public bodies may deliberate on matters of official business “only in meetings held pursuant to and in compliance with the provisions of RSA 91-A:2, II or III”—that is, only in properly noticed public meetings or properly-held nonpublic sessions. This does not mean that any mention of a matter of official business outside a public meeting is illegal; however, it is illegal for the body to deliberate on such a matter outside a meeting—that is, to discuss the matter with a view toward making a decision. This includes email, social media, or any other electronic communication method! The intent of the law is that discussion of official matters by a quorum of the board should occur in public, except for properly held nonpublic sessions or “nonmeetings.”

Following logically from the requirement that public bodies deliberate in public meetings is the requirement that public bodies only take votes or make decisions in properly held public meetings or nonpublic sessions. There is one exception to this requirement: Select board members may sign manifests either in a properly held public meeting or non-contemporaneously (i.e., at different times). So long as a majority of the select board members

sign the manifest, the treasurer may pay the authorized expenditures. RSA 41:29, I(a). This exception does not extend to any other public body or vote.

B. No Circumvention of Spirit or Purpose of the Law

Communications outside a meeting, “including, but not limited to, sequential communications among members of a public body,” shall not be used “to circumvent the spirit and purpose of this chapter.” This is intended primarily to prevent public bodies from skirting the “meeting” definition by deliberating or deciding matters via a series of communications, none of which alone involves a quorum of the public body, but which in the aggregate include a quorum. RSA 91-A:2-a.

As a practical matter, this prohibition means that any electronic media which is to be distributed to a board should be sent in a manner that prevents the board members from “communicating contemporaneously” about the matter. The best practice is to have an administrator or other staff person email the information to him/herself with the members of the board listed in the “bcc” or “blind carbon copy” portion of the address. That way, the members all receive the information, but cannot communicate with one another about the information.

VI. GOVERNMENTAL RECORDS

A. What Is a Governmental Record?

A “governmental record” is defined in RSA 91-A:1-a, III as “any information created, accepted, or obtained by, or on behalf of, any public body, or a quorum or majority thereof, or any public agency in furtherance of its official function. Without limiting the foregoing, the term ‘governmental records’ includes any written communication or other information, whether in paper, electronic, or other physical form, received by a quorum or majority of a public body in furtherance of its official function, whether at a meeting or outside a meeting of the body. The term ‘governmental records’ shall also include the term ‘public records.’”

The word “information,” in turn, is defined as “knowledge, opinions, facts, or data of any kind and in whatever physical form kept or maintained, including, but not limited to, written, aural, visual, electronic, or other physical form.” RSA 91-A:1-a, IV.

1. INFORMATION IN PHYSICAL FORM

“Information” may be “written, aural, visual, [or] electronic,” but in any case, must be in some physical form.

Thus, for something to constitute a governmental record, there must be some physical manifestation of it: for example, a paper document, a computer file, a tape recording, a CD or DVD, or a videocassette. If it exists in one of those forms or any other physical form, it may be a “governmental record” (if the other elements of the definition are satisfied). It is important to note that the law applies to “records” rather than “information.” The law defines information and records; it does not, however, apply to information that a public official or employee happens to know. Thus, if an official or employee is asked for information that is not contained in any “governmental record,” RSA 91-A does not require that information be disclosed.

2. CREATED, ACCEPTED, OR OBTAINED BY A PUBLIC BODY

Information (such as a written communication) will constitute a governmental record when it is “created, accepted, or obtained by, or on behalf of, any public body, or a quorum or majority thereof, ... in furtherance of its official function.” More specifically,

email and other written communications constitute governmental records if they are “received by a quorum or majority of a public body in furtherance of its official function.” Thus, a communication—electronic or otherwise—that is created, accepted, or obtained by less than a quorum of a public body is not a governmental record and is not subject to disclosure.

a. Definition of Agency

A “public agency” is “any agency, authority, department, or office of the state or of any county, town, municipal corporation, school district, school administrative unit, chartered public school, or other political subdivision.” RSA 91-A:1-a, V. Information constitutes a governmental record if it is “created, accepted, or obtained by, or on behalf of, ... any public agency in furtherance of its official function.” RSA 91-A:1-a, III. Examples may include (but not be limited to) the town administrator or manager’s office, the police department, the land use administrator, a planning department, tax collector, treasurer, or town clerk.) Thus, records created, accepted, or obtained by, or on behalf of, a city or town may be governmental records.

b. ‘In Furtherance of Its Official Function’

A governmental record is one created, accepted or obtained by a public body or a public agency in furtherance of its official function. Personal correspondence, for example, is not in furtherance of the public body’s or public agency’s official function and is not subject to disclosure. However, letters and emails sent to the public body about something that the body has control over would be subject to disclosure.

3. RETENTION OF GOVERNMENTAL RECORDS

The question of how long to retain governmental records is less a Right to Know Law question than it is a Municipal Records Disposition Act question. RSA chapter 33-A governs the length of time and the manner in which certain municipal records must be retained and also includes a detailed retention schedule.

a. Municipal Records Committee

Every municipality must have a Municipal Records Committee. RSA 33-A:3. This committee includes the “municipal officers” or their designee (such as the select board, town manager, mayor, county or precinct commissioners), the clerk, the treasurer, an assessor and the tax collector. See RSA 33-A:1, III. It is the duty of the committee to designate which municipal office will be responsible for the retention of each type of municipal record. Alternatively, the municipality may pass an ordinance to make this designation. In any case, however, the statute requires that the committee exist.

b. Retention Periods

RSA 33-A:3-a sets forth the length of time that 156 different categories of municipal records must be retained. The following are a few examples:

- Abatements five years
- Annual audit reports ten years
- Annual reports and town warrants..... permanently
- Bank deposit slips and statements six years
- Correspondence - administrative minimum of one year
- Correspondence transitory retain as needed for reference

Minutes of boards and committees permanently
Job applications: successful.....retirement or termination plus 20 years
Job applications: unsuccessful.....current year plus three years
Vehicle maintenance records..... life of vehicle plus two years

Each municipal official and body should review the retention schedule in RSA 33-A:3-a to ensure that records are being retained for as long as the law requires and to ensure that there is an appropriate policy in place governing the time and manner of record disposal. Once the retention period has expired, records may be destroyed or discarded; however, so long as they still exist, they remain governmental records subject to the disclosure requirements of the Right to Know Law. Municipalities should develop a policy regarding retention and disposal of records. The policy should include required retention periods; a set time after the end of the retention period when records will be disposed of; which official, body, or employee will review the records, decide what may be disposed of, and actually dispose of it (these tasks might be assigned to different officials, boards or employees as time permits); and the method of disposal.

c. Format

The government must maintain governmental records “in a manner that makes them available to the public.” *Hawkins v. N.H. Dep’t of Health and Human Services*, 147 N.H. 376 (2001). The Court said that information stored as data in a computer system was a public (now governmental) record under the Right to Know Law. In response to the *Hawkins* decision, legislation enacted in 2008 and amended in 2009 states that records maintained in electronic form must remain accessible and available as long as they exist and must be kept and maintained for the same minimum retention or archival periods as their paper counterparts. RSA 91-A:4, III-a.

The legislature has made several changes to the RSA chapter 33-A to allow for electronic storage of records. Electronic municipal records listed on the disposition and retention schedule of RSA 33-A:3-a that are to be retained for 10 years or less may be retained solely electronically in their original format if so approved by the municipal committee responsible for the records. The municipality is responsible for assuring the accessibility of the records for the retention period. If the records retention period exceeds 10 years or the municipal committee does not approve retention of the record solely electronically in an approved format, the records must be transferred to paper, microfilmed, or stored in portable document format/archival (PDF/A) or another approved file format on a medium from which it is readily retrievable.

Furthermore, under RSA 33-A:5-a paper municipal records listed in the disposition and retention schedule of RSA 33-A:3-a may be transferred to electronic records, as defined in RSA 5:29, VI, and the original paper records may be disposed of as the municipality chooses, subject to the requirements of other state or federal laws. Such records shall be stored in portable document format/archival (PDF/A) or another file format approved by the secretary of state and the municipal records board. However, as provided in RSA 33-A:6, original town meeting and city council records shall not be disposed of but shall be permanently preserved; such records prior to 1900 need not be microfilmed unless legible.

At least once every five years from date of creation, the municipal records committee must review documents and procedures for compliance with guidelines issued by the secretary of state and the municipal records board.

Regardless of format, the municipality is responsible for maintaining all records in an accessible place and manner. RSA 33-A:5-a; RSA 91-A:4, III.

4. PUBLIC INSPECTION OF GOVERNMENTAL RECORDS

RSA 91-A:4 governs the public inspection of governmental records. The statute requires the following:

a. Availability

Governmental records must be available for inspection and copying during the regular business hours of the public body or agency, unless a record is temporarily unavailable because it is actually being used. See *Gallagher v. Windham*, 121 N.H. 156 (1981). The state Supreme Court has held that when the office receiving the request for a record is busy, officials may ask the citizen to make an appointment to review the records. RSA 91-A:4, IV requires a public body or agency to provide a written reason for the delay when it is not able to make a governmental record available for inspection and copying within five business days after receiving a request. See also *Brent v. Paquette*, 132 N.H. 415 (1989). RSA 91-A:4, IV also requires a public body or agency to cite the specific exemption authorizing withholding of a governmental record, and a brief explanation of how the exemption applies, when it denies a request to inspect or copy the record.

How far must a municipality go to find records responsive to a request under RSA chapter 91-A? “[T]he search need not be exhaustive. Rather, the agency must show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents.” *ATV Watch v. N.H. Dep’t of Transportation*, 161 N.H. 746 (2011). When denying a request for records, the municipality must provide the reason(s) for denial in writing. However, it is not necessary to produce a detailed list such as a “Vaughn index” (an index with a general description of each document withheld and the reason for its nondisclosure). *Id.*

One lingering question is who is a “citizen” with the right to access governmental records? The statute refers to “citizens” but does not define this term. The United States Supreme Court issued an opinion in April 2013 addressing this question under a similar statute in Virginia. *McBurney v. Young*, 569 U.S. 1709 (2013). Two separate cases (consolidated and heard together by the Court) involved records requests from people who were not Virginia citizens. Both requests were denied under the Virginia Freedom of Information Act, although the information was available through other channels. Of particular interest, the Court noted that New Hampshire is one of the eight states whose public records statutes guarantee access only to citizens of that particular state.

This opinion includes several important points:

- The U.S. Constitution does not grant any citizen the right to access governmental records. Rather, that right is a relatively recent addition to federal law, based in the federal Freedom of Information Act first enacted by Congress in 1966.
- Individual state freedom of information acts (known by various names) are intended to provide citizens of that state access to information about what their own state and local governments are doing.
- State freedom of information acts do not violate the U.S. Constitution by regulating how access to public documents may be obtained by non-citizens of a state, so long as there exists some means by which access may be obtained.
- The provisions in these laws limiting access to citizens of that state recognize that the taxpayers of that state “foot the bill for the fixed costs

of recordkeeping and record production,” and do not violate the U.S. Constitution by preventing citizens of other states from making a profit by trading in the use of that information.

In New Hampshire, we do not yet have a ruling from our Supreme Court as to the meaning of the word “citizen” in RSA 91-A. Thus, we cannot say with certainty how our courts or legislature will define or construe the meaning of that term. For now, the focus when responding to requests for governmental records should remain on the obligation to meet the purpose and intent of the law. The purpose is “to ensure the greatest possible access to governmental records.” If requests are received from outside New Hampshire, it seems that a refusal to provide those records electronically will not violate a federal law. Furthermore, it appears that, under RSA 91-A, a request by an out-of-state person could be denied. However, a request made in person should be honored, regardless of the citizenship of the person making the request, even though you are likely not technically required to do so.

b. Copies

Any citizen may make notes, tapes, photos, or photocopies of a governmental record. The law does not provide a right to receive copies of records at the municipality’s expense. See *Gallagher*, above. Government officials should not hand over the records for copying. See RSA 41:61, which prohibits the person with custody of the records from loaning them out, and RSA 91-A:4, III. The governmental agency or official is permitted by RSA 91-A:4, IV to make copies and charge the person requesting them the “actual cost of providing the copy.” Note, however, that the governmental agency is strictly prohibited from charging a fee for allowing a person to merely “inspect” the records. RSA 91-A:4, IV. The “actual cost” of copying probably does not include an amount for staff time needed to make the copies, but may include the actual mechanical costs of copying.

Establishing a per copy cost that is not out of line with the prevailing rates charged by other governmental agencies will likely help to avoid complaints that the rates exceed the “actual cost” or are so high as to frustrate the intent of the law. In *Paul Martin v. City of Rochester*, 173 N.H. 378 (2020) the N.H. Supreme Court ruled that the city’s public records copying fee of fifty cents per page for the first ten pages and then ten cents per page did reflect the “actual cost.” The plaintiff challenged the city’s copying fee schedule arguing that only a rate of four cents per copy would comply with RSA 91-A:4, IV. The Supreme Court agreed with the trial court that the testimony of the city manager was adequate evidence that the city’s fee schedule was commensurate with the actual cost of providing the copy. The Court noted that the legislature did not mandate the use of a formulaic method for determining the actual cost for copying. Thus, the testimony provided by the city manager that that the city based its copying fee on the cost of leasing copy machines, maintenance, capital costs of the machines, and the cost of paper was sufficient.

Effective June 21, 2016, RSA 91-A:4, IV was amended to provide that no fee may be charged for the inspection or delivery, without copying, of governmental records, whether in paper, electronic, or other form. This statute was further amended in 2019 to make clear that “no cost or fee” may be charged for the inspection or delivery, without copying, of governmental records. When an electronic record is provided, and no redaction of that record is necessary, no fee can be charged for the delivery of that record. However, if the electronic record must be redacted and a paper copy of the redacted version of the record

is provided in response to a public records request, a fee can be charged for the paper copy, but not for the cost of the redaction process. On the other hand, if an electronic record were redacted and the person requesting access only requested the ability to inspect the redacted version, no fee can be charged.

c. Form and Manner of Production

If the information requested exists in a more convenient form, then that must also be made available. For instance, in *Menge v. Manchester*, 113 N.H. 533 (1973), an individual requested that the city produce certain computerized tax records. In response, the city provided only photocopies of the paper assessment cards. The Court held that the city's response did not satisfy its requirements under the Right-to-Know Law. It is unclear from the *Menge* decision how municipalities should respond to RSA chapter 91-A requests that involve copyrighted software. However, while RSA 91-A:4, III requires records to be maintained in an accessible way, RSA 91-A:4, VII provides that "nothing in this chapter shall be construed to require a public body or agency to compile, cross-reference, or assemble information into a form in which it is not already kept or reported to that body or agency." See also *Hawkins v. N.H. Dep't of Health and Human Services*, 147 N.H. 376 (2001); *N.H. Civil Liberties Union v. Manchester*, 149 N.H. 437 (2003); *Hampton Police Ass'n v. Hampton*, 162 N.H. 7 (2011).

Production of electronic records has been on the forefront of The Right-to-Know Law over the past few years. The obligation to provide electronic records in an electronic form was addressed by the New Hampshire Supreme Court in *Green v. School Administrative Unit #55*, 168 N.H. 796 (2016). In *Green*, the Court determined that, when requested to do so, a public body is required to provide electronic records in electronic format in response to a Right-to-Know Law request if it is reasonably practical to do so.

Thereafter, the statute was amended to specifically address requests for records in electronic form. RSA 91-A:4, V says that any public body or agency which maintains governmental records in electronic format may, in lieu of providing original records, copy governmental records requested to electronic media using standard or common file formats in a manner that does not reveal information which is confidential under this chapter or any other law. If copying to electronic media is not reasonably practicable, or if the person or entity requesting access requests a different method, the public body or agency may provide a printout of governmental records requested, or may use any other means reasonably calculated to comply with the request in light of the purpose of this chapter as expressed in RSA 91-A:1. The change to the records retention law, allowing electronic files to be kept electronically, and the subsequent changes to RSA chapter 91-A suggest that municipalities may be obligated to keep their records in an accessible format. No fee can be charged for the inspection or delivery, without copying, of governmental records, whether in paper, electronic, or other form. RSA 91-A:4, IV.

Under the law at the time this book went to publication, there is no obligation to email or otherwise send records electronically—or even to send records at all. In September 2017, the New Hampshire Supreme Court held that a school administrative unit's policy of requiring individuals to acquire electronic records by coming to the business office with their own thumb drive, or by purchasing a thumb drive from the business office, did not violate the Right-to-Know Law. *Taylor v. School Administrative Unit #55*, 170 N.H. 322 (2017). The Court focused on RSA 91-A:4, I, which requires records to be made

accessible on the business premises for inspection, copying, etc., but does not require that records be *sent* to individuals.

As a practical matter, municipalities should protect the integrity of their computers and networks by refusing to allow people to insert media such as USB flash drives into the public computers. This is a significant risk to security of public records and a possible avenue for introduction of software that could harm the system or corrupt the data. Even if the citizen appears to have no intent to cause the harm, most individuals are not capable of truly assuring that their media is free of malicious software.

d. Motive

The motives of the person requesting the information are irrelevant and should not be questioned. *Union Leader Corp. v. Nashua*, 141 N.H. 473 (1996). As a general rule, if the requested information is subject to disclosure under the Right-to-Know Law, it belongs to everyone. *Lambert v. Belknap County Convention*, 157 N.H. 375 (2008).

e. Raw Materials

Materials (tapes, rough notes, etc.) used to compile the official minutes are governmental records. These materials may be destroyed after the official minutes are prepared, but they remain governmental records until destroyed. NHMA recommends that municipalities adopt (and then follow) a formal policy stating how long drafts or original tapes are kept after the minutes are prepared and approved by the public body, who is responsible for discarding them, and the method to be used. It is also our position that the better practice is not to destroy “draft” minutes; remember that minutes must be made available within five days of a public meeting, and the only minutes available at that time are usually the draft minutes. It is also important that municipalities designate who is taking the official minutes. Tapes or notes made by a board member for personal use are not governmental records and are not subject to disclosure under the Right to Know Law. RSA 91- A:5, VIII; *Brent v. Paquette*, 132 N.H. 415 (1989).

f. Working Documents

Preliminary drafts, notes, and memoranda and other documents not in their final form may or may not be governmental records subject to release under the Right to Know Law. In *Goode v. N.H. Office of the Legislative Budget Ass’t*, 145 N.H. 451 (2000), the Supreme Court reversed the trial court’s decision that audit papers were not subject to disclosure to the public “because they were not in their final form.” The Court reasoned that RSA 91-A:4, IV does not exempt records just because they are drafts and not yet completed. However, the legislature subsequently added a new paragraph, RSA 91-A:5, IX, which exempts from disclosure “[p]reliminary drafts, notes, and memoranda and other documents not in their final form *and not disclosed, circulated, or available to a quorum or a majority of the members of a public body.*” Thus, such materials are subject to disclosure only if they have been made available to a quorum or majority of the public body to which they relate. Within a public agency, this exemption protects “pre-decisional, deliberative communications that are part of an agency’s decision-making process.” *ATV Watch v. NH Dep’t of Transportation*, 161 N.H. 746 (2011). It does not matter whether the document is close to completion or whether the author of the document expects to alter it. Moreover, documents that contain facts, rather than opinions or suggestions not based on fact, may still be considered exempt as preliminary drafts so long as they are pre-decisional, deliberative communications. The Court in *ATV Watch* stressed that the “nature

of the process is more important than the nature of the materials.” In addition, as the court in *Goode* noted, draft documents may still be exempt from disclosure if they qualify as confidential information under RSA 91-A:5, IV.

g. Format

The government must maintain governmental records “in a manner that makes them available to the public.” *Hawkins v. N.H. Dep’t of Health and Human Services*, 147 N.H. 376 (2001); RSA 91-A:4, III and III-a. The *Hawkins* Court said that information stored as data in a computer system was a public (now “governmental”) record under the Right-to-Know Law. In response to the *Hawkins* decision, legislation enacted in 2008 states that records maintained in electronic form must remain accessible for the same periods as their paper counterparts. RSA 91-A:4, III-a. As discussed above, retention periods for all records are prescribed in a separate statute, RSA chapter 33-A.

h. Settlement Agreements

Every agreement to settle a lawsuit or claim entered into by any municipality or its insurer must be kept on file at the municipal clerk’s office and made available for public inspection for 10 years from the date of settlement. RSA 91-A:4, VI.

i. Employee Separation Payments

Records of any payment made to an employee of any public body or agency, or to the employee’s agent or designee, upon the resignation, discharge, or retirement of the employee, paid in addition to regular salary and accrued vacation, sick, or other leave, shall immediately be made available without alteration for public inspection. All records of payments shall be available for public inspection notwithstanding that the matter may have been considered or acted upon in nonpublic session pursuant to RSA 91-A:3.

5. EXEMPTIONS TO PUBLIC DISCLOSURE

RSA 91-A:5 exempts certain documents from public disclosure, including records regarding grand and petit juries, parole and pardon boards, personal school information of students, and teacher certification. In addition, under RSA 91-A:4, I, documents whose disclosure is prohibited by another statute are also not subject to disclosure. *But see Grafton Co. Attorney’s Office v. Canner*, 147 A.3d 410 (2016) (records maintained by arresting and prosecuting agencies pertaining to an annulled arrest and the related prosecution do not fall under the exemption in RSA 91-A:4, I, for records that are “otherwise prohibited by statute” from public inspection.) The following records, which are particularly relevant to municipalities, are also exempt:

- Under RSA 91-A:5, IV “records pertaining to internal personnel practices” are exempt from disclosure. In 2020 the NH Supreme Court overruled its decision in *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993) that “internal personnel practices” are categorically exempt from disclosure under RSA 91-A:5, IV. The Court will now require that the disclosure of internal personnel practices will be subject to a balancing test to determine whether such materials are exempt governmental records. *Union Leader Corp v. Town of Salem*, 173 N.H. 345 (2002). As stated by the Court in the companion case *Seacoast Newspapers v. Portsmouth*, 173 N.H. 325 (2020), the “internal personnel practices” exemption applies narrowly to records relating to the internal rules and practices governing an agency’s operations and employee relations. In the future, the balancing test used for other categories of records listed in RSA 91-A:5, IV shall apply to records relating to “internal personnel practices.” Determining whether the exemption for records relating to “internal personnel practices” applies will require analyzing whether the records relate to such practices

as redefined in the Seacoast Newspapers decision, and whether their disclosure would constitute an invasion of privacy. In a decision from 2016, the Court explained that for information to be an “internal personnel practices” it must be both “internal” and “personnel.” *Reid v. New Hampshire Attorney General*, 169 N.H. 509 (2016). “Internal” means that the information fits within the limits of an employment relationship. The term “personnel” refers to the selection, placement, and training of employees and the formulation of policies, procedures, and relations with or involving employees or their representatives as well as the conditions of employment and such matters as hiring and firing, work rules and discipline, compensation and benefits. Salaries and lists of employees, however, are not exempt from disclosure. *Mans v. Lebanon School Board*, 112 N.H. 160 (1972). Similarly, the names of public retirees and the amount of retirement benefits received are not exempt from disclosure, since public retirees have no greater privacy interest in information associating their names with the amounts of their retirement benefits than current public employees have in information linking their names and salaries. *Union Leader Corp. v. N.H. Retirement System*, 162 N.H. 673 (2011). However, medical or welfare information, library user and videotape sale or rental records would still be deemed exempt from disclosure. RSA 91-A:5, IV.

- Confidential, commercial or financial information and other records whose disclosure would be an invasion of privacy. RSA 91-A:5, IV.
- Notes or other materials made for personal use that do not have an official purpose, including notes and materials made prior to, during or after a public proceeding.
- Preliminary drafts, notes and memoranda, and other documents not in their final form and not disclosed, circulated or available to a quorum or a majority of a public body. RSA 91-A:5, IX. This exemption is designed to “protect pre-decisional, deliberative communications that are part of a [governmental] agency’s decision-making process” and does not turn on whether the document is close to completion or whether the author of the document expects to alter it. Moreover, documents that contain facts, rather than opinions or suggestions not based on fact, may still be considered exempt as preliminary drafts so long as they are pre-decisional, deliberate communications. The “nature of the process is more significant than the nature of the materials.” *ATV Watch v. N.H. Dep’t of Transportation*, 161 N.H. 746 (2011).
- Video and audio recordings made by a law enforcement officer using a body-worn camera pursuant to RSA 105-D except where such recordings depict any of the following:
 - (a) Any restraint or use of force by a law enforcement officer; provided, however, that this exemption shall not include those portions of recordings which constitute an invasion of privacy of any person or which are otherwise exempt from disclosure.
 - (b) The discharge of a firearm, provided that this exemption shall not include those portions of recordings which constitute an invasion of privacy of any person or which are otherwise exempt from disclosure.
 - (c) An encounter that results in an arrest for a felony-level offense, provided, however, that this exemption shall not apply to recordings or portions thereof that constitute an invasion of privacy or which are otherwise exempt from disclosure.
- Records pertaining to information technology systems, including cyber security plans, vulnerability testing and assessments materials, detailed network diagrams, or other materials, the release of which would make public security details that would aid an attempted security breach or circumvention of law as to the items assessed.

6. WHAT DOES ‘CONFIDENTIAL, COMMERCIAL OR FINANCIAL’ MEAN?

Several Supreme Court decisions have examined what confidential, commercial or financial information is and when such information should be disclosed to the public,

if at all. Whether such records must be disclosed decision depends on a balancing test that weighs the public's interest in disclosure against the government's interest in nondisclosure. In *Union Leader Corp. v. N.H. Housing Finance Authority*, 142 N.H. 540, 554 (1997), the Court applied a two-step analysis:

- Is the requested document confidential, commercial or financial information?
- Would its disclosure constitute an invasion of privacy?

The Court said that an "expansive" definition of the terms "confidential, commercial or financial" could not be given because to do so would allow the exemption to swallow the rule, which would be inconsistent with the purposes of the Right to Know Law.

The Court concluded that "commercial or financial" information includes business sales statistics, research data, technical designs, overhead and operating costs, and information on financial condition. Such information is not automatically exempt from disclosure, but "is sufficiently private that it must be balanced against the public's interest in disclosure." Although the court has not addressed this issue specifically, it seems reasonable to conclude that financial information which would facilitate fraud (social security numbers, bank account numbers, birth dates, etc.) is also covered by this exemption.

"Confidential" information is "determined objectively, and not based on the subjective expectations of the party generating it." In other words, just because a person stamps a document "confidential" does not mean it is exempt from disclosure to the public under the Right to Know Law. Again, the benefits of disclosure of such information must be weighed against the benefits to the government of nondisclosure. The burden is on the government to prove disclosure would likely impair its ability to obtain such information in the future, or that disclosure would cause "substantial harm to the competitive position of the person from whom the information was obtained." This is not the exclusive test for whether information is confidential.

The second step of the analysis is to determine if disclosure would constitute an invasion of privacy. In *Lamy v. N.H. Public Utilities Comm'n*, 152 N.H. 106 (2005), the Court applied a three-part test:

- Is there a privacy interest at stake that would be invaded by disclosure?
- If so, what is the public's interest in disclosure?
- Finally, balance the public's interest in disclosure against (a) the government's interest in nondisclosure and (b) the individual privacy interest that would be invaded.

The party resisting disclosure "bears a heavy burden to shift the balance towards non-disclosure." In other words, the court begins by assuming that the information should be disclosed, and the party resisting disclosure must convince the court it should not be disclosed.

The determination of whether a privacy interest exists is based on an objective standard, not on the subjective expectations of any particular person. Some privacy interests may be relatively strong, such as certain private financial information (account numbers, etc.), while others may be relatively weaker. For example, the Court in *Lamy* determined that residential utility customers have a "modest" privacy interest in their names and home addresses because that information "serves as a conduit into the sanctuary of the home." Noting that the Right to Know Law gives every member of the public (including commercial advertisers and solicitors) the same right to access public information, the Court said that "individuals have some nontrivial privacy interest in avoiding the influx of unwanted, unsolicited mail or the telephone calls and visits that could follow from disclosure of their names and home addresses." Similarly, the Court has found that a person who applies for appointment to fill a vacant elective office has a minimal privacy interest in the information on the application that would be invaded by disclosure of the application

itself. *Lambert v. Belknap County Convention*, 157 N.H. 375 (2008). Most recently, the Court rejected the idea that retired municipal employees had any greater privacy interest in information associating their names with the amounts of their retirement benefits than the interest public employees have in information linking their names and salaries. *Union Leader Corp. v. N.H. Retirement System*, 162 N.H. 673 (2011). In the Superior Court decision of *Clay v. City of Dover*, Strafford County Superior Court, No. 219-2014-CV-124 (May 29, 2015), the court concluded that persons who had applied for the school superintendent position had no privacy interest in the fact they had applied since there was no evidence the applicants had an expectation their names would remain non-public.

When a privacy interest does exist, the second part of the test is to determine what the public interest is, if any, in disclosing the information. As the Court stated in *Lamy*, if the disclosure of such private information does not “provide the utmost information about what the government is up to,” then it should not be disclosed. The Court has previously held that the nature of the document (or information) requested must be examined in relationship to the basic purpose of the Right to Know Law. *Union Leader Corp. v. N.H. Housing Finance Authority*, 142 N.H. 540, 544 (1997). The purpose is “to increase the public’s knowledge about how the [government] works.” As a result, the Court will “broadly construe provisions favoring disclosure and interpret the exemptions restrictively.” *Goode v. N.H. Office of the Legislative Budget Ass’t*, 145 N.H. 451, 453 (2000). For example, “knowing how a public body is spending taxpayer money in conducting public business is essential to the transparency of government, the very purpose underlying the Right-to-Know Law.” *Union Leader Corp. v. N.H. Retirement System*, 162 N.H. 673 (2011). In *N.H. Civil Liberties Union v. Manchester*, 149 N.H. 437 (2003), the New Hampshire Civil Liberties Union requested that the Manchester Police Department (government) disclose certain photographs of individuals stopped by the police. In order to properly deny the Right to Know request, the Court said the government must show the information sought “will not inform the public about the [government’s] activities, or that a valid privacy interest, on balance, outweighs the public interest in disclosure.”

This will bring the court to the third part of the test, which is to weigh the public interest in disclosure against the government’s interest in nondisclosure and the individual privacy interest that will be invaded. This balancing test and the weight of the various interests will depend on the circumstances involved. For example, the Court in *Lambert v. Belknap County Convention* held that the public’s interest in the contents of an application for appointment to fill a vacant elective office is “high.” 157 N.H. 375 (2008). On the other hand, the Court held in *Lamy v. N.H. Public Utilities Comm’n*, 152 N.H. 106 (2005), that if the only public interest in disclosure is to use that information to gain secondary information (“derivative use”), that interest will be given little weight. For example, in that case, a citizen requested copies of complaints filed by utility customers with the Public Utilities Commission (PUC). The PUC provided the reports but redacted the names and street addresses of residential customers, leaving only the town in which each person lived. The Court noted that names and street addresses alone would provide no information about the PUC’s own conduct. The person who requested the information argued that he wanted the names and addresses so he could contact those customers at home to interview them about the PUC’s conduct. The Court stated that when such derivative use is the only public interest in disclosing information, it will not be given great weight; in this case, therefore, disclosure was not appropriate because the public interest did not outweigh the individuals’ privacy interests in not being contacted at home.

The Court also recently addressed whether there is a privacy interest in certain information that could otherwise be available through other sources, such as the Internet. The Court concluded that a person’s address or whereabouts under the Right- to-Know Law—even if the information may otherwise be public—is still significant. Furthermore, individuals generally have a right to “practical obscurity”— that is, privacy in their

identity and whereabouts. However, this right to practical obscurity does not mean that such information is per se exempt from disclosure. *N.H. Right to Life v. Dir., N.H. Charitable Trusts Unit*, 169 N.H. 95 (2016).

As an example of how the privacy balancing test will be used after the Court's decision in *Union Leader v. Salem*, a recent Superior Court decision ruled that an internal investigative report about the conduct of a police officer during the performance of his official duties would likely be subject to disclosure under the Right-to-Know Law, even if the allegations that brought about the investigation are unfounded. However, an internal investigative report about the conduct of a police officer in his personal affairs, and not during the performance of his official duties, may entail a sufficient privacy interest under RSA 91-A:5, IV to justify not disclosing an internal affairs investigation report. *Samuel Provenza v. Town of Canaan*, Grafton County Superior Court Case No. 215-2020-CV-155 (decided December 2, 2020).

Finally, RSA 91-A:5, IV has a final consideration even when the above privacy balancing test supports non-disclosure. The statute states, "Without otherwise compromising the confidentiality of the files, nothing in this paragraph shall prohibit a public body or agency from releasing information relative to health or safety from investigative files on a limited basis to persons whose health or safety may be affected." If the party making the request under the Right-to-Know Law can establish that these records have an impact on their health or safety, the agency can release the records to that person after making sure to properly redact the records to protect the privacy interest of the other parties involved.

B. Other Exemptions

1. LAW ENFORCEMENT FILES

Interestingly, law enforcement records are not directly addressed by the Right to Know Law. Since 1978, New Hampshire courts have applied the test used in the federal Freedom of Information Act (FOIA) to analyze requests for law enforcement documents under RSA 91-A. As the New Hampshire Supreme Court has confirmed, the six-prong FOIA test should be used to analyze any records compiled for law enforcement purposes (not only those directly connected with an investigation or prosecution). A record satisfying any of the six elements is exempt from disclosure. *Montenegro v. Dover*, 162 N.H. 641 (2011).

The six elements under the FOIA rules for law enforcement records are:

- A. Interference with law enforcement proceedings. This includes details regarding initial allegations giving rise to an investigation, interviews with witnesses and subjects, contacts and investigative reports furnished to the prosecuting attorneys, prosecutive opinions, and a reasonable belief that an investigation will lead to criminal charges at some point in the future (even if no charges are pending at the current time).
- B. Interference with a defendant's right to a fair trial. This includes pretrial situations and consultation with the prosecutor. It also includes records relating to the guilt or innocence of a defendant, tests taken or refused by the defendant, confessions (the existence or absence of), anything regarding prospective witnesses or speculation about the merits of the case, and anything that would tend to prejudice potential jurors.
- C. Invasion of privacy. This is analyzed in a manner similar to the "invasion of privacy" exemption under the *Lamy* case discussed above. Examples in this area include marital status, legitimacy of children, medical conditions, substance abuse, domestic disputes, names of witnesses and information they provided, and names of the subjects of an investigation.
- D. Confidential sources. This includes information that could identify or lead to the identification of confidential sources, whether a person was given the promise of

confidentiality in return for information, whether express or implied.

E. Disclosing investigative techniques and procedures. This includes information which could reasonably be expected to make it easier to circumvent the law by providing those who wish to engage in criminal activity with the ability to adjust their behaviors in an effort to avoid detention, investigation and prosecution procedures, guidelines and techniques. This does not include information already well-known to the public; that information is not exempt.

F. Endangering the life or safety of any person. FOIA mentions law enforcement personnel, and the New Hampshire Supreme Court has included any other person. The question to ask is whether disclosure of the information could “reasonably be expected” to endanger anyone.

In 2012, the FOIA test was applied for the first time to “law enforcement records” created, accepted, or obtained by an agency that was not strictly a police department. *38 Endicott Street North, LLC v. State Fire Marshal*, 163 N.H. 656 (2012). The records in this case were those of the NH State Fire Marshal’s Office. The Court concluded that the exemption may apply to records compiled by any type of agency, even if its primary function is not law enforcement. The difference is that an agency which is primarily a law enforcement agency (such as a local police department) does not have a high burden of proof regarding the “law enforcement purpose” of the records. On the other hand, a mixed-function agency with some administrative and some law enforcement purposes must satisfy a higher burden, demonstrating that the records at issue were created in furtherance of its sphere of law enforcement authority. This decision raises the possibility that records of other mixed-function agencies may be similarly exempt from RSA chapter 91-A.

A 2018 amendment to RSA 260:14 clarified that copies of motor vehicle accident reports prepared by a police department, and filed with the division of motor vehicles pursuant to RSA 264:25 and RSA 264:26, may be released only to an owner, operator, or passenger of a vehicle involved in the accident; pedestrian hit by a vehicle in the accident; owner of property damaged in the accident; or the insurance company or lawyer of any of the foregoing parties. The police department may also charge a reasonable fee for release of the report.

The accident report, the technical accident reconstruction report, any repair estimate, or any similar document that constitutes a motor vehicle record that is created or received as a result of any accident or collision involving a vehicle owned or leased by the state, a county, a city, a town, or a local public entity is a governmental record subject to inspection and disclosure in accordance with RSA 91-A, except when inspection or disclosure would risk exposure of undercover law enforcement activity. Any report of such a violation by an employee or official of a county, a city, a town, or a local public entity while engaged in official business in a vehicle owned or leased by the state, a county, a city, a town, or a local public entity is a governmental record subject to inspection and disclosure in accordance with RSA 91-A. RSA 260:14, II-a.

Arrest records are considered governmental records subject to the same disclosure and exemptions as other governmental records. Under RSA 594:14-a, an “arrest record” is a record created by law enforcement personnel to document the arrest of a person 17 years of age or older. They must include, at a minimum, (a) the identity of the individual arrested, (b) the identity of the arresting officer(s) unless their supervisor has good cause to believe that identifying the officer(s) would not serve the public interest, (c) a statement of reasons why and how the arrest was made, (d) the alleged crime, and (e) whether the arrest was made pursuant to a warrant.

With the recent disclosure of the Exculpatory Evidence Schedule (a/k/a Laurie List), the question of whether or not these records will be exempt from the Right-to-Know-Law has been at issue. While there has yet to be a definitive answer, the courts have ruled that the Exculpatory Evidence Schedule is not exempt from disclosure as a police personnel

file under RSA 105:13-b, nor is it an exempt internal personnel practice. *New Hampshire Center for Public Interest Journalism v. NH Dept. of Justice*, 173 N.H. 648 (2020).

2. WRITTEN LEGAL ADVICE

The Right-to-Know Law was amended effective July 30, 2021 to explicitly exempt from disclosure records protected under the attorney-client privilege or the attorney work product doctrine. RSA 91-A:5, XII. Therefore, written legal advice is considered exempt from disclosure so long as the information remains subject to attorney-client privilege. However, once the client discloses the contents of written legal advice to anyone outside the circle of the attorney-client privilege, the privilege is lost. At that point, the record should be analyzed just like any other governmental record when a request is made.

On the other hand, billing records from outside counsel indicating the time spent and activities performed may not be protected by the privilege, depending upon their contents. The privilege may apply when the narratives in the records contain more than a general description of the nature of the services performed. According to the N.H. Supreme Court, narratives likely to be considered privileged include the motive of the client in seeking representation; litigation strategy; areas of the law the attorney is researching; and detailed entries that identify privileged communications and reveal people the attorney has spoken with and the topics discussed. In contrast, items such as the general (not detailed) purpose of the work, the billing and amount of fee, and the time expended will not be privileged. *Hampton Police Ass'n v. Hampton*, 162 N.H. 7 (2011). If a municipality intends to withhold records based on attorney-client exemption in the statute, the municipality must be prepared to identify specifically the information to be withheld and why the privilege is applicable to that specific information.

Documents that are considered to be attorney work product are also exempt from disclosure. At its core, the work-product doctrine shelters the mental processes of the municipal legal advisor, providing a privileged area within which s/he can analyze and prepare his/her client's case. The NH Supreme Court has defined work product as the result of an attorney's activities when those activities have been conducted with a view to pending or anticipated litigation. For the work product doctrine to apply, the lawyer's work must have formed an essential step in the procurement of the data which the opponent seeks, and he must have performed duties normally attended to by attorneys. *Balzotti Glob. Grp., LLC v. Shepherds Hill Proponents, LLC*, 173 N.H. 314, 324 (2020).

3. OTHER INFORMATION PROTECTED BY STATUTE

There are other privacy statutes that make certain information confidential. Some examples include: RSA 106-H:14, regarding the enhanced-911 system; RSA 165:2-c, concerning local welfare recipients; RSA 159:6-a, regarding pistol permits; and RSA 466:1-d concerning lists of licensed dog owners. See also, for example, RSA 151-D:2 (quality assurance program records of ambulatory care clinics), discussed in the context of a Right-to-Know Law petition in *Disabilities Rights Center, Inc. v. Comm'r, N.H. Dep't of Corrections*, 143 N.H. 674 (1999). Amendments to RSA 654:31-a, clarifies that contact information, such as telephone numbers and e-mail addresses, included on voter registration forms and affidavits is treated as confidential information and is not subject to disclosure under the Right-to-Know Law.

C. Partial Release

If only part of a governmental record is subject to an exemption, the part that is not protected should be released. The confidential portion should be “redacted” (i.e., blacked out, erased, or otherwise removed). If a case goes to court, the burden of proof will be on the town or city to prove that the material is subject to an exemption. Further, RSA 91-A does not

require public officials to retrieve and compile into a list random information gathered from numerous documents, if a list of this information does not already exist. *Brent v. Paquette*, 132 N.H. 415, 426 (1989).

D. When Are Electronic Records ‘Deleted’?

A record in electronic form is no longer subject to disclosure under RSA 91-A once it has been “initially and legally deleted.” RSA 91-A:4, III-b. A record cannot be “legally” deleted until the expiration of any statutory retention periods (generally governed by RSA chapter 33-A). An electronic record is deemed to have been “deleted” only if it is no longer readily accessible to the public body or agency itself. This means that the mere transfer of an electronic record to a “deleted items” folder or similar location on a computer does not constitute deletion. To delete it sufficiently under this section, the “deleted items,” “trash” or “recycle bin” folder must be emptied. Please note, however, that these records may still be physically recovered by computer professionals using special software tools for purposes of a lawsuit or criminal prosecution.

VII. REMOVAL FOR CONFIDENTIALITY VIOLATION

RSA 42:1-a makes it a breach of a municipal official’s oath of office to divulge to the public any information learned by virtue of his or her official position if either:

- the public body has voted to withhold that information from the public by a vote of two-thirds under the Right-to-Know Law; or
- the official knew or reasonably should have known that the information was exempt from disclosure under the Right to Know Law, and that its divulgence would constitute an invasion of privacy, or would adversely affect the reputation of some person other than a member of the public body, or would render proposed municipal action ineffective.

As stated by the NH Supreme Court in *Tejasinha Sivalingam v. Newton*, 2021 N.H. Lexis 150 (2021), even though a public body select board had voted to seal nonpublic meeting minutes because it believed that the information would likely affect adversely a person’s reputation, this has no bearing on whether the information disclosed was capable, as a matter of law, of adversely affecting a person’s reputation under RSA 42:1-a, II(a). “Thus, public bodies should continue to vote to withhold information under RSA 91-A:3, III when warranted.”

The method of removing an official for violation of this statute is by petition to the superior court; removal is not automatic.

VIII. CONSEQUENCES OF VIOLATING THE LAW

The superior court has the authority to invalidate action taken in a meeting held in violation of the Right-to-Know Law “if the circumstances justify such invalidation.” RSA 91-A:8, III. The N.H. Supreme Court upheld the superior court’s refusal to invalidate the actions taken at a meeting held with improper notice, finding that no one was harmed by the violations and the public body had taken immediate action to rectify the violations once it was made aware of the problem. *Hull v. Grafton County*, 160 N.H. 818 (2010).

The superior court is required to assess reasonable attorney’s fees and costs against any public body or public agency when the court finds that the lawsuit was necessary to enforce compliance with the law or

to address a “purposeful” violation of the law, where the public body, public agency or person knew or should have known that the conduct engaged in violated the law. RSA 91-A:8, I.

In the alternative, the superior court may award attorney’s fees to a public body or public agency or employee or member thereof for having to defend against a lawsuit under RSA 91-A, when the court finds that the lawsuit is in bad faith, frivolous, unjust, vexatious, wanton, or oppressive. RSA 91-A:8, II. The parties may agree, however, that no such fees will be paid. RSA 91-A:8, I.

In addition, in any superior court action under the RSA 91-A, all documents filed with the petition and any response to it will be considered as evidence by the court, subject to objection by either party, and all documents submitted must be provided to the opposing party prior to a hearing on the merits.

If the court finds that any individual officers, employees, and other officials of a public body or public agency committed any bad faith violations of the law, it is required to impose a civil penalty of \$250 to \$2,000 against such person. The individual may also be required to reimburse the public body or public agency for any attorney’s fees or costs it paid to the plaintiff pursuant to RSA 91-A:8, I. If the person is an officer, employee or official of a municipality, the penalty shall be payable to that municipality. RSA 91-A:8, IV.

In addition, it is a misdemeanor for a person to knowingly destroy information with the purpose of preventing the information from being disclosed after a request has been made under the Right-to-Know Law. RSA 91-A:9.

IX. HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996 (HIPAA)

Federal law potentially restricts the disclosure of “personal health information” (PHI), irrespective of the requirements under RSA chapter 91-A. It would be impossible to summarize all of HIPAA’s statutory and regulatory privacy requirements in these materials. As such, this section is intended as a source of basic information and a starting point for your questions with respect to Right to Know requests that may trigger HIPAA. For more complicated questions, contact NHMA or your municipal attorney.

The purpose of HIPAA is two-fold: (1) to promote access to and portability of health care and (2) to improve the administrative efficiency and effectiveness of the health care system. Pursuant to HIPAA, the Department of Health and Human Services codified certain privacy regulations. HIPAA privacy regulations are found at 45 C.F.R. Parts 160 and 164. HIPAA restricts disclosure by “covered entities” of “protected health information,” that is, “individually identifiable health information,” which is information that “relates to the past, present or future physical condition of an individual; the provision of health care to an individual; or the past, present or future payment for the provision of health care to an individual ... that identifies the individual...” 45 C.F.R. §160.103. “Covered entities” may not use or disclose PHI, except as authorized by the individual who is the subject of the information, or as expressly required or permitted by the privacy regulations. 45 C.F.R. Parts 160 and 164. Group health plans are “covered entities.” It is unclear to what extent municipalities and other employers (plan sponsors), while not themselves covered entities, may be required by federal regulations to agree with their group health plans to follow HIPAA as to information the plan provides to the employer.

For purposes of RSA chapter 91-A, these privacy regulations impact municipalities and information relating to “individually identifying health information.” “Individually identifiable health information” includes any health information that identifies the individual or which could reasonably be expected to be used to identify an individual. 45 C.F.R. §160.103.

However, federal regulations also provide that PHI may be disclosed to the extent “required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.” 45 C.F.R. §164.512(a)(1).

For municipalities in New Hampshire, there are two questions. First, what sort of “protected health information” might they actually have? Second, if they do have such information, must it be disclosed upon request under RSA chapter 91-A?

RSA 91-A:5, IV specifically exempts “medical” information from disclosure. The HIPAA issues arise most often regarding the amount of money paid by a municipality for an employee’s health insurance as a fringe benefit. Reasonable attorneys disagree about whether that information is “protected health information” at all, and federal agencies have not yet provided a clear answer. Further, even if it is PHI, there is still an open question about whether the dollar value of employer-paid fringe benefits of public employees should be treated the same as salaries, or protected from disclosure under RSA 91-A:5, IV, as “files whose disclosure would constitute an invasion of privacy.” (Salaries are, of course, public information under RSA 91-A. *Mans v. Lebanon School Board*, 112 N.H. 160 (1972).) A court would likely review the question using the three- part test developed in *Lamy v. N.H. Public Utilities Comm’n*, 152 N.H. 106 (2005), discussed in section VI, E above: (1) Is there a privacy interest at stake that would be invaded by disclosure? (2) If so, what is the public’s interest in disclosure? (3) Balance the public’s interest in disclosure against the government’s interest in nondisclosure and the individual privacy interest that would be invaded.

Clearly, in certain situations, the fact of whether an employee has an individual, two-per- son, or family plan could reveal information that could reasonably be considered confidential, embarrassing and an invasion of privacy. An extra measure of caution is called for because of another HIPAA regulation: Under 45 C.F.R. §164.504(f)(2)(ii) (C), plan sponsors (employers) must agree not to use or disclose protected health information for employment-related actions and decisions. In the Lamy balancing test, if an individual employee’s health insurance premium is “protected health information,” then the public interest in disclosure is minimized because no legitimate use can be made of the information in hiring or retaining a given employee, or budgeting for the employee’s position.

In short, notwithstanding requests under RSA chapter 91-A, a municipality should use caution and seek legal advice when considering whether to disclose an individual’s protected health information unless the municipality has first received a valid authorization from the individual or unless HIPAA otherwise expressly permits such use or disclosure (for example, workers’ compensation claim, law enforcement purposes, etc.). Obviously, such privacy restrictions significantly limit the type and manner of information that may be disseminated to a select board, a budget committee, and the public.

CHAPTER SIX

THE LOCAL BUDGET PROCESS

I. APPLICATION OF THE MUNICIPAL BUDGET LAW

The Municipal Budget Law, according to RSA 32:1, is intended to “establish uniformity in the manner of appropriating and spending public funds” in all towns and districts that adopt their budgets at an annual meeting of voters. RSA 32:1 through :13 and sections :25 and :26 apply to all such towns, village districts, and school districts, even if the town or district does not have an official budget committee. This includes town council-budgetary town meeting towns, as well as towns that have adopted the official ballot referendum (SB 2) form of government. The towns, school districts, and village districts that have established an official budget committee by town meeting vote according to RSA 32:14 are also subject to the remaining sections of RSA chapter 32 (RSA 32:14 – :24). In towns with town councils and no budgetary town meeting and in cities, budgeting is governed by provisions of the municipal charter. RSA 32:5-b, relative to local tax caps, applies only to those towns and districts which have adopted that section pursuant to RSA 32:5-c.

II. SEVEN KEY CONCEPTS

Local government officials subject to the Municipal Budget Law have the responsibility to propose annually a budget to the voters for the expenditure of public funds. The voters will consider the proposal at a public meeting, although the specific date of the meeting will vary with the form of government selected by the municipality. The easiest way to understand the Municipal Budget Law is to consider seven key concepts. This chapter will briefly describe each of the seven key concepts. More detailed information is available in NHMA’s publication, *The Basic Law of Budgeting: A Guide for Towns, Village Districts and School Districts*. The seven key concepts are:

- Appropriation
- Gross Basis Budgeting
- Warrant Notice and Permissible Amendments
- No Spending Without an Appropriation
- Lapse of Appropriations
- Transfer of Appropriations
- 10 Percent Limitation

A. Appropriations

1. DEFINITIONS

RSA 32:3 defines “appropriate” as “to set apart from the public revenue of a municipality a certain sum for a specified purpose and to authorize the expenditure of that sum for that

purpose.” An “appropriation” is “an amount of money appropriated for a specified purpose by the legislative body.” These are the policy decisions the legislative body makes; the governing body carries out those policies during the budget year.

2. RAISE AND APPROPRIATE: THE DIFFERENCE

Why should most appropriations articles include the phrase, “To see if the Town will raise and appropriate...”? The New Hampshire Supreme Court explained the difference between the two terms:

To ‘raise’ money, as the word is ordinarily understood, is to collect or procure a supply of money for use To ‘appropriate’ is to set apart from the public revenue a certain sum for a certain purpose. *Frost v. Hoar*, 85 N.H. 442 (1932).

That is, to “raise” is to indicate the source of revenue, while to “appropriate” is the legislative act of authorizing an expenditure of that revenue for a specific public purpose. Both parts are required for a valid appropriation.

3. PURPOSES OF APPROPRIATIONS

Under RSA 31:4, towns and cities can appropriate money for any municipal public purpose, unless the New Hampshire Constitution or state law prohibits that purpose. While this grant of authority is broad and open-ended, it is limited by the principle that public money cannot be appropriated for a private benefit. This issue can be confusing at times because even something that may result in a general “benefit” to the public does not always constitute a “public purpose” as required by the New Hampshire Constitution. As a rule, public money cannot be granted to a private person, company, or organization, unless that private person takes on some obligation to benefit the town or city. *Opinion of the Justices*, 88 N.H. 484 (1937). For example, a grant to a private ambulance service is valid if the ambulance service agrees to use that money to provide a public service.

a. Reimbursement for private benefit. If the town performs some act that benefits only private individuals—for example, plowing private roads or private driveways—the town’s costs must be reimbursed by those people, so that no burden falls on taxpayers. Such work on behalf of private individuals is permissible only if it is incidental to work performed primarily for a public purpose. *Clapp v. Jaffrey*, 97 N.H. 456 (1952).

In some very specific cases, the legislature has carved out particular purposes of appropriation that might appear to benefit private parties, but which a statute declares to be a proper public purpose for which towns or cities may appropriate money. For example, if the legislative body votes to adopt the provisions of RSA 36-A:4-a, a conservation commission may expend funds to facilitate a conservation easement transaction, even if the municipality will not hold any interest in the property or the easement. RSA 36-A:4-a; RSA 36-A:5, II.

b. DRA forms. Towns are not limited to the purposes printed on the MS-636 or MS-737 budget forms (currently only accessible through the Municipal Tax Rate Setting Portal). The town budget forms required by the Department of Revenue Administration (DRA) contain line items for most valid public purposes. These items now correspond to the “uniform system of accounts” (now defined in RSA 32:3, VII) developed by the DRA. It is, however, possible to insert numbered line items for purposes that are not on this chart of accounts, so long as the purposes are not prohibited by law or the state constitution.

c. A power to act implies a power to appropriate. Any statute granting authority to municipalities also impliedly authorizes municipalities to appropriate money to carry out that action. For example, RSA 31:39 authorizes a town to pass ordinances. The power to

appropriate money to enforce those ordinances is implied. As another example, RSA 41:10 authorizes a town to appoint a town physician. It is implied that the town can pay that physician and the town can appropriate money for this purpose.

d. Contingency Funds. Towns may establish a contingency fund by an article in the warrant for the annual meeting. The fund may be used by the governing body during the year to meet the cost of unanticipated expenses that may arise during that year. The fund may not exceed one percent of the amount appropriated by the town during the preceding year, excluding capital expenditures and debt service. A detailed report of all expenditures from the contingency fund must be made each year by the select board and published in the annual report. RSA 31:98-a; RSA 32:11.

4. POLICY DECISION

An appropriation is a fundamental exercise of governmental power. It is a policy decision to set aside a specific amount of public money, which may not even have been collected yet, for a specific stated purpose. This is normally done either through a line item in an adopted budget or by a dollar amount in a separate legislative body vote. An appropriation is not the actual spending of money, but the authorization to spend money.

5. LEGISLATIVE BODY VOTE

Only the legislative body can vote to appropriate money. The budget and list of separate warrant articles prepared by the select board under RSA 31:95, or by the official budget committee under RSA 32:5, are initial proposals only and not binding on the voters. The voters can change the amounts to be spent or (with some exceptions) eliminate a purpose entirely by amending a warrant article during the deliberative process at the town meeting. However, this power to authorize expenditures for any public purpose is checked by RSA 32:6, which prohibits the legislative body from appropriating money for a purpose unless that purpose appears in the proposed budget or in a separate or special warrant article. Only an item contained in the adopted budget or an adopted separate warrant article constitutes a valid appropriation.

6. TAX/SPENDING CAPS

Towns and cities (as well as school districts) may adopt limits on spending or tax increases. For a city, or for a town with a town council form of government, the charter may be amended to include a limit on annual increases in the amount raised by taxes in the city or town budget. The limit must include a provision allowing for override of the cap by a supermajority vote as established in the charter. RSA 49-C:12, III; RSA 49-C:33, I(d); RSA 49-D:3, I(e).

In other towns with traditional town meeting or official ballot referendum town meeting (SB 2), and other political subdivisions adopting a budget at an annual meeting of the voters, the voters may adopt a limit on annual increases in the estimated amount of local taxes in the governing body's or budget committee's proposed budget. RSA 32:5-b; RSA 32:5-c. The cap must be either a fixed dollar amount or a fixed percentage. If the taxes raised for the prior year were reduced by the use of fund balance (explained in Section F below), the amount of the reduction is added back and included in the amount to which the tax cap is applied. RSA 32:5-b, I-a. If a cap is adopted, the estimated amount to be raised by local taxes as shown on the proposed budget certified by the governing body or budget committee and posted with the warrant may not exceed the local taxes actually raised for the prior fiscal year by more than the cap. The cap does not, however, limit the amount the voters may **actually appropriate** at the meeting; it is only a limit on the budget **submitted** to the voters for consideration. In a traditional town meeting, the

voters may still amend the proposed budget up or down in the same way they ordinarily would. In a town using the SB 2 form of town meeting, adoption of a cap does not prevent the voters at the deliberative session from amending one or more warrant articles (or all of them) to increase the amount of a proposed appropriation or the total amount of all proposed appropriations. It is important to note that in a town with an official budget committee, the ten percent limitation (explained below) will still apply and effectively cap the total amount that may be appropriated.

A cap can be adopted by a town with either traditional town meeting or an SB 2 meeting. In either case, the question of adopting a cap must be placed on the warrant by the governing body or by citizen petition under RSA 39:3. In a town with traditional town meeting, voting on the question is by ballot conducted at the business session of the meeting, not by official ballot with the election of officers. In an SB 2 town, the question is voted upon on the official ballot with all other questions. In either case, adoption of the cap requires a three-fifths majority of those voting. If a cap is adopted, it takes effect beginning with the subsequent fiscal year. A cap can be repealed in the same manner in which it is adopted.

The law also ratifies all tax or spending cap provisions previously adopted in any city or town charter. RSA 32:5-b.

7. PROCEDURAL REQUIREMENTS FOR VALID APPROPRIATIONS

For an appropriation to be valid, it must comply with several procedural requirements. They include:

- a public hearing on the proposed budget;
- disclosure and/or discussion of all proposed purposes and amounts at the public hearing;
- budgeting on a gross basis;
- recommendations of the governing body and (if there is one) the budget committee, as permitted by law; and
- notice in the warrant and permissible amendments.

a. Public hearing. Under RSA 32:5, the select board, or official budget committee, if there is one, must hold at least one public hearing at least 25 days before the town meeting at which the budget and special warrant articles are to be voted on. Notice of the hearing must be given at least seven days in advance. In official ballot referendum (SB 2) towns and districts, the 25-day requirement does not apply; instead, the budget hearing is held on or before the third Tuesday in January for a March meeting. (See RSA 40:13, II-b and II-c for SB 2 hearing requirements for April and May town meetings.)

The legislature has amended RSA 32:5 and RSA 40:13 to clarify that only the first public hearing must be held on or before the statutory deadline. Supplementary public hearings are permitted after that, subject to the seven-day notice requirement unless the date, time, and place of the supplemental session are made known at the original hearing. The ultimate deadline is the posting of the warrant in non-budget committee towns and districts, or the forwarding of the budget to the governing body in budget committee towns and districts—at least 20 days before the meeting according to RSA 32:16, IV. Remember, however, that each hearing requires at least seven days' notice (not counting the date of the hearing). If a second hearing is expected, notice for that hearing could be included in the notice for the first hearing.

The hearing requirement applies to appropriations not only in the line-item proposed

operating budget, but also to all appropriations included in other warrant articles. Therefore, at least one budget hearing should be scheduled after the final day for submitting petitioned articles. Due to recent amendments to RSA 32:3 and RSA 32:5, I, if a town or district uses sub-accounts to budget or track financial data it shall make that data available for public inspection at the public hearing. A “sub-account” is now defined as “an optional level of accounting, one or more levels below the account level. Sub-accounts may be used to budget and track expenses when several different activities are funded by the same account.”

b. ‘Disclose or discuss.’ RSA 32:5, II prohibits the select board or official budget committee from adding budget purposes or amounts to the proposed budget after the public hearing unless they were “disclosed or discussed” at the public hearing, or unless a further hearing is held. If a member of the public, at the public hearing, makes a suggestion for a new appropriation, the governing body or budget committee can add it to the proposed budget without a second hearing because the purpose and amount were “discussed” at the hearing. Of course, at town meeting itself, the legislative body (the voters) may increase or decrease the proposed amounts or delete (but not add) purposes of appropriation. This topic is discussed further below.

c. Appropriations at special town meetings. Special town meetings can be called by the select board as a result of a board vote or to respond to a citizen petition for a special meeting. RSA 39:1; RSA 39:3. However, a special town meeting to appropriate money may only be held in two special circumstances. Either 50 percent of all voters on the checklist must attend the special meeting, or the Superior Court must grant the town permission to hold the meeting. RSA 31:5. Since very few towns can guarantee 50 percent voter turnout at any meeting, Superior Court permission generally should be sought before holding a special meeting. The superior court cannot grant permission for the special meeting unless it finds that an “emergency” exists, as provided in RSA 31:5. An emergency in this case means “a sudden or unexpected situation or occurrence ... of a serious and urgent nature, that demands prompt or immediate action, including an immediate expenditure of money.” RSA 31:5, I(b). See the discussion in Chapter Three, section IV for a description of the factors that will be considered by the Superior Court in determining whether an emergency exists to warrant a special town meeting. Court approval is not automatic, and it is not always granted when sought. The public hearing requirements of the budget law, described above, also are required in order to hold a special town meeting to appropriate money.

d. Ballot vote in official ballot referendum (SB 2) towns. In towns that have adopted the official ballot referendum form of government, RSA 40:12 – :16, the annual meeting consists of two sessions: deliberative session and official ballot voting day. The first session, also known as the deliberative session, is conducted in the manner of the business portion of a traditional town meeting, complete with the authority to discuss and amend any warrant article, but without the authority to take final action. Voters at the deliberative session may amend the dollar amount of an appropriation (all the way to zero, if they wish) and may otherwise amend articles, but they may not eliminate the subject matter of the article. RSA 40:13, IV(c); *Cady v. Town of Deerfield*, 169 N.H. 575 (2017). The budget and other warrant articles that propose appropriations, as amended, are placed upon the official ballot to be voted upon at the second session of the annual meeting. If the operating budget is defeated, a form of the prior year’s operating budget (called the “default budget”) takes effect, unless the select board decides to call a special meeting to vote on a revised operating budget. RSA 40:13, IX(b) describes the method used to calculate the “default budget.” It is the total amount of “the same appropriations

as contained in the operating budget authorized for the previous year, reduced and increased, as the case may be, by debt service, contracts and other obligations previously incurred or mandated by law, or reduced by one-time expenditures contained in the operating budget[.]” For purposes of calculating the default budget, one-time expenditures “shall be appropriations not likely to recur in the succeeding budget, as determined by the governing body, unless the provisions of RSA 40:14-b are adopted[.]” DRA has created a default budget form, which the governing body (or the official budget committee, if the municipality has voted to give it that responsibility) must complete. The governing body, or official budget committee if it has been delegated the responsibility of calculating the default budget, must make the default budget calculation available at the first budget hearing and for use in the deliberative session, and must post certified copies of the default budget form along with the proposed operating budget and the warrant. Voters are permitted to discuss and debate, but not amend, the default budget at an SB2 deliberative session. See the discussion in Chapter Three, section V for more information about the SB 2 form of government.

B. Gross Basis Budgeting

RSA 32:5, III requires all appropriations to be stipulated on a gross basis, meaning that all anticipated revenues from all sources, not just tax money, must be shown as offsetting revenues to the amounts appropriated for specific purposes. Revenues other than taxes raised include grants, gifts, bond issues, and proceeds from the sale of municipal property. Revenues not appropriated cannot be spent. For example, if the town votes to purchase a new fire truck for \$360,000 and intends to pay for it with \$280,000 of tax money and \$80,000 from selling the old fire truck, the total amount of \$360,000 must be appropriated, disclosing both sources of revenue. In other words, always set forth the grand total in the “raise and appropriate” clause, and then go on to break it down by listing the amount to be drawn from each separate revenue source. When drafting the language of warrant articles, care should be taken to observe this concept because the DRA has authority to invalidate appropriations that fail to follow this requirement. It is helpful to have draft warrant articles reviewed through the DRA’s “pre-review process” and/ or the town’s attorney well in advance of the meeting. DRA also publishes a helpful document titled “Suggested Warrant Articles for Towns, Village Districts, School Districts, and Regional School Districts” which provides templates for most financial warrant articles. DRA’s Municipal Tax Rate Setting Portal software will use DRA template language by default when using the online portal for drafting warrant articles.

C. Recommendations

1. SPECIAL WARRANT ARTICLES

All special warrant articles require a notation of whether or not they are recommended by the governing body and the official budget committee (if there is one). “Special warrant articles” are (a) petitioned warrant articles including an appropriation; (b) articles calling for issuing bonds or notes; (c) appropriations into or out of trust funds or capital reserve funds; (d) any other separate appropriations article designated by the governing body as “special,” “nonlapsing,” or “nontransferable”; and (e) an appropriation of an amount for a capital project under RSA 32:7-a. RSA 32:3, VI. In budget committee towns and districts, special articles should contain both governing body and budget committee recommendations. RSA 32:5, V. Articles regarding cost items for collective bargaining agreements also require a statement of the recommendation or nonrecommendation of the governing body and budget committee. RSA 32:19. However, RSA 32:5, V provides that “defects or deficiencies in these notations shall not affect the legal validity of any

appropriation otherwise lawfully made.” The recommendation requirement does not apply to non-money articles.

2. NUMERIC TALLIES ON RECOMMENDATIONS

RSA 32:5, V-a allows any town operating by traditional town meeting to require that the numeric tally of all votes of an advisory or official budget committee and all votes of the governing body be printed in the warrant next to that article. A vote to include the numeric tally under this law also authorizes a town to include these recommendations on separate warrant articles, not just special warrant articles and those relating to cost items in a collective bargaining agreement.

RSA 40:13, V-a allows any town operating under the official ballot referendum (SB2) town meeting to require that the numeric tally of all votes of an advisory or official budget committee and all votes of the governing body be printed on the ballot next to the affected article.

In either case, the town may authorize this by a vote of town meeting, or if the town has not voted to do so, the governing body or an official budget committee may take a vote at a public meeting on its own initiative. The “numeric tally” means the total result of the vote on the item, such as “Budget Committee recommends this article by a vote of 9 to 2. Select board does not recommend this article by a vote of 3 to 2.” Unless and until such a vote of town meeting or the governing body has occurred, recommendations should continue to appear without the numeric tally and only for special articles and cost items of collective bargaining agreements.

3. RECOMMENDATIONS ON OTHER WARRANT ARTICLES

In *Olson v. Town of Grafton*, 168 N.H. 563 (2016) the N.H. Supreme Court ruled that the select board can also state its recommendations on all articles on the warrant. This means the select board can state its approval or disapproval towards any warrant article on the warrant, and that ability to express its opinion on each warrant article is not limited to articles just containing appropriations.

4. MULTI-YEAR APPROPRIATIONS FOR CAPITAL PROJECTS

Towns may make multi-year appropriations for a “capital project,” RSA 32:7-a. A capital project for this purpose is one for which bonds could be issued under RSA 33:3 or RSA 33:3-a. These include:

- the acquisition of land;
- planning relative to public facilities;
- the construction, reconstruction, alteration, and enlargement or purchase of public buildings;
- other public works or improvements of a permanent nature including broadband infrastructure;
- the purchase of departmental equipment of a lasting character;
- the payment of judgments;
- economic development (including public-private partnerships involving capital improvements, loan, and guarantees); and
- preliminary expenses associated with proposed public works or improvements of a permanent nature (including public buildings, water works, sewer systems, solid waste facilities, and broadband infrastructure).

The article authorizing the appropriation must (a) identify the specific project, (b) state the term of years of the appropriation (up to five years), (c) state the total amount of the appropriation, and (d) state the amount to be appropriated in each year of the term. The article must pass by a 2/3 vote (3/5 vote in official ballot referendum towns).

For each year after the first year, the amount designated for that year as provided in the original warrant article shall be deemed appropriated without further vote by the legislative body. In other words, once town meeting has authorized a capital project multi-year appropriation, no warrant article is needed in any other year of the term; each year's amount will be treated as appropriated automatically in the future years of the term. In official ballot referendum towns, that year's amount is also automatically included in the default budget.

If the amount appropriated in any year is not spent in that year, it will not lapse. The money will remain available for use for the project during the term stated in the warrant article. However, a capital project appropriation does not create a capital reserve fund. It is simply accounted for as a nonlapsing appropriation from year to year. At the end of the term stated in the original warrant article, any unspent amounts will lapse into the fund balance.

At any annual meeting before the end of the term of the project, the legislative body may rescind the appropriation by a simple majority vote on a warrant article. If the project is rescinded, any unexpended appropriations for the project will lapse into fund balance immediately.

5. RECOMMENDATION AUTHORITY BY CHARTER

In municipalities with charters under RSA chapter 49-B, the Court has held that the charter may authorize additional recommendations to appear on the warrant and official ballot. *Forsberg v. Kearsarge Regional School Dist.*, 160 N.H. 264 (2010).

6. ESTIMATED TAX IMPACT

There has long been a question about whether including extra information on a warrant article is proper. In particular, the Attorney General's Office has indicated in the past that no information other than the actual question to be decided and other information permitted or required by statute should appear on a warrant or ballot. However, it is also well-understood that the potential tax impact of a warrant article (or lack of tax impact) is something of considerable interest to voters.

The legislature cleared up this confusion by providing that the legislative body (town, school, or village district meeting) may vote to require that the annual budget and all special warrant articles having a tax impact include a statement of the estimated tax impact of that appropriation. RSA 32:5, V-b. The law specifies that it is up to the governing body (select board, school board, or village district commissioners) to determine whether an article has a tax impact. In addition, the determination of the estimated tax impact is subject to approval by the governing body, even if someone else actually performs the initial calculations.

It is important to remember that the estimated tax impact will always be just that: an estimate. Many factors may influence the final tax rate, which is not set until many months after town meeting has voted on the budget. Therefore, if the estimated tax impact is going to be included on the warrant and/or ballot, it is strongly advisable to explain to the voters that it is only an estimate based on the information available at the time. Having said that, however, it can be useful to know if a particular proposed appropriation might have an impact of pennies, dimes, or dollars on the tax rate, even

if the actual impact varies slightly.

D. Notice in the Warrant and Permissible Amendments

1. NOTICE IN THE WARRANT

No appropriation is valid unless the subject matter (purpose) appears in the warrant of the meeting. This requirement, as stated in RSA 39:2 and RSA 32:6, is satisfied by either a line item in the posted budget or the language of a separate warrant article. New line items describing additional purposes cannot be added from the floor of town meeting or under an “other business” article.

2. VOTERS’ ABILITY TO AMEND

The budget recommended by the select board or the budget committee is not binding on the voters. Amounts of line items can be increased, decreased, or even deleted. RSA 32:10. It is only new purposes that cannot be added from the floor. RSA 32:6; RSA 39:2. In general, it can be helpful to think about the issue of proper amendments using the “stay at home” test. Suppose a voter had read the original article, decided he or she wasn’t interested and stayed home instead of attending the meeting. Does the proposed amendment add a new subject matter, such that the voter might have reconsidered his or her decision not to attend? If so, then the amendment is probably improper.

The final form of appropriations is up to the voters, with these exceptions:

- The total amount appropriated cannot exceed the total amount recommended by the official budget committee by more than 10 percent in official budget committee towns. RSA 32:18. This “10 percent rule” is discussed in more detail later in this chapter.
- Pursuant to RSA 32:10, the ability of the voters to amend line items does not include the authority of the voters to designate an appropriation as nontransferrable. *McDonnell v. Derry*, 116 N.H. 3 (1976). In other words, the voters cannot restrict the governing body’s ability to transfer funds between line items in the operating budget once it has been adopted.
- If a whole line on the posted operating budget (e.g., DRA Forms MS-636 or MS-737) is actually reduced to zero by the voters or deleted entirely, the governing body cannot expend any funds, or transfer funds into the line, to accomplish that purpose. RSA 32:10, I(e). This transfer authority is discussed in more detail later in this chapter.
- In official ballot referendum towns or districts, any amendments are made at the first (“deliberative”) session, not at the official ballot voting session. However, the first session’s ability to amend articles has been sharply limited by the legislature. Under RSA 40:13, IV(c), “No warrant article shall be amended to eliminate the subject matter of the article. An amendment that changes the dollar amount of an appropriation in the warrant article shall not be deemed to violate this sub- paragraph.” In other words, an article may still be amended to change the dollar amount, including reducing it all the way to zero, but it may not be amended by deleting everything after the words “to see.” In a Supreme Court decision this principle was further explained stating that a warrant article amendment in a SB 2 town would be prohibited only if the subject matter of the warrant article waseffectively eliminated. *Cady v. Town of Deerfield*, 169 N.H. 575 (2017).

E. No Spending Without Appropriation

The most fundamental rule of municipal budgeting, which is spelled out in RSA 32:8, is that no official can spend any money for any purpose unless that amount was appropriated for that purpose by the town meeting (subject to the select board's power to transfer unexpended appropriations, discussed in more detail below). This rule applies to all municipal appropriations, not just to spending money raised by taxation. It means that if the town budget fails to properly appropriate anticipated revenue from grants, gifts, bond issues, or the sale of town property (the old fire truck in the previous example), that revenue cannot be spent. It also means that an official who overspends a budget illegally may be subject to dismissal. *Blake v. Pittsfield*, 124 N.H. 555 (1984). Also, RSA 32:12 subjects any official who violates the provisions of the Municipal Budget Law to removal from office upon petition to the superior court. While the general rule prohibits spending without an appropriation, there are some exceptions to this rule:

1. UNANTICIPATED REVENUE

Under RSA 31:95-b, the select board can, without an appropriation, apply for, accept, and spend *unanticipated* money that becomes available during the year from a federal, state, or private source. The governing body can only act in this way if the town or district meeting has previously passed a warrant article to grant the governing body this authority. If the amount of unanticipated revenue is \$10,000 or more, the governing body must hold a public hearing on the action to be taken and publish notice in the newspaper at least seven days prior to the hearing. For an amount less than \$10,000, the governing body must post notice of the receipt of such funds in its meeting agenda and include notice in the minutes of the meeting at which the funds are discussed. In either case, actual acceptance of the funds must occur at a public meeting of the governing body. One important limitation is that the money cannot be accepted or spent in a way that does or will require other town funds to be spent unless those other funds have already been appropriated for the same purpose. In other words, this statute cannot be used to accept money that requires additional local matching funds to be appropriated. (Note, however, that under RSA 31:5-a, the select board may call a special town meeting to authorize the expenditure of federal funds allocated to the town as a result of a major disaster as declared by the governor and appropriate the local matching share for such funds. The authorization to expend federal funds and the appropriation of matching funds are the only actions that can be taken at such a meeting.)

2. LEGAL JUDGMENTS

RSA 32:9 permits the town to spend money to pay a legal judgment against the town without an appropriation.

3. PERMISSION FROM DRA

Under RSA 32:11, a town can, in an emergency, seek permission from the commissioner of DRA to overspend the budget or spend for a purpose for which no appropriation was made. This exception applies only “when an unusual circumstance arises during the year which makes it necessary” to overspend the budget or spend money on a purpose for which no appropriation has been made. The governing body must hold a public hearing on the request. In towns with a budget committee, the majority of the budget committee must approve of the application to the DRA. Permission should be sought from the DRA *before* the expenditure is made. In the case of a sudden or unexpected emergency, the application may be approved after the expenditure has been made, but the DRA rarely grants “after the fact” permission if

there was reasonable time and opportunity to apply for permission before spending the money. The DRA won't grant this permission unless the town has an actual source of funds available, such as an amount in the fund balance. The DRA *cannot* increase the tax rate for this purpose. If there is no source of revenue, the only option is to petition the superior court for permission to hold a special meeting to appropriate the money.

4. PRIOR BINDING CONTRACT OR VALID MANDATES

Municipalities have no special authority to overspend the budget to pay for contractual expenses or valid mandates. RSA 32:13 says, in essence, that if a municipality runs out of budgeted appropriations to pay obligations under a contract that the legislative body has previously ratified, the lack of funds is not a reason to be excused from the contract (and as a result, the municipality may face a lawsuit for breach of the contract). In addition, a lack of budgeted appropriations to pay a validly mandated expense, such as local welfare assistance, does not excuse the municipality from responsibility for those expenses (and may result in a civil rights lawsuit).

However, neither of these situations alone justifies overspending the budget. To remain in compliance with the Municipal Budget Law, local officials should consider the available legal options: transferring other appropriations to cover that expense (RSA 32:10); asking the DRA for emergency spending authority (RSA 32:11); or holding a special town meeting to appropriate funds (RSA 31:5). RSA 32:13 underscores the importance of appropriating adequate funds to cover these expenses, because a municipality may find itself in the unenviable position of being unable to overspend the budget for an expense that a court may later impose upon the municipality as a legal judgment.

5. SPENDING FROM CERTAIN TYPES OF FUNDS

Money can be spent from special accumulating funds like the conservation fund (RSA 36-A:5), heritage commission fund (RSA 674:44-a), airport fund (RSA 423:6 and :7), and recreation revolving fund (RSA 35-B:2, II) by those various bodies without a town meeting appropriation. Money can also be spent from a capital reserve fund or town-funded trust fund for the purpose for which the fund was established without an appropriation if the town meeting has named agents to expend those funds. RSA chapter 35 (capital reserve funds); RSA 31:19-a (expendable trust funds). Finally, revolving funds established by town meeting for recycling activities, ambulance services, public safety services, creating affordable housing, providing cable access for public, educational or governmental use, or financing of energy conservation and efficiency improvements may be spent by the official or board specified in the warrant article, for the specific purpose for which the fund was created, with no further vote of town meeting. RSA 31:95-h. However, the statute expressly provides that no amount may be spent from a revolving fund for any item or service for which an appropriation specifically has been rejected by the voters during the same year.

6. SPENDING PRIOR TO TOWN MEETING

Pursuant to RSA 32:13, II, the governing body may spend money between January 1 and the date of the annual meeting even though no appropriation for the expenditures has yet been made. However, the expenditures must be "reasonable in light of prior year's appropriations and expenditures for the same purposes during the same time period." This means that the governing body can approve expenditures during that time that are generally the same as those that were approved and expended during the same period in the previous year.

7. MULTI-YEAR CONTRACTS

There is a good deal of uncertainty when it comes to authorizing contracts that will oblige a municipality to expend money for more than one year going forward. The New Hampshire Supreme Court has held that approval of a multi-year contract is “in a sense” raising and appropriating funds. See, *Childs v. Hillsboro Electric Light and Power Co.*, 70 N.H. 318 (1900); *Bedford Chapter-Citizens for a Sound Economy v. School Administrative Unit #25-Bedford School Dist.*, 151 N.H. 612 (2005). As a result, it seems that the select board and other officials and employees are not, in the absence of an express statute, empowered to enter multi-year agreements for expenditures without town meeting approval. Only the legislative body, which makes appropriations, can promise to make future appropriations. Proper procedure includes an adequate disclosure of the financial terms of each year of the agreement (the “cost items”) at the time the legislative body is asked to appropriate the funds for the first year. The term for such disclosure is “Sanbornizing” the agreement, which comes from the leading case, *Appeal of the Sanborn Regional School Board*, 133 N.H. 513 (1990). This means, for example, if a collective bargaining calls for step increases each year, those increased costs should be disclosed at the time voters appropriate the money for the first year. However, if a CBA does not contain an evergreen clause, the employer has no obligation to pay step increases after the CBA expires, so the cost of step increases only needs to be disclosed for the term of the CBA. See, *Appeal of Laconia Patrolman Association*, 164 N.H. 552 (2013). In SB 2 Towns only “contracts previously approved, in the amount so approved, by the legislative body in either the operating budget authorized for the previous year or in a separate warrant article for a previous year,” are included in the calculation of the default budget. For more information on these important matters, see NHMA’s publication *The Basic Law of Budgeting: A Guide for Towns, Village Districts and School Districts*.

F. Lapse of Appropriations

An appropriation, which is a town meeting authorization to spend a certain sum for a specific purpose, lapses at the end of the fiscal year. For towns, the fiscal year is January 1 to December 31 (RSA 31:94), unless the town has adopted the optional July 1 to June 30 fiscal year in accordance with RSA 31:94-a *et seq.* This follows from the principle that a town meeting is generally not bound by the votes of a prior town meeting. Without the lapse rule, the votes of prior years would interfere with the following year’s budget. Under the lapse statute, RSA 32:7, the authority to spend the money appropriated ceases with the close of the fiscal year.

1. FUND BALANCE

When an appropriation lapses, it is often said that the amount goes into “surplus.” However, that does not mean the money is cash available to the governing body to use as it pleases. The term “unreserved fund balance” is used by fund accountants to describe the amount of surplus or lapsed funds remaining at the end of the accounting period after all of the revenues and expenditures are taken into account. The “unreserved fund balance” may be used by the governing body to reduce the amount to be raised by taxes the following year, may be legislatively appropriated to a new purpose as the result of a town meeting warrant article, or may be retained.

2. SOME APPROPRIATIONS DO NOT LAPSE

There are some exceptions to the lapse rule, which are explained in RSA 32:7. They are:

a. Encumbered funds. Funds may be encumbered in one of two ways. The select board may vote before the end of the fiscal year to “encumber” funds if those funds have already been obligated by contract to be spent. Planning to spend it is not enough; there must be a contract, purchase order, or other legally enforceable obligation on the town’s part to spend the funds. RSA 32:7, I. In order to prevent the lapse of an unspent portion of an appropriation through a legally enforceable obligation, two conditions must be satisfied. First, the unspent funds must be encumbered by a legally enforceable obligation for their expenditure. Second, the obligation must attach to the funds before the end of the fiscal year for which they were appropriated. *Monadnock Regional School District v. Monadnock District Education Ass’n*, 173 N.H. 41189 (2020). The other category of encumbered funds includes those raised by one of three types of special warrant article (a petitioned appropriations article, an appropriations article designated by the select board as special, nonlapsing, or nontransferable, and an appropriation for a capital project under RSA 32:7-a). In order to encumber a special warrant article, the select board must vote prior to the end of the fiscal year to carry this sort of article over for an extra year. In addition, , the town’s vote on a special article can specifically allow the amount to be considered encumbered for up to five years. RSA 32:7, V and RSA 32:7, VI; RSA 32:3, VI.

b. Bond issues. Amounts raised through issuance of bonds or notes do not lapse until the purpose for which they were issued is completed, or authorization to issue the bond is rescinded by a vote of the legislative body (either at a time specified in the original vote to issue the bond or by later vote to rescind under RSA 33:8-f). RSA 32:7, III. If there is an amount left over after the completion of the project, or for some reason no expenditure has been made, RSA 33:3-a, II permits the town meeting to authorize expenditure of the remaining funds for any purpose for which it is legal to issue bonds or notes. Otherwise, any balance after completion shall be used to pay the principal of the loan as it matures. (The procedure for authorizing bonds or notes is found in RSA chapter 33.)

c. Anticipated grants. If revenue is anticipated from a state, federal, or private source, then, of course, it must be appropriated in the normal manner under the gross basis budgeting rule discussed above. However, RSA 32:7, IV prevents that appropriation from lapsing “as long as the money remains available under the rules or practices of the granting entity.”

d. Capital reserve funds and town-funded trust funds. Money that the town meeting votes to put into a capital reserve fund under RSA 35:1 or a town-funded expendable trust fund under RSA 31:19-a is allowed to accumulate from year to year without lapsing. After all, these funds are like savings accounts. For more information on the proper creation and expenditure of capital reserve funds and town-funded trust funds, see Chapter Five of NHMA’s *The Basic Law of Budgeting: A Guide for Towns, Village Districts and School Districts*. Additional information and examples of warrant articles are also available in DRA’s *Suggested Warrant Articles for Towns, Village Districts and School Districts*, available on the DRA website at <https://www.revenue.nh.gov/mun-prop/municipal/documents/suggested-warrant-articles.docx> .

e. Special revenue funds. These funds are authorized by RSA 31:95-c and are made up of all or a portion of non-tax revenue from user fees, such as solid waste tipping fees, which upon approval of town meeting can be automatically put into a special fund. The money cannot be spent without a town meeting appropriation related to the fund’s purpose. These funds differ from capital reserve funds and town-funded trust funds in that town meeting must vote a specific amount into a capital reserve fund or a trust fund, while town meeting must vote a specific dollar amount out of a special revenue fund.

f. Other statutory funds. Other funds, by statute, that do not lapse. Examples are the conservation fund (RSA 36-A:4); the heritage fund (RSA 674:44-a); the airport fund (RSA 423:6 and RSA 423:7); money collected from sewer or water bills (RSA 149- I:10; RSA 38:29); impact fees (RSA 674:21, V); forest maintenance fund (RSA 31:113); and recreation revolving funds (RSA 35-B:2, II).

g. Revolving funds. These are funds created by vote of town meeting under RSA 35-B:2, II (for recreation programs) or RSA 31:95-h for recycling activities; ambulance services; public safety service special details or for any other public safety purpose deemed appropriate by the municipality; cable access for public, educational or governmental use; creating affordable housing and facilitating transactions relative thereto; financing energy conservation and efficiency and clean energy improvements by participating property owners in an energy efficiency and clean energy district established pursuant to RSA chapter 53-F; and for providing fire service, or both fire and ambulance service. These funds are nonlapsing, but money may be spent only for the purposes for which the fund was created. However, if a recreation revolving fund is rescinded by vote of the legislative body, any remaining money in the fund becomes part of the municipality's general fund balance. RSA 35-B:2, II.

3. CAPITAL PROJECTS UNDER RSA 32:7-A.

An appropriation for a “capital project” under RSA 32:7-a does not lapse automatically. If the amount appropriated in any year is not spent in that year, it will not lapse. The money will remain available for use for the project during the term stated in the warrant article. However, a capital project appropriation does not create a capital reserve fund. It is simply accounted for as a nonlapsing appropriation from year to year. At the end of the term stated in the original warrant article, any unspent amounts will lapse into fund balance. Alternatively, at any annual meeting before the end of the term of the project, the legislative body may rescind the appropriation by a simple majority vote on a warrant article. If the project is rescinded, any unexpended appropriations for the project will lapse immediately to fund balance.

G. Transfer of Appropriations

As a general rule, if the select board finds it needs more money in any one account (purpose of appropriation), RSA 32:10 allows the board to transfer money from another account so long as total spending does not exceed the bottom line of the approved budget. The governing body's transfer authority was upheld by the New Hampshire Supreme Court in *Sullivan v. Hampton*, 153 N.H. 690 (2006), and includes the authority to make transfers within the default budget in official ballot referendum (SB 2) towns and districts. For more information on default budgets, see Chapter Three, section V. While the legislative body may not restrict this transfer authority by a vote of the town meeting, the governing body may not transfer appropriations to an account in instances where the town meeting has deleted a purpose, reduced the amount appropriated for that purpose to zero, or defeated an appropriation contained in a separate warrant article. RSA 32:10, I(e).

1. SPECIAL WARRANT ARTICLES NOT TRANSFERABLE

Money cannot be transferred out of an appropriation that was approved as a special warrant article into any other purpose. RSA 32:10, I(d). However, the select board can transfer money into a special warrant article appropriation. There are five kinds of special warrant articles as defined by RSA 32:3, VI:

- petitioned warrant articles;
- articles calling for appropriations raised by the issuance of bonds or notes;
- articles that appropriate money into or out of a special fund such as a capital reserve or town-funded trust fund;
- articles specifically designated by the select board in the warrant as special, nonlapsing, or non-transferable, and
- capital projects appropriations.

Those are the only five types of articles that can be included in the category of special warrant article. Not every article inserted in the warrant by the select board is a “special” article merely because it is separate from the operating budget article. It must be marked as such. Otherwise, it is still transferable and is subject to the lapse rule.

2. RECORDS OF TRANSFERS

The town’s expenditure books must be kept in a way that is consistent with the budget as passed by the voters, so that any citizen can see, at any time, what transfers have been made. This is required by RSA 32:10, I(b) and RSA 32:10, I(c). Records of transfers can be kept in two ways. One way is to take an actual vote on every transfer at a select board meeting and record the vote in the minutes of that meeting. The other way is simply to record each expenditure properly under the purpose for which it actually was spent. If some accounts show over-expenditure and others show under-expenditure, that is an implied transfer. These records of actual expenditures must be disclosed on the following year’s budget form, so voters can compare appropriations to actual expenditures in deciding how much to appropriate for next year. If one line is over-spent and another under-spent, the voters have the right to find out why. Example: Suppose more money is needed in the welfare budget and some extra money is available to transfer from highways. The municipality’s account books must record that expenditure under the proper welfare account, not the highway account.

3. ‘NO MEANS NO’

RSA 32:10, I(e) was amended in 2004 to specify that if a separate appropriations article—an appropriations article separate from the operating budget article—is rejected by the voters, the purpose in the article is deemed “one for which no appropriation is made.” The effect of this law is that no amount of money may be transferred to, or spent for, the purpose of a separate warrant article (including special warrant articles) that has been defeated or reduced to zero. This is often referred to as the “no means no” provision.

Unfortunately, while the language of this statute may seem rather clear, in practice it has not been that simple. There are many gray areas in which the limits of the governing body’s authority have not yet been made clear. It is not clear, for example, whether or not the purpose of an article proposing a “lease/purchase” of a piece of equipment is considered the same purpose as the purchase of the same piece of equipment. It is also unclear whether the defeat of a separate article to purchase a piece of equipment prevents the already-designated agents of a capital reserve fund from spending money from that fund to purchase the equipment instead. In these difficult situations, it is best to seek advice from the DRA, your municipal attorney, and/or the NHMA Legal Services attorneys.

H. Ten Percent Rule in Budget Committee Towns

In towns with an official budget committee adopted according to RSA 32:14, the total amount appropriated by the town meeting cannot exceed the total amount recommended by the budget

committee by more than 10 percent. See RSA 32:18 for the description of how this figure is calculated. It excludes several fixed cost items. In official ballot referendum (SB 2) towns and districts, the 10 percent limitation is calculated based on the initial recommendations of the budget committee prior to the first (deliberative) session, even if the budget committee changes its recommendations after an article has been amended. RSA 32:5, V(b).

The 10 percent rule affects the bottom line only, not individual line items. The amount calculated for the annual meeting does not affect any special meetings held during the year. If an appropriation is sought in a special meeting, the rule is calculated based upon only the amounts presented to the special meeting.

1. POWER OF BUDGET COMMITTEE TO LIMIT APPROPRIATIONS

The 10 percent rule gives the budget committee a significant role in the annual budget process. As a check on the governing body, if the budget committee does not recommend certain large expenditures, the 10 percent limitation can prevent the expenditures from being appropriated, even if a majority of the voters favors the projects involved. As a check on the legislative body, the 10 percent rule prevents a town meeting from appropriating large amounts in excess of budget committee recommendations. In a sense, town meeting, by opting to have an official budget committee, has given up some of its legislative authority to appropriate money. If the voters want that power back, they can repeal their adoption of RSA 32:14 – :24.

In a town with a tax or spending cap, the 10 percent rule still applies regardless of how the cap affects the proposed budget. In other words, the legislative body may appropriate only up to 10 percent more than the total amount recommended by the budget committee. The concept of tax and spending caps is discussed above in Section II(A) (6).

2. OVERRIDE OF 10 PERCENT RULE

RSA 32:18-a allows the town meeting to override the 10 percent limitation when the budget committee has voted not to recommend a bond article in its entirety. In order for the provisions of this statute to take effect, the select board must first vote in favor of the bond request at a duly posted meeting. Then, the bond article can be placed on the warrant with the following statement: “Passage of this article shall override the 10 percent limitation imposed on the appropriation due to the non-recommendation of the budget committee.” The recommendations of the select board and budget committee shall be included on the warrant. If the voters approve the bond request, the select board members must send a copy of the minutes of the meeting at which they voted to approve the bond request to the DRA.

3. EXCEPTION FOR COLLECTIVE BARGAINING AGREEMENTS

Under RSA 32:19, amounts that are included in a budget for the purpose of funding the cost items of collective bargaining agreements are exempt from the 10 percent rule. Budget committees are free to decide not to recommend these items, but that non-recommendation does not cause the warrant article automatically to fail. The statute provides that the budget committee’s failure to recommend the negotiated cost items is not considered an unfair labor practice. RSA 32:5-a and RSA 32:19-a set a final date by which cost items under negotiation as part of a collective bargaining agreement must be finalized prior to town meeting. This “drop dead date” is the same date as the last day for submitting petitioned warrant articles—RSA 39:3 for towns and RSA 197:6 for school districts (RSA 40:13, II-a(b) for official ballot referendum towns and districts). Cost items in a collective bargaining agreement that has not been finalized by that date cannot be submitted to the voters until a subsequent town meeting or a special meeting under the provisions of RSA 31:5 for towns or RSA 197:3 for school districts.

4. EXCEEDING THE 10 PERCENT LIMIT

What happens if the total appropriations exceed the budget committee's recommended budget by more than 10 percent? The statute does not say, but it is the practice of the DRA to treat the meeting chronologically, in the order the votes are declared passed by the moderator. The first appropriations that take the total over the 10 percent limit are invalid, as are any subsequent votes increasing the total appropriations. This is a bit more complex in SB 2 towns, but the DRA's practice has been to follow the chronological order in which appropriations appear on the official ballot. Clearly, exceeding the 10 percent limit should be avoided, because when it happens, voters believe they have made a valid appropriation that is later disallowed by the DRA. The best practice is for the moderator to have a clear understanding of the issue. Someone should calculate the 10 percent limit before the business meeting (or deliberative session) using the DRA's required forms. The moderator can then make the meeting aware of votes to amend or approve articles which could take the total over the limit.

5. PURPOSE OF THE BUDGET COMMITTEE

According to RSA 32:1, the purpose of the budget committee is "to assist voters in the prudent appropriation of public funds." The New Hampshire Supreme Court has said that the purpose of the municipal budget committee is "to provide a committee with special knowledge to oversee and analyze the expenditures of the various towns and districts." *Hecker v. McKernan*, 105 N.H. 195 (1963). The budget committee provides a valuable advisory opinion on spending to the voters, but it is the town meeting, not the budget committee, that sets the budget. The relationship between the budget committee and the governing body creates some natural tension. The system is designed so that more than one set of minds considers the issues. The budget committee can second-guess the governing body by proposing amounts for various purposes that are higher or lower than those proposed by the governing body. A little debate and disagreement is normal in the budget process, but local officials should conduct these proceedings with civility and respect. In the end, the town meeting is free to disagree with both the select board and the budget committee. The adopted operating budget and warrant articles set the actual spending plan for the town.

6. BUDGET COMMITTEE MEMBERSHIP

The membership of the budget committee is determined by the town meeting within the limits set by RSA 32:15. At-large members may be elected or appointed, and the committee may vary in size from three to twelve at-large members. The town meeting can alter the size of the committee or rescind the election to have an official budget committee by warrant article in future years. A member of the governing body of the municipality, one member of the school board of each district wholly within the municipality and one member of each village district wholly within the town will serve as voting members of the committee. However, no other select board member, town manager, school board member, full-time employee, or part-time department head may serve as a member-at-large.

III. BORROWING

A. Municipal Finance Act

Some projects are too large to accomplish with the resources available in an annual budget. If the town hasn't accumulated money in a capital reserve or other nonlapsing account, money may have to be borrowed. While the range of allowable purposes is broad, RSA 33:3 provides that money may not be borrowed to fund "current maintenance and operation." A municipal debt obligation is an attractive investment to investors because the interest income is often exempt from federal and state income taxation. Since the opportunity to purchase the investment is offered to the public, municipal bonds and notes must meet stringent requirements imposed by federal and state tax and securities laws. Expert assistance on these matters is available from attorneys who serve as "bond counsel" and from the New Hampshire Municipal Bond Bank created under RSA chapter 35-A. Expert assistance should be sought early in the process of planning for the project to assure that all of the required procedures are carefully followed. Procedural errors may prevent issuance of the bonds or notes, even if the underlying project has the support of the voters.

RSA 33:4-a and RSA 33:4-b place limits on the total amount of debt a municipality can have outstanding at any one time. This debt limit is calculated as a percentage of the total equalized assessed value of all taxable property in the municipality. The debt limit is 3 percent for towns, 7 percent for school districts and 1 percent for village districts. However, it is possible for the limit of a town or district to be lower at any particular time because the total combined debt to which any municipality can be subjected is 9.75 percent. RSA 33:4-a and RSA 33:4-b.

The mechanics of borrowing are contained in RSA chapter 33, the Municipal Finance Act. The law includes the following provisions:

1. SUPERMAJORITY REQUIRED

Under RSA 33:8, the issuance of bonds or notes requires a three-fifths secret ballot vote on the specific warrant article at town meeting. The same super-majority, three-fifths, is also required in towns that operate under the official ballot referendum form of government (SB 2).

2. BONDS OR NOTES OVER \$100,000

If the amount of the bond is more than \$100,000, there are some additional requirements under RSA 33:8-a. At least one public hearing must be held at least 15 but not more than 60 days prior to the meeting where the bond will be considered. Notice of the hearing must be posted and published in a newspaper at least seven days prior to the hearing. The warrant article must be acted on prior to all other town meeting business except town officer elections and zoning questions on the official ballot. Secret ballot voting must be open for at least one hour after discussion. ***Do not, under any circumstances, close ballot voting on a bond article in less than an hour, or the vote will likely be invalidated, and the decision of the people will be delayed.*** A bond article vote cannot be reconsidered until at least seven days later, at a meeting noticed by publication in a newspaper at least two days prior to the meeting. (In an official ballot referendum (SB 2) town, votes to reconsider, or to restrict reconsideration, may occur only at the first deliberative session when articles are discussed, debated, and possibly amended. RSA 40:13, IV provides that a vote to restrict reconsideration prohibits any further action upon that article until the second session, when voters either approve or reject the article in whatever form it was at the time of the vote to restrict reconsideration. Effectively, therefore, a vote to restrict reconsideration on a bond over

\$100,000 in an SB 2 town means there will be no further reconsideration by discussion or amendment, only by voting on that final form.)

B. Tax Anticipation Notes

Tax anticipation notes (TANs) are short-term borrowings by the municipality used when the cash flow from tax revenues is insufficient for current needs because of the timing of tax bills. The notes are repaid with tax revenue when it is received. Under RSA 33:1, III, tax anticipation notes are not subject to the debt limit imposed upon the municipality, but the total amount of TANs cannot exceed the total tax levy of the preceding fiscal year. Once the tax levy of the current year is determined, the town may borrow up to the total tax levy of the current year. During the period from the beginning of the fiscal year until the date of the annual meeting, towns may issue TANs in an amount up to 30 percent of the total tax receipts in the preceding fiscal year. RSA 33:7. TANs may be authorized by a majority vote at town meeting and do not require a secret written ballot.

C. Capital Improvement Program

The use of long-term debt instruments may be reduced if the municipality engages in long-term capital planning and periodic appropriations into capital and other reserve funds created to carry out the plan. When a major new asset is acquired, such as a fire truck, planning can begin immediately to replace it in the future. Annual appropriations into a reserve fund will help to set aside the funds needed, so that when the truck must be re-placed, all or most of the money will be available to accomplish the task. The CIP is a task of the planning board or a committee appointed by the governing body, pursuant to RSA 674:5; cooperation with the governing body and the budget committee is important in CIP development.

IV. PURCHASING AND BIDDING

A. Competitive Bidding Not Required

New officials are often surprised to learn that there is no state law requiring competitive bidding for town purchases, unless a public official is involved as one of the sellers. If a public official is a seller of goods, RSA 95:1 requires competitive bidding if the amount of the goods exceeds \$200. Some city charters require competitive bidding. Towns may vote, by a warrant article at town meeting, to establish a centralized purchasing department for the town in accordance with RSA 31:59-a. If the warrant article is approved, the select board must appoint a purchasing agent, who may establish rules and regulations for competitive bidding for town purchases of goods or services. RSA 31:59-a – :59-d. Under RSA 447:16, any municipal project for the construction, repair or rebuilding of public buildings, public highways, bridges or other public works involving an expenditure of \$125,000 or more must include as a condition of the contract sufficient security by bond or otherwise covering at least 100% of the contract price conditioned upon the payment by to all contractors and subcontractors for all labor performed or material used by the principal contractor.

B. Competitive Bidding Policies

Where municipalities have enacted local purchasing or competitive bidding policies, the policies must be strictly followed. *Gerard Construction Co. v. Manchester*, 120 N.H. 391 (1980). The

purpose of competitive bidding, as stated by the Court in Gerard, is “to invite competition, guard against favoritism, improvidence, extravagance, fraud and corruption and secure the best work or supplies at the lowest price practicable.” *Id.* at 396. Caution should be exercised in creating municipal purchasing policies. For small quantities of items that are readily available at any retail store at a fair price, the cost and delay inherent in competitive bidding is probably not warranted. For larger quantities of goods and services, the competition inherent in a competitive bid will likely result in the best price for the item or service. Competitive bidding procedures should be reviewed by the municipal attorney in order to assure that the specifications are precise and the procedures for review of the bid and determination of the winner are clear. In addition, the municipal attorney should be consulted on drafting and approving the award to the bidder and the written contract for the goods or services.

C. Rules of Competitive Bidding

The New Hampshire Supreme Court has issued several decisions in cases challenging municipal competitive bidding practices. These cases have established some basic rules of fairness in the bidding process:

1. LOWEST BIDDER

If the town decides to use competitive bidding, the process must be conducted fairly. The town can reject all bids, but if it decides to accept one, it must choose the “lowest responsible bidder” who has complied with all of the terms of the solicitation, without showing favoritism. *Curran, Inc. v. Auclair Transportation Inc.*, 121 N.H. 451 (1981). That does not mean that the lowest bid in dollar amount must be accepted in all cases; if that low bid has not responded to all terms of the solicitation, or has proposed materials that are different from those specified in the solicitation, or if the bidder cannot meet a required condition, such as provision of a performance bond, it may be rejected.

2. FAIR TREATMENT

All bidders must be treated fairly and equally with respect to the town’s competitive bidding procedures, such as notice. *Irwin Marine, Inc. v. Blizzard, Inc.*, 126 N.H. 271 (1985).

3. CHANGING SPECIFICATIONS

The town cannot, after putting one set of specifications out to bid, decide to accept a bid that is calculated on different specifications. If the municipality desires to use the new specifications, it must reject all bids, advertise the new specifications, and allow the other responsible bidders to submit new bids based upon the new specifications. *Marbucco Corp. v. Manchester*, 137 N.H. 629 (1993).

CHAPTER SEVEN

WELFARE FOR NON-WELFARE OFFICIALS

I. PROVIDING LOCAL WELFARE IN CHALLENGING ECONOMIC TIMES

This chapter provides a brief overview of local welfare administration. Anyone who will become actively involved in administering welfare is strongly advised to obtain more information, such as that provided in NHMA's publications, *The Art of Welfare Administration* and *Model Welfare Guidelines*.

Administering local welfare is a challenging endeavor, even for the most experienced welfare administrators. The welfare administrator will work directly with applicants to obtain all necessary information and determine eligibility for assistance in accordance with the town's welfare guidelines. The welfare administrator's job is to ensure that citizens in need are assisted according to the law and that the town's welfare budget is prudently managed. The reality is that applicants arrive in the office seeking financial help to stop an eviction, to keep the lights and heat on, to put food on the table, and for many other basic needs. These individuals are often under a great deal of stress and may be emotional and quite demanding.

The needs presented will vary significantly based upon a person's age, employment status, physical or mental disability or illness, housing needs, and marital situation, which may include pending divorce or domestic violence proceedings. The financial records provided by applicants will present issues of banking law, consumer law, federal and state tax law, and property law. The issues presented by individuals and families in need are complex, and the welfare administrator has a duty to administer this program fairly, confidentially, and with impartiality to all applicants.

II. LOCAL WELFARE

A. The Mandated Duty

The following sentence has been part of RSA chapter 165, the New Hampshire local welfare law, virtually unchanged for more than 200 years:

Whenever a person in any town is poor and unable to support himself, he shall be relieved and maintained by the overseers of public welfare of such town, whether or not he has a residence there. RSA 165:1.

The duty to provide local welfare is not optional; it is something the town must do under the law. **A town cannot deny assistance because it is over budget**, and a town cannot deny assistance because the applicant is not a town resident. The local welfare duty is a mandate, and the State provides no funding to operate the program. Since it is a mandate that predates the amendment to the New Hampshire Constitution (Part I, Article 28-a) that prohibits such action, it is constitutional. While sweeping changes were made to state and federal welfare programs in the 1990s, local welfare laws have changed little.

B. Some Fundamentals

1. BUDGET

There is no dollar limit on the costs that a municipality might be required to incur to assist a particular recipient over a period of time. In other words, an eligible person cannot be denied welfare assistance because the budget has been overspent. In addition, an eligible person cannot be denied welfare assistance because the municipality has elected not to increase the amount available for housing as housing costs have increased over time. See *Hall v. Hillsborough County*, 122 N.H. 448 (1982) (discussing the requirement of actual costs). The municipality has a duty to provide sufficient funds for welfare expenditures by transfer from other budget line items, permission for emergency expenditure from the DRA, or, if necessary, a special town meeting to make additional appropriations.

2. NO TIME LIMIT

There is no time limit for assistance to a particular recipient. So long as that person remains eligible for assistance, the obligation to assist continues. This might be a continuous period measured in years.

3. IRRELEVANT FACTORS

At times applicants are in distress because of factors beyond their control, while at other times the distress results from poor decision making. The cause of the distress does not make the applicant ineligible to receive local assistance. If the person's monthly income is less than legitimate monthly expenses for the basic necessities of life according to the municipal guidelines, he or she is eligible for local assistance. However, certain actions by an otherwise *eligible* applicant may cause him or her to be *disqualified* from receiving any assistance. This topic is discussed more fully in section III of this chapter.

4. NO RESIDENCY REQUIREMENT

Nonresidents of a municipality are equally as eligible to receive assistance as residents, although the town or city providing assistance has a right under RSA 165:20 to recover those sums from the municipality where the assisted person is a resident. Residence is defined in RSA 21:6 and RSA 21:6-a, and for the purpose of local welfare is the place where the applicant intends to remain physically present for the indefinite future, to the exclusion of all other places. Residence can be formed instantaneously. Residence is not lost by a temporary absence if there is an intent to return to a place as the principal place of physical residence.

C. Local Guidelines Required

All towns and cities are required to have welfare guidelines. The guidelines must be adopted by the governing body (defined in RSA 21:48). RSA 165:1. A municipality must insert guideline amounts for assistance representing the actual, realistic costs of the basic necessities of life unique to that municipality. Once adopted, these should be reviewed periodically to ensure that they continue to accurately reflect the actual and realistic costs of life in the municipality. Many municipalities have seen that recent increases in housing costs and decreases in housing availability have necessitated a shorter timeframe for review than in prior years. The written guidelines must include, but need not be limited to: the process for application for general assistance, the criteria for determining eligibility, and the process for appealing a decision relative to the granting of general assistance. While the statute allows for local flexibility in these matters, the guidelines may not openly conflict with the procedural and substantive requirements of RSA 165. Several years ago, the City

of Manchester adopted a guideline which provided that any misrepresentation or omission of information in an application was grounds for denial or termination of all assistance for up to six months. Because this was in direct conflict with the procedural requirements of RSA 165:1-b, the NH Supreme Court invalidated the guideline. *Bond v. Martineau*, 164 N.H. 210 (2012).

D. Who Administers Welfare?

A town may choose to have an elected “overseer of public welfare” administer local welfare. RSA 41:2. If there is no elected welfare officer, the duty falls to the select board (RSA 41:56) or, if there is one, the town manager (RSA 37:6, VIII). In many towns, the select board appoints a welfare officer to carry out the town’s local welfare responsibilities. In cities, the position of welfare director is usually determined by the city’s charter. It is also possible for municipalities to band together to share a welfare officer through an intergovernmental agreement pursuant to RSA Chapter 53-A. Such officials have been granted protection against liability (immunity) for good faith activities undertaken while in office as a result of an amendment to RSA 31:104.

E. Availability of Assistance

The welfare administrator must be available, or there must be access to the welfare program, during business hours, five days a week. Welfare administrators without full-time office hours should post telephone numbers where the administrator or an alternate official may be reached. In an emergency situation, a person must be able to receive aid for which he or she is eligible within 72 hours of making an application (or more quickly if it is available). Thus, a municipality cannot make an applicant with emergency needs wait until the next meeting of the governing body (select board or council). Most cities have full-time welfare directors and may have one or more caseworkers, as well. In towns, the governing body should delegate the dual responsibilities of receiving an application and making an emergency aid decision to someone who is available during business hours, such as the administrative assistant or an appointed welfare officer. The persons who staff the town office during business hours should have a written procedure available to them regarding who is responsible for the welfare function and how that person may be contacted during business hours. Otherwise, the town or city could be sued for violating the applicant’s due process rights guaranteed by the federal constitution.

F. The Role of the Local Police

There is nothing criminal about being a person in need of assistance. Therefore, as a general rule, the municipal police should not conduct an investigation or be involved in the process of determining whether or not an applicant is eligible for assistance. Because of the potential stigma that is involved, the police should generally not be used to deliver ordinary paperwork to applicants or provide transportation to appointments. In the event the welfare officer determines that applicants may have engaged in any intentional fraud in claiming expenses or concealing assets, or if an applicant becomes threatening or abusive, then it is appropriate to seek assistance from the police.

G. Privacy and Confidentiality

The names and addresses of people applying for and receiving assistance may not be made public. Anyone who releases them for any purpose except in furtherance of welfare administration is subject to a penalty. RSA 165:2-c and RSA 91-A:5. The historical files, computerized data or paperwork that are created as a case is processed must be kept in a secure place that is not available to the public or to other town or city employees and elected officials not involved in

administering the case. In general, that includes the local police, who are not entitled to learn the information that may be placed into a local welfare file. This means discussions about welfare cases at select board meetings must take place in a nonpublic session, under RSA 91-A:3, II(c), as “matters which, if discussed in public, would likely affect adversely the reputation of any person,” including “any application for assistance or tax abatement or waiver of a fee, fine, or other levy, if based on inability to pay or poverty of the applicant.”

In addition, RSA 41:46 requires the welfare official to “keep full and accurate records of the assisted persons fully supported.” Detailed records help to keep track of cases and support any decisions that are challenged. However, it is critical to note that the file is confidential, is not subject to disclosure under RSA 91-A:5, IV, and should be kept in a secure location where only those who need access to administer the program may access them. Please note, however, that the applicant himself or herself has the right to review the file for any purpose. It is important the applicant is aware of this right.

III. DETERMINING ELIGIBILITY

As noted previously, any person who is poor and unable to support himself or herself is eligible to receive assistance from the municipality. However, even if a person is apparently eligible for assistance, the facts must be verified, and even if completely accurate, the person may be disqualified for various reasons that are described in the statute.

A. Determine Need as a Whole

The local welfare administrator should take a complete written application and determine an applicant’s entire financial picture, rather than focusing only on what the applicant requests. The municipality then has the right and the responsibility to verify the accuracy of this information. The applicant may have verifying documentation, but sometimes it will be necessary to contact other persons. For example, the welfare officer can only verify a rent obligation by talking with the landlord. Written permission (in the form of a release) should be obtained from the applicant before talking to others to avoid a claim that confidentiality has been illegally breached. The municipality should provide assistance in an amount that represents the person’s overall eligibility, but the assistance need not necessarily take the form or the amount requested by the applicant.

B. Factors Affecting Eligibility

The verified financial need of the applicant is the only valid reason for giving or refusing assistance in the first instance. The person’s age, race, religion, national origin, criminal record, or moral character is not legally relevant. Applicants are not required to take legal action against others to recover money they may be owed as a condition of eligibility. Persons who are not United States citizens may only qualify for limited emergency or medical assistance.

C. Effect of Other Assistance

If an applicant for assistance is receiving other forms of aid, normally that aid will be considered as income and will, therefore, reduce the amount that the municipality must provide. However, there are some exceptions to this basic rule:

1. FOOD STAMPS

This program is now called “SNAP”, which stands for the “Supplemental Nutrition Assistance Program”, see <https://www.fns.usda.gov/snap/supplemental-nutrition-assistance-program>. Federal law prohibits the receipt of food stamps from being counted as “income” of the applicant or used to reduce the amount that the municipality would otherwise pay for food. 7 U.S.C. §2017(b). The legislative history of the food stamp program reveals that Congress intended that result when it passed the law. Congress intended to raise the nutritional level of program participants and to stimulate the agricultural economy by requiring local welfare administrators to ignore receipt of food stamps when determining how much food assistance a person might be eligible to receive locally. This means that the receipt of food stamps cannot be counted as “income” or in any way as an offset against the amount of food assistance for which the applicant would otherwise qualify. If this seems like “double dipping” regarding food assistance, it is. Congress understood the issue and intended this result in designing the federal program.

2. OAA AND APTD

Under RSA 167:27, no person who is receiving either state old age assistance (OAA) or state aid to the permanently and totally disabled (APTD) may at the same time receive any other relief from the state or its political subdivisions (the municipality). However, this limitation is not as strong as it may seem at first.

In *Smith v. Franklin*, 159 N.H. 585 (2010), The New Hampshire Supreme Court clarified the meaning of APTD for purposes of eligibility for local welfare assistance under RSA 167:27. The Court ruled that there are actually two separate APTD programs: NH-APTD, which is financial assistance, and Medicaid-APTD, which is medical assistance. The APTD program which is incompatible with local assistance under RSA 167:27 is the NH-APTD, or financial assistance, and not the Medicaid-APTD program. Thus, when presented with an applicant who is receiving benefits under APTD, the welfare administrator must first determine from which program the applicant is receiving benefits. Those who receive *only* medical assistance from the Medicaid-APTD program may be eligible to receive local assistance if the person meets the eligibility requirements of the municipality’s welfare guidelines.

The other factor to consider is whether, under a new optional provision, the municipality’s guidelines permit applicants who are receiving OAA or financial assistance under the NH-APTD program are eligible to receive local assistance. RSA 167:27, II. There are no clear court cases on this issue, but on its face, it seems like a risky strategy under the ADA to deny local welfare assistance to APTD recipients. Thus, the conservative advice is that municipalities either ignore, or better yet change, any language in their guidelines that disqualifies OAA and APTD recipients from receipt of local welfare. Process applicants with OAA or APTD income as any other applicant following your guidelines. While an argument might be made that municipalities can still exercise the local option relative to assisting OAA recipients, that path should be reviewed carefully with local counsel. Generally, income from APTD and OAA should be simply factored into the amount of aid to be awarded.

3. FUEL ASSISTANCE

Federal law also prohibits fuel assistance from being counted as income, under the same general policy considerations as apply to food stamps (now SNAP). It is best if the application does not even ask the question so that fuel assistance won’t accidentally be counted as “income” when calculating the amount of assistance for which the applicant qualifies.

D. Nonresidents

Towns and cities are responsible for assisting anyone in need who applies and is eligible. The duty applies to nonresidents as well as residents. If a needy person is physically present in a town or city at the time of application, assisting that person is the responsibility of that town or city. Residency is important only to determine if the municipality can be reimbursed for the assistance provided. If the person is truly a resident of another New Hampshire town or city, the assisting municipality may later recover the amount of assistance from that other municipality. A welfare officer cannot simply send the person away or ask them to travel back to a place where they may have a residence. If the applicant requests help in returning to his or her residence in another municipality, such help may be provided. RSA 165:1-c.

E. Disqualification

Even if an applicant has provided verifiable information to show that he or she is eligible for assistance, there may be a valid and lawful reason to disqualify that applicant from the receipt of assistance under the local assistance law. Each of these situations can be factually complex; the welfare officer should read the statute carefully and be sure that all required documentation is present before making a decision to disqualify an applicant. Often the disqualification is temporary, so that a person who may be correctly refused assistance today may qualify for that assistance in the near future.

1. FAILURE TO COMPLY WITH GUIDELINES

RSA 165:1-b disqualifies an applicant who “willfully fails to comply with written guidelines adopted by the governing body” relating to disclosure of financial information, participation in a work program, searching for work or making application with other public assistance agencies. Be sure to check the language of the statute before making this determination and be sure to follow the statutory procedure if the decision is to disqualify the applicant.

2. VOLUNTARY QUIT

RSA 165:1-d disqualifies an applicant who has voluntarily terminated employment within the 60 days prior to application. There are many exceptions to this general rule contained in the statute, so read the law carefully before relying on this provision to deny assistance.

3. QUALIFIED STATE ASSISTANCE

RSA 165:1-e allows a local welfare administrator to treat as income an amount called the “qualified state assistance reduction” (QSAR) imposed pursuant to RSA 167:82, VIII. This means that if a person is penalized by state welfare officials for failure to participate in required work programs, that loss of state assistance will not permit the same applicant to qualify for local assistance. This may only be done if the local governing body has authorized it in the written guidelines, and the town must waive any or all of a QSAR if necessary to prevent an immediate threat to children in the household.

4. TRANSFER OF PROPERTY

RSA 165:2-b disqualifies an applicant who has transferred ownership of property out of his or her name at any time in the past three years for the purpose of qualifying for local assistance.

F. Hearings

If a person is denied assistance on one of the above grounds, he or she has a right to have the

decision reviewed by an impartial person who did not participate in the original decision. RSA 165:1-b, III. This “fair hearings officer” has the authority to require the welfare officer to render assistance if the applicant shows by a preponderance of the evidence that the welfare officer made an error in rendering the decision. The fair hearings officer is appointed by the governing body. More information regarding this process is contained in the NHMA publication *The Art of Welfare Administration*.

IV. AMOUNTS OF ASSISTANCE (GUIDELINE ALLOWANCES)

A. Actual Cost

The New Hampshire Supreme Court has ruled that the amount of assistance a municipality allows to an eligible person must be based on the actual cost of the basic necessities of life—that is, food, clothing, shelter and other necessities—in that town or city. *Hall v. Hillsborough County*, 122 N.H. 448 (1982). To the extent that local guidelines are set to artificially low amounts, legal challenges on behalf of applicants may result. For this reason, guidelines should be reviewed by the governing body periodically to assure that they reflect the actual cost of living in the municipality. We suggest that this be done at least annually, both to provide the most accurate measure of relief, and to assure that the governing body is aware of how the program is actually being administered in the municipality.

B. Consistency

An initial welfare calculation should be purely mathematical. Add the person’s income and liquid assets, and if the total is less than the “need” amounts established in the municipality’s guidelines, the difference is granted as assistance. Even if the amounts are later varied due to special circumstances, the analysis should start with this formula, and then justify the variation in writing. Otherwise, the decision could be seen as an arbitrary violation of the applicant’s due process rights. One basic mistake that even experienced administrators often make is to focus on only what the applicant requests. The municipality may provide assistance in an amount that represents the person’s overall eligibility, but the assistance need not necessarily take the form or the amount requested by the applicant.

C. Disbursements

Assistance is never provided in the form of cash payments to an applicant. Instead, the municipality issues vouchers payable directly to the vendors involved, such as landlords, utility companies or pharmacies. RSA 165:1, III. The amount on the voucher is the maximum amount to be used for payment. The vendor returns the voucher to the municipality with itemized receipts for the things or a service provided and is paid the actual value of what was provided. For example, a rent voucher may require a rent receipt from a landlord, but a pharmacy voucher may require a register tape from the store showing the actual value of the items dispensed.

D. Prescription Drugs

When the municipality assists a person in the purchase of a prescription product, the provider of pharmaceutical services is prohibited from charging the person or the municipality more than the rate that would be charged to the state Department of Health and Human Services (DHHS) for

that product. RSA 126-A:3, III(e). Local welfare officials should not question whether an applicant needs pharmaceuticals that have been prescribed by a physician, but if a release is provided, officials may contact the physician to determine if a less expensive or generic drug would in fact meet the applicant's needs.

E. Imposing Conditions on Continued Assistance

After the initial eligibility decision has been made and assistance has been granted, it is possible to put conditions upon the continued receipt of aid. The conditions may vary to fit individual situations and the type of assistance granted. If the conditions are not met and there is no valid excuse for the failure, it is possible to terminate aid. A willful refusal to comply with the following conditions can justify disqualification and a suspension of aid:

- requiring the applicant to look for work;
- requiring participation in an authorized work program;
- disclosure of relevant financial data; or
- requiring application for other state and federal assistance programs.

In order to terminate aid for these reasons, the municipality must follow the procedure in RSA 165:1-b. The statute includes requirements for two written notices, the first of which should be included in the decision granting aid, plus an opportunity for a fair hearing.

V. RECOVERY AND OFFSETS

Local assistance is not a grant, and recipients are required to repay the amount of the assistance if they are able to do so. A lien in favor of the municipality arises immediately upon the provision of assistance. RSA 165:20-b. There are several ways a town or city might recover some or all of the amount expended for welfare assistance. These matters may be legally complex, and we suggest that you contact your legal counsel for assistance in recovery matters, which may involve initiating a lawsuit, or undertaking other efforts to enforce the lien.

A. Lien on Real Estate

Pursuant to RSA 165:28, the town or city shall place a lien on real estate owned by a recipient for the amount of assistance provided. The notice of lien is recorded at the county Registry of Deeds. The municipality may be reimbursed when the property is sold, but that is by no means guaranteed. Unlike a tax lien, the welfare lien is of a lower priority than a prior recorded mortgage, prior recorded judgment or execution, and certain other liens. The obligation can be extinguished forever by a foreclosure of the mortgage, a sheriff's sale, or certain other proceedings to collect upon a higher priority lien. The tax collector should be notified of the lien so that he or she will have a local record that the lien exists. **Unless the welfare amounts provided have been secured by a lien upon real estate, the ability to recover the money is lost after six years under RSA 165:25.**

B. Liens on Estates, Civil Judgments and Property Settlements

For six years after assistance is rendered, the town or city has a lien against an assisted person's estate, property settlements and personal injury judgments. This lien has priority over all other

claims. RSA 165:28-a. See RSA 165:29. This situation arises when an individual has been injured and cannot work but may eventually recover money from the person who caused the injury.

C. Legally Liable Relatives

Pursuant to RSA 165:19, the town or city may recover against a person's spouse, parents, or children for assistance rendered to the person. This is true even if the assisted person is a fully competent adult. This obligation often comes as a surprise to these relatives. The method for enforcing the obligation is an action in Circuit Court – District Division. The fact that an applicant has a parent economically able to provide financial help, for example, does not mean the municipality is relieved of its duty to provide assistance in the first instance or in an emergency. It simply means the municipality may be able to recover later from these responsible persons.

D. Recovery from Another Municipality

When a town or city, or a county acting as agent for a municipality under RSA 165:34, spends money for the support, return to his or her home, or burial of a person “having a residence in another town or city,” that amount may be recoverable from the municipality in which the person has a residence. A civil action may be brought under RSA 165:20 to recover the cost of assistance rendered; however, RSA 165:20-a establishes a voluntary arbitration system in the state DHHS to resolve disputes among municipalities regarding liability for such assistance.

E. Reimbursement from the State

RSA 165:20-c allows towns and cities to be reimbursed by the state for certain delays in processing state welfare applications. There are federally mandated time periods for state welfare workers to make decisions on state welfare applications. If the state exceeds these time periods, and the town or city must provide financial support to a person who should be supported by a state welfare program, the state may be required to reimburse the municipality. Read the statute carefully. Few municipalities have been successful with this process.

F. Reimbursement from Recipient

An assisted person must reimburse the municipality if his or her income rises to the point where it exceeds the cost of acquiring the basic necessities of life. RSA 165:20-b. One way for an assisted person to reimburse the municipality is to participate in the local welfare work program. RSA 165:31. In lieu of receiving a paycheck for the hours worked, the assisted person is “credited” against assistance already received. However, the fact that a person has not reimbursed the town for assistance in the past is not a valid reason to deny assistance at any other time if he or she is otherwise eligible.

G. Offsets

RSA 165:4-a allows the town or city to apply welfare rental payments due a landlord on behalf of a recipient to delinquent tax, sewer, water, or electric bills owed by the landlord on that property. This provision does not allow for offset of amounts due on other properties in the town that may be owned by the landlord. This provision must be adopted in the welfare guidelines in order to use it. See RSA 165:4-b. Use of this offset does not reduce or eliminate the amount owed by the assisted person under RSA 165:20-b.

VI. MORE INFORMATION

The publications *The Art of Welfare Administration* and *Model Welfare Guidelines* provide more detailed information on this topic. Visit the NHMA website at www.nhmunicipal.org for more details. Also, consider joining the New Hampshire Local Welfare Administrators Association, which meets regularly and is an excellent resource.

VII. REVIEW

Welfare assistance issues *must* be addressed in this order:

- **Emergency need?** Is there an immediate need for food, medical care, or shelter while the person's financial condition is being verified?
- **Determine the applicant's basic aid eligibility.**
- **Basic need formula:** Allowable Expenses (the municipality's guideline amounts) *less* Income and Available Assets *equals* Amount of Aid Eligibility.
- **Special circumstances?** Are there special facts justifying variation from guideline amounts? Example: The person's rent slightly exceeds the guideline amount, but in light of all of the circumstances, suggesting that the person move will delay a return to income status, thus costing the town more in the long run.
- **Impose conditions for continued assistance.** Example: Requirements for seeking other sources of aid, work search, or local work program.
- **Offset and recovery issues:** Can the town recover part of its expense from the applicant, state, legally liable relative, or another town in which the person resides?

The order is important. Need always comes first. Keep records, for you may need to justify your decisions in a fair hearing.

CHAPTER EIGHT

PROPERTY TAXATION

CONCEPTUAL SUMMARY

The taxation process can be conceptually divided into seven steps:

Step 1

Property **valuation** is the first step in the real estate taxation process. Assessing officials must determine the true value of all property in the municipality. Annual adjustments are made to maintain proportionality of assessed values throughout the municipality.

Step 2

Exemptions are then subtracted from the assessed value to determine how much of the assessed value is subject to being taxed (total taxable valuation).

Step 3

The **tax rate** is set by the Department of Revenue Administration (DRA) by dividing the total taxable valuation by the total amount the municipality needs to raise (that is, total appropriations minus other sources of revenue).

Step 4

Credits are then subtracted from a property owner's tax bill by the municipality.

Step 5

Billing and payment.

Step 6

If requested by individual taxpayers and if justified, **abatements** can be granted by the assessing officials to correct the amount charged.

Step 7

Collection occurs when tax bills aren't paid in a timely manner.

I. VALUATION (RSA CHAPTER 75)

A. Background

1. WHO?

Property valuation is the responsibility of the board of assessors in a city. RSA 48:12 (variations by charter or ordinance). In towns, the select board members serve as the assessors, unless the town has voted to elect a board of assessors. In this chapter the term “select board” will be used to refer to the officials performing the assessing function. Even when there is a town-wide revaluation by professionals, the select board still has the final word on assessed value (subject to requests for abatement). *Hudson v. Dep’t of Revenue Administration*, 118 N.H. 19 (1978).

2. WHAT?

Part II, Article 5 of the New Hampshire Constitution authorizes the legislature to impose and levy taxes on all estates within the state. RSA 72:6 provides that “[a]ll real estate, whether improved or unimproved, shall be taxed except as otherwise provided.” The types of real estate taxed are found within RSA chapter 72 and include land, buildings, and many other types of property.

3. HOW?

Unless otherwise provided by statute, all property must be appraised at full and true market value. RSA 75:1. Market value is the amount a willing buyer would pay a willing seller in an arm’s-length transaction. Exceptions to this rule include current use property, which is appraised according to RSA chapter 79-A; open space land with conservation restrictions (RSA chapter 79-B); land with discretionary easements (RSA chapter 79-C); residences on commercial or industrial zoned land (RSA 75:11); excavations (RSA Chapter 72-B); farm structures and land under farm structures (RSA chapter 79-F); taxation on qualifying historic buildings (RSA chapter 79-G); taxation of certain chartered public schools (RSA chapter 79-H); and residential property subject to housing covenant under the low-income housing tax credit program (RSA 75:1-a). As of August 20, 2019, valuation of electric, gas and water utility company distribution assets are assessed using RSA 72:8-d, a new statutory formula that is being phased in over a five-year period. Various methods are used for valuing different types of property (for example, sales of comparable properties, capitalization of income for commercial property, etc.). The details of the various appraisal techniques are beyond the scope of this overview, but market value is always the objective. In short, each different technique attempts to capture the true market value.

B. When Appraised?

1. WHAT DATE?

The property tax year begins on April 1 and ends the following March 31. RSA 76:2. The value of property for real estate tax purposes is its value as of April 1, the first day of the tax year, regardless of how the property might change before the tax bills are sent. There is, however, one exception. Whenever a taxable building is damaged by unintended fire or other natural disaster to the extent that the building is not able to be used for its intended purpose, the assessing officials are required to prorate the assessment for the building for the current tax year. RSA 76:21. The proration of the assessment shall be based on the

number of days that the building was available for its intended use divided by the number of days in the tax year, multiplied by the building assessment. The taxpayer has 60 days from the date of the damage to file an application with the assessing officials for proration or by March 1st, whichever is later. RSA 76:21, III. The total tax reduction from proration under this provision for any single town or city is limited to an amount equal to ½ of one percent of the total property taxes committed during the year. If the assessing officials determine that it is likely this limit will be reached, the proration shall not be applied to any additional properties.

2. MARKET VALUE

Part II, Article 6 of the New Hampshire Constitution requires that “there shall be a valuation of the estates within the state taken anew once in every five years, at least, and as much oftener as the general court shall order.” Pursuant to RSA 75:8-a, all properties in a town must be assessed at full market value at least as often as every fifth year. The fifth year is counted either from the first year of the town’s assessments that were reviewed and determined by the DRA to be at market value, or from the first year after 1999 that the town conducted a DRA monitored full revaluation.

3. ANNUALLY

Any property that has changed in value over the prior year must be revalued. RSA 75:8. The appraisal is calculated to determine value as of April 1. For example, if a building is half built on April 1, the value for the entire tax year (April 1 to March 31) is the market value of a half-built building. If a building is placed on a lot on April 2, there will be no value included for the building for the entire tax year, but the value of the building will be included in the following year’s assessment. When a property undergoes a material physical change that increases its value, the new value must be set so that it is proportional to the other properties in town. Note as well that property damaged during the year by unintentional fire or other natural disaster may be eligible for a proration of tax in the year during which the damage occurs. See Section B(1) above.

4. PROPORTIONALITY

RSA 75:8 requires the select board to adjust property values annually to reflect changes so that the assessments on all properties in the town are reasonably proportional. For example, in some years, condominium properties have dropped significantly in value, whereas individual houses have not. In such case, an adjustment to the condominium property values may be required to maintain their proportionality with other properties in the town. Market changes, material physical changes and zoning changes are the types of events that may result in a change in value requiring an adjustment to maintain proportionality.

5. SUBDIVISION

It is important to keep the town’s tax records and subdivision records consistent with each other. Land that has been subdivided as of April 1 should be appraised as separate tracts. RSA 75:9; RSA 674:37-a. If a subdivision application is pending but not yet approved as of April 1, then all assessments, appraisals and tax warrants for that property during that tax year shall pertain to the entire non-subdivided property as it was configured on April 1, regardless of any later sale or transfer of subdivided lots which may occur during that year. RSA 674:37-a, II.

When a subdivision occurs mid-year and any portion of it is transferred to a new owner prior to the payment of all outstanding taxes, the municipality’s tax lien remains in effect with respect to the entire property until it is collected in full. RSA 674:37-a, III.

6. INVOLUNTARY MERGERS PROHIBITED

In the past, adjacent lots in the same ownership may have been merged for the purposes of zoning, assessing, or taxation pursuant to terms of local ordinances, or as a matter of local practice. These “involuntary mergers” are now prohibited, and owners who were affected in the past may submit a request for restoration of their lots to premerger status to the governing body. The time limit for submitting an unmerger request was eliminated from the governing statute effective September 21, 2021. See RSA 674:39-aa.

C. DRA Assessment Review Process

1. THE SIRRELL CASE

The plaintiffs in *Sirrell v. State*, 146 N.H. 364 (2001), challenged the constitutionality of the then newly adopted state education property tax, claiming that property values varied among municipalities by unacceptable levels because of the different assessing practices followed by municipalities. While the New Hampshire Supreme Court ruled the plaintiffs failed to prove there was a systematic pattern of disproportional taxation and therefore held that the statewide property tax was not unconstitutional as applied, the Court did find that the “[e]vidence at trial established that the statewide property tax system as currently applied has significant shortcomings” and that “[t]he current system of administering the statewide property tax raises serious concerns as to whether it is proportional and reasonable, as required by Part II, Article 5.”

As a result of *Sirrell*, however, a number of changes were made to the assessing statutes and to the statutes authorizing the DRA to oversee municipal assessing practices. The legislature established an Assessing Standards Board (ASB) to assist it in addressing the five main issues raised in *Sirrell*, which included a lack of standards for local assessing practices and a lack of verification of assessing data.

2. ASSESSMENT REVIEW PROCESS

In RSA 21-J:11-a, the legislature established an assessment review process and identified five areas of municipal assessing practices for review and report by DRA:

- whether the level of assessments and uniformity of assessments are within acceptable ranges as recommended by the ASB;
- whether assessment practices substantially comply with applicable statutes and rules;
- whether exemption and credit procedures substantially comply with applicable statutes and rules;
- whether assessments are based on reasonably accurate data; and
- whether assessments of various types of properties are reasonably proportional to other types of properties within the town.

The DRA reviewed the assessing practices and data of all municipalities according to standards developed by the ASB covering the five areas above. The DRA prepared an assessment review report detailing how well the town meets the assessing standards and filed the report with the ASB and the legislature. The assessment review report for all reviewed municipalities is available in the Property Appraisal Division section of the DRA website at <https://www.revenue.nh.gov/mun-prop/property/assessment-review.htm>. Amended RSA 21-J:14-b, I (c) authorizes the Assessing Standards Board to establish standards for revaluation of property based on the most recent edition of the Uniform Standards of Professional Appraisal Practice (USPAP). Previous law had referred only

to USPAP Standard 6. That assessment review report must also separately categorize compliance with findings that test current assessing practices since the year of the prior assessment report, examine permanent records, and summarize compliance in a single conclusion statement.

II. EXEMPTIONS FROM TAXATION

Under RSA 72:6, all real property is taxable unless it is covered by an exemption. An exemption is defined as “the amount of money to be deducted from the assessed valuation, for property tax purposes, of real property.” RSA 72:29, III. The burden of showing that an exemption should be granted is on the person or organization applying for the exemption. RSA 72:23-m.

There are two categories of exemptions: those related to the use of the land and those related to the circumstances of the landowner.

A. Exemptions Related to Use of the Land

Most of the exemptions related to use of the land are covered under RSA 72:23:

1. GOVERNMENTAL

Property owned by the state, cities, towns, counties, school districts, and village districts is entitled to exemption unless used or occupied by a private party, or in the case of counties, county farm property. Property of the University System of New Hampshire is exempt from taxation, apparently even if it is used or occupied by a private party. RSA 187-A:25. In *Appeal of Reid*, 143 N.H. 246 (1998), the New Hampshire Supreme Court held that government-owned land leased to a private party is not subject to taxation unless the lease so provides. Under RSA 72:23, I(b), leases and other agreements concerning use of government property must include provisions for the lessees to pay property taxes. In addition, RSA 72:23, I (b) (1)(A) requires the state or any political subdivision that owns property and leases it to others to file a written notice with the assessing officials annually, on or before April 15, along with a copy of the lease or other agreement. Although 2019 NH Laws Chapter 346:392 exempted the NH Department of Transportation from this requirement, that exemption expired January 1, 2021. Thereafter on an annual basis, on or before April 15, the Department of Transportation shall provide to the assessing officials of the municipality in which leased property is located a copy of any new or renewed lease in effect. Such lease filing with municipal assessing officials shall not include permits, licenses, or non-lease agreements. 2020 N.H. Laws Chapter 33:6.

In *New England Telephone & Telegraph Co. v. Rochester*, 144 N.H. 118 (1999), the Court held that licenses to use telecommunications poles were “other agreements” within the meaning of the statute. The exemption under RSA 72:8-b for conduits and wooden poles owned by telecommunications companies expired on July 1, 2010. As a consequence, municipalities could assess and tax the property starting with the tax year that begins April 1, 2011. Furthermore, municipalities cannot enter into a contract that would waive the obligation of a private party to pay properly assessed property taxes on land leased from a city, town, school district or village district. *Signal Aviation Services, Inc. v. City of Lebanon*, 169 N.H. 162 (2016). An amendment to RSA 72:23, I, clarified that when property owned by the state or a political subdivision is leased to another party, the party using the property is required to pay property taxes even though the lease does not

contain the precise language required by the statute. It also allows a political subdivision to adopt an exemption from the tax obligation for land that is used exclusively for agriculture. RSA 72:23, I (b)(3).

2. RELIGIOUS

Religious entities are entitled to real estate tax exemption where property is owned, used and occupied for religious purposes. The manner in which the property is owned and used should be specified in the exemption application in order for the town to determine whether an exemption will be granted.

3. EDUCATIONAL

Property that is owned, used and occupied for school purposes is exempt from taxation. However, if the value of the dormitories, dining rooms and kitchens exceeds \$150,000, the excess value is subject to taxation, unless the legislative body has voted to increase the amount of the exemption. RSA 72:23, IV.

4. CHARITABLE

Property owned, used and occupied by charitable organizations for charitable purposes is entitled to exemption. Note that “charitable” does not mean the same as “non-profit” and not all entities qualifying as nonprofits for federal tax purposes are exempt from local property tax. See RSA 72:23-I. The Supreme Court formulated a succinct four-part test for the charitable exemption in *Eldertrust of Florida, Inc. v. Epsom*, 154 N.H. 693 (2007), summarizing the elements previously discussed in many cases. In *Peterborough v. MacDowell Colony, Inc.*, 157 N.H. 1 (2008), the Court clarified that the inquiry needed to determine what constitutes a “charitable organization” is not whether “the public benefits from the organization’s *property*, but whether the public . . . benefits from the organization’s *performance of its stated purpose*.” If the organization is actually administered so that any public benefit is slight, negligible, or insignificant compared to the benefit to the organization’s members, it will not qualify for the charitable tax exemption. *Appeal of Concord*, 161 N.H. 344 (2011). A charitable exemption is not lost merely because a qualified organization actually conducts its activities through a series of related legal entities. *Granite State Management & Resources v. City of Concord*, 165 N.H.277 (2013).

5. THE ‘DIRECT USE’ REQUIREMENT

Property must be used and occupied to be exempt. “A tax exemption is not warranted when the asserted [use] is no more than slight, negligible or insignificant, indefinite and prospective, or theoretical.” *Appeal of Liberty Assembly of God*, 163 N.H. 622, (2012). Under the religious, educational, and charitable purpose exemptions, the only part of the property exempted is that part actually used for those purposes. For example, a school owns 50 acres, only 10 of which are used for the school. The rest is timbered. Only the 10 acres gets the exemption. The rest is taxed, though it might qualify for current use. See *St. Paul’s School v. Concord*, 117 N.H. 243 (1977); *Appeal of Emissaries of Divine Light*, 140 N.H. 552 (1995). If only a portion of the structures owned by the exempt organization is directly used for the exempt purpose, the exemption only covers the portion of the structure actually used. *Appeal of Liberty Assembly of God*, 163 N.H. 622 (2012). “Direct use” means the property must be in actual use for the exempt purpose. Plans for future use or designation for an exempt use will not support an exemption. *Wolfboro Camp School Inc. v. Wolfboro*, 138 N.H. 496 (1994). A church summer camp complex could not claim exemption as a charitable organization where it served primarily only its own members and was not entitled to exempt recreational

property under a religious exemption. *East Coast Conference of Evangelical Covenant Church of America, Inc. v. Swanzey*, 146 N.H. 658 (2001). An organization operating a large housing complex for the elderly qualified for complete charitable tax exemption where independent living units generated significant income, but those profits were used for providing charitable assistance to residents requiring assisted living or nursing home care. *In re Laconia*, 146 N.H. 725 (2001). But the same organization was denied an exemption where its property in Wolfeboro contained only independent living units, with no assisted living or nursing care facilities, and there was no evidence of financial assistance given to residents. *In re Wolfeboro*, 152 N.H. 455 (2005). Two closed church buildings used only for storage pending sale were held not to be directly used for religious purposes. *Appeal of Nashua*, 155 N.H. 443 (2007). The charitable entity is not required to devote all of its resources – at all times – to providing charitable services. *The Marist Brothers of NH v. Town of Effingham*, 171N.H. 305 (2018).

6. FINANCIAL FILINGS

Charitable organizations claiming exemption under RSA 72:23, V must file certain financial forms with the town each year to retain exempt status. RSA 72:23, VI. .

7. OTHER EXEMPTIONS

These include water and air pollution control facilities, if approved by the Department of Environmental Services under RSA 72:12-a (however, the exemption is no longer available for sewage disposal systems other than those granted an exemption prior to January 1, 2010); ski area machinery, RSA 72:12-c; demountable plastic-covered greenhouses, RSA 72:12-d; new commercial and/ or industrial construction, RSA 72:81, and others. The pollution control exemption is also limited to those facilities that regularly operate and does not extend to emergency systems which may never operate to treat anything (although they may be eligible in years during which they do operate). *Appeal of Seabrook*, 163 N.H. 635 (2012).

8. INFORMATION REQUESTS

Select boards may ask organizations seeking the religious, educational or charitable exemptions to provide any information needed to determine eligibility for the exemption. Failure to supply the requested information can result in denial of the exemption, unless the request is found to be unreasonable. RSA 72:23-c; *see also* RSA 72:23, VI. Charitable organizations must also file BTLA form A-9 before April 15 providing a list of all real estate and personal property for which exemption is claimed. Failure to timely file the form, without evidence of accident, mistake or misfortune will result in a denial of the charitable exemption. *New London Hospital v. Town of Newport*, 174 N.H. 68 (2021).

B. Circumstances of the Landowner Exemptions

These exemptions, which may only apply if the town has voted to adopt them, or has voted to amend the statutory exemption amount, include the unified elderly exemption, RSA 72:39-a (see below); the exemption for the blind, RSA 72:37; the exemption for the disabled, RSA 72:37-b; and the exemption for the deaf, RSA 72:38-b. The procedures for adoption, modification or rescission of tax exemptions (and credits) have been unified into one statute, RSA 72:27-a. In towns that have not adopted charters, the question is placed on the warrant of a special or annual town meeting. The filing date for applications for all exemptions (and credits) is April 15 preceding the setting of the tax rate. RSA 72:33.

1. UNIFIED ELDERLY EXEMPTION

The unified elderly exemption law, RSA 72:39-a and RSA 72:39-b, allows each town to fill in the blanks with its own choice of income and asset limits and exemption amounts for each statutorily designated age category. All income is treated equally when determining income limits; Social Security income is not excluded. The amount of “net assets” owned, is based upon the value of all includable assets net of any encumbrances. *Appeal of the City of Nashua*, 164 N.H. 749 (2013). Additionally, a town can vote to establish a separate married combined net asset limitation to apply to a surviving spouse.

2. PERMANENT APPLICATION

Personal exemptions are given to someone who files a permanent application for that type of exemption by April 15 preceding the setting of the tax rate. The deadline to apply for a property tax deferral for the elderly or disabled is March 1 following the date of the notice of the tax. RSA 72:38-a.

3. QUALIFICATIONS

The taxpayer must have been qualified for the exemption as of April 1 of the tax year claimed, except that financial qualifications will be judged, in most cases, as of the time the application is filed. The DRA provides an application form. RSA 72:33.

4. DECISION

The select board must provide a written decision on the forms provided by the DRA no later than July 1. The town can request that the taxpayer provide a self-addressed envelope with sufficient postage to mail the decision. Failure of the select board members to decide (*i.e.* doing nothing) will constitute a denial of the application. RSA 72:34, IV.

5. APPEAL

The applicant may appeal the denial of an exemption to the superior court or the Board of Tax and Land Appeals (BTLA) by the September 1 following the notice of tax. RSA 72:34-a. The applicant must state the specific grounds supporting the appeal. *In re Taylor Home*, 149 N.H. 96 (2003) (holding that where the applicant only stated grounds for appeal of the denial of abatement, the application was not sufficient to constitute an appeal of the denial of application for charitable exemption).

6. PERIODIC INVESTIGATION

The select board can investigate an application for an exemption and ask for verification to determine if the person is eligible. RSA 72:34. Furthermore, they can, as often as once a year, require information to be resubmitted to make sure the person still qualifies. RSA 72:33, VI. The ASB administrative rules require that municipalities review the recipient's eligibility at least once every review period.

7. PROPERTY IN TRUST OR LIFE ESTATE

Persons who have their property in a grantor/revocable trust or who have equitable title or the beneficial interest for life in the subject property may also receive these exemptions, provided they otherwise qualify. RSA 72:29, VI.

8. TAX DEFERRAL

RSA 72:38-a provides a different type of tax relief to elderly and disabled taxpayers, allowing them to defer property taxes as long as they remain on the property. The total tax deferrals cannot exceed 85 percent of the equity value of a particular property. Unlike other outstanding

real estate taxes, a tax deferral granted under this provision shall be subject to any prior liens on the property, such as a mortgage, and shall be treated as such in any foreclosure proceeding. Upon selling or otherwise conveying the property subject to the deferral, the owner must pay the full amount of the deferred taxes plus interest within nine months, or collection actions may be commenced. RSA 72:38-a, IV-a.

III. SETTING THE TAX RATE

A. Report to DRA

The select board annually reports to the DRA, on forms provided by the DRA, the total value of taxable property in the town and the total amount appropriated by the town. RSA 21-J:34. The DRA sets the tax rate.

1. CALCULATION

The basic formula for setting the tax rate is:

$$\frac{\text{VOTED APPROPRIATIONS minus ALL OTHER REVENUE}}{\text{LOCAL ASSESSED PROPERTY VALUE}} = \text{Property Tax Rate}$$

2. OVERLAY

RSA 76:6 allows local officials to add an extra 5 percent to the total amount to be raised by taxes for all purposes, including school district and village district appropriations, for the purpose of offsetting possible abatements. This is because abatement requests are not resolved until after the tax rate has been set.

B. DRA Authority

When the DRA calculates total appropriations, it has the authority to “delete” appropriations “made in a manner which is inconsistent with statute.” RSA 21-J:35, III. Appeals from one of these deletions must be made within 10 days to the commissioner of the DRA, whose decision is final. Do not wait until tax rate setting time to discover that the DRA considers the town to have made an appropriation in a manner inconsistent with statute. If there are any doubts, call the DRA before the vote is taken. Ask whether the DRA is going to disallow the appropriation at tax rate setting time.

Once the tax rate has been set, the tax equals: the DRA-set rate *times* the total taxable valuation (the town’s gross tax assessment). Each tax bill is created by multiplying the assessed value of the taxable property by the DRA-set tax rate.

IV. TAX CREDITS

A tax credit is defined as “the amount of money to be deducted from the person’s tax bill.” RSA 72:29, IV. What many people call the veterans’ “exemption” is really a tax credit. RSA 72:28; RSA 72:28-b. It reduces the tax due, not the appraised value of the property itself. A municipality may adopt the All Veterans’ tax credit by following the procedures for adoption of other local option

credits and exemptions outlined in RSA 72:27-a. The amount of the All Veterans' credit will be the same as the standard or optional veterans' tax credit in effect in the municipality under RSA 72:28. Other tax credits include the surviving spouse tax credit (RSA 72:29-a), the tax credit for service-connected total disability (RSA 72:35, allowing a maximum credit of \$4,000), and the Optional Tax Credit for Combat Service, RSA 72:28-c.

V. BILLING

A. Posting

After the tax rate has been set, the select board prepares an alphabetical list of all the taxable property in the town, the assessed value of each lot, and the amount of the tax, which is then posted where the public can see it during business hours five days a week. RSA 76:7 and RSA 76:7-a. If the town office is not open five days a week, then this list must be posted in a public place.

B. Warrant

The list of taxable property, along with a warrant, is sent by the select board to the tax collector. The warrant is the document reflecting the legal command to the Tax Collector to bill and ultimately collect the tax as set forth on the list of taxable property. Responsibility for billing now rests with the tax collector, who must send out bills within 30 days of receiving the tax warrant. RSA 76:11. Tax bills must be sent either by first class mail or by electronic means if approved by the governing body. Electronic tax billing may only be used after the taxpayer requests it and must be done free of charge to the taxpayer. RSA 76:11, II.

VI. CORRECTIONS AND ABATEMENTS

A. Mistakes

The select board has until the end of the tax year—March 31—to correct mistakes (that is, the property was taxed to the wrong person, or property has completely “escaped taxation” for that year). RSA 76:14. “Escaping taxation” does not mean a mistakenly low assessment. In *Pheasant Lane Realty Trust v. Nashua*, 143 N.H. 140 (1998), the New Hampshire Supreme Court ruled that RSA 76:14 does not allow a town to adjust a taxpayer's assessment and to send a supplemental bill. The Court said the phrase “escaped taxation” means only that a tax bill was never sent, not that the property was under-assessed. Furthermore, in order to correct an under assessment based upon new information, there must be some change to the subject property. The discovery of an extreme under assessment does not constitute a legal change permitting a reassessment under RSA 75:8. *Merrimack Premium Outlets v. Town of Merrimack*, 174 N.H. 481 (2021).

B. Abatements

1. AUTHORITY TO GRANT

Pursuant to RSA 76:16, I(a), the select board or assessors, for good cause shown, may

abate any tax, including prior years' taxes, assessed by them or by their predecessors, including any portion of interest accrued on such tax. In the alternative, under I(b), the taxpayer may request the abatement, in writing to the select board or assessors, by March 1 following the notice of the tax. Note that the tax collector has no statutory authority to grant an abatement, or to refuse to implement an abatement that has been granted by the select board or assessors. Notice of the tax means the date the BTLA determines is the last date tax bills were mailed in the town. In towns with semi-annual billing, this means the date of mailing the second, or final, bill. The statute specifies that abatement requests must be made on a form prepared by the BTLA, which will help to make sure that the taxpayer is providing all the information necessary to support the abatement request. Taxpayers should state with specificity the grounds for the request. Failure to use the form, however, will not affect the right to seek an abatement. A simple letter with all the information is adequate. RSA 76:16.

2. 'GOOD CAUSE'

Under both RSA 76:16, I (a) and RSA 76:16, I (b), the select board or assessors can grant an abatement for "good cause shown." Usually, the grounds for the request are that the property was assessed at a disproportionately high value. Although the New Hampshire Supreme Court has held that poverty also counts as a "good cause," this is a reason that should apply in limited circumstances. *Ansara v. Nashua*, 118 N.H. 879 (1978). When an abatement is granted, a refund of the overpayment, plus interest at the rate of six percent from the date of payment to the date of refund, is made to the taxpayer. RSA 76:17-a. If the property taxes have not been paid in full, the amount of taxes abated is deducted from the outstanding tax bill. A taxpayer may also apply for an abatement under the good cause standard for taxable building damage due to fire or natural disaster even if the taxpayer did not seek a timely proration under RSA 76:21. *Carr v. Town of New London*, 170 N.H. 10 (2017)

3. FUTURE TAXES

Can a town legally make an agreement to abate future taxes in exchange for some perceived benefit to the community—for example, an agreement with a commercial developer the town is trying to attract?

RSA chapter 79-E, Community Revitalization Tax Incentives, enables cities and towns to grant property tax relief on a building-by-building basis for rehabilitated structures in designated areas. The tax relief is for a period of up to five years, or more for certain uses. Relief under RSA chapter 79-E is not an "abatement." By vote of the town meeting vote to expand the program, this relief may be made available to historic structures on the national or state register of historic places that are not located in a downtown, town center, central business district, or village center, RSA 79-E. An amendment to this chapter adding RSA 79-E:4-a allows a municipality to establish a "coastal resilience incentive zone" and grant tax relief to qualifying structures within the zone for the purpose of resilience measures related to anticipated storm surge, sea level rise, and extreme precipitation. Further amendments to this statute in 2021 allows a municipality to designate a "residential property revitalization zone" and grant community revitalization tax relief under RSA 79-E to the owner of a residential property in the zone with not more than four units if the structure is at least 40 years old and if the owner significantly improves the quality, condition, or use of the structure. Separately, it allows a municipality to create "housing opportunity zones" and apply the community revitalization tax relief incentive to housing units constructed within a housing opportunity zone. To be eligible, at least one-third of

the housing units constructed must be designated for households with an income of 80 percent or less of the area median income, or the housing units in a qualifying structure must be designated for households that are deemed to be of “very low, low, or moderate income” under RSA 204-C:57, IV.

RSA 72:75 - :78, Commercial and Industrial Construction Exemption, enabled cities or towns in Coos County to grant property tax relief for new structures and additions, renovations or improvements to existing structures for commercial use (retail, wholesale, service, and similar uses) and industrial uses (manufacturing, production, assembling, warehousing, processing of goods or materials for sale or distribution, research and development activities, or processing of waste materials). The exemption is a specified percentage on an annual basis of the increase in assessed value attributable to the new construction, addition, renovation or improvement, and may run for a maximum period of 10 years following the new construction. However, the exemption for all years cumulatively may not exceed 500 percent of the increased assessed value. Like RSA Chapter 79-E, this relief is not an “abatement.”

This optional exemption was extended to the entire state in 2017 through the adoption of RSA 72:80 through RSA 72:83. However, the manner of calculating the maximum percentage amount of the exemption that may be granted is different. If adopted, the exemption applies only to municipal and local school property taxes, not to state education property taxes or county taxes, and is limited to a specified percentage on an annual basis, not to exceed **50 percent per year**, of the increase in assessed value attributable to construction of new structures and additions, renovations, or improvements to existing structures. And like the Coos County provisions, the exemption may only be granted for a maximum period of 10 years. As of July 12, 2019, the percentage rate and duration of this exemption is granted on a case-by-case basis and is based on the amount and value of public benefit. It may be made available to all properties within the municipality or to a specific group of parcels as determined by the legislative body. This optional exemption is adopted using the procedure found in RSA 72:27-a.

4. DECISION

The select board has until July 1 to grant or deny an abatement request. Failure to respond is considered a denial. RSA 76:16, II. Answering, however, is usually more courteous and may reduce the chance of appeal.

5. APPEAL

If the select board does not grant the abatement request, the taxpayer can appeal to the superior court or BTLA. This must be done by September 1. Otherwise, the right to appeal is lost. This is true even if the select board has not answered the written abatement request. The timeliness of an appeal is governed by RSA 76:16-e, which refers to the provisions of RSA 80:55. That statute provides that a document is deemed to be filed on the date shown on the postmark on the envelope. RSA 80:55 also provides that, if the deadline for filing falls on Saturday, Sunday, or a legal holiday, the filing shall be considered timely if performed on the next business day.

6. EFFECT OF ABATEMENT APPEAL

If the BTLA or court grants an abatement on the grounds of an incorrect property assessment value, the select board must use the corrected value in assessing subsequent taxes (until such time as there is a reappraisal or annual adjustment), and shall automatically abate any taxes that were assessed using the incorrect value while the appeal

was pending (provided there was no reappraisal or adjustment), even if no abatement application was filed. RSA 76:17-c.

Clarifying the scope of a court's authority to order relief in abatement appeals, the Court held that abatements can only be adjusted down, not up. *LSP Ass'n v. Gilford*, 142 N.H. 369 (1998).

VII. COLLECTION

A. Payment on Time

For annual billing, the taxpayer has until December 1 or 30 days after the bills are sent, whichever is later, to pay without any penalty. After that, interest accrues at 8 percent. RSA 76:13. If the town has adopted semi-annual billing (RSA 76:15-a), the first bill is mailed by June 15 and is due before July 1. The amount of this first billing is an estimate based on one-half of the prior year's taxes, subject to adjustments for changes in adequate education grants as may be permitted by the DRA. This first bill is not subject to abatement requests, but if it goes unpaid for 30 days, then interest accrues at the 8 percent rate. If the town has adopted quarterly billing (RSA 76:15-aa), payments are due July 1, October 1, January 2, and March 31. Refer to RSA 76:15-aa for complete details on quarterly billing.

B. Tax Lien

The notices and other requirements for the tax lien procedure are set forth in RSA Chapter 80 and are not covered in this outline. It is crucial that the statutory tax lien procedure is strictly followed. Tax collectors should consult the publications of the DRA and the New Hampshire Tax Collectors Association. There are some details, however, that all officials should know:

1. LIEN

Property taxes, timber yield taxes, and sewer and water rates constitute a lien on the property being taxed, which is superior to all other liens, including prior recorded mortgages. RSA 80:19 and RSA 80:59.

2. EXECUTION

This lien arises automatically upon assessment and expires by October 1, eighteen months after the assessment date, unless the tax has been paid or a tax lien execution has been held. Most towns do this sometime in May or June. Pursuant to RSA 80:60, the property owner must be notified at least 30 days prior to the lien execution. On the day of the lien execution, the tax collector creates an affidavit of the action, and reports the execution to the Registry of Deeds within 30 days in accordance with RSA 80:64.

Within 60 days of the execution of the lien, notice must be given to all mortgagees of record. These mortgagees have a right to pay the outstanding taxes due, which extinguishes the municipal lien and restores the priority of their mortgage interest, and may thereafter pursue their own remedies against the landowner in accordance with the terms of the mortgage document.

Under the tax lien process, the town meeting can authorize the select board to sell liens to outside buyers. RSA 80:80, II-a. If the town does not exercise this authority, only the

municipality where the property is located, or the county or the state, may acquire a tax lien against land and buildings for unpaid taxes. RSA 80:63.

3. INTEREST

The interest rate increases to 14 percent per annum as of the time the tax lien is executed. RSA 80:69.

4. REDEMPTION

The taxpayer has two years from the date of the tax lien execution to redeem the property by paying the taxes plus accumulated interest and costs. RSA 80:69. If the back taxes and costs are not paid in full, the tax collector shall give the lienholder a deed to the property. RSA 80:76. The municipality is usually the lienholder, although it may be an outside purchaser if the municipality uses the statutory “tax sale” collection procedure, or if the municipality has authorized the select board to sell the liens to others. However, most municipalities no longer use the tax sale procedure and instead have adopted the “tax lien” procedure described above. *See* RSA 80:58 - :86.

C. Refusal of the Tax Deed

1. LIABILITIES OR OTHER OBLIGATIONS:

The town has the authority to conduct an environmental investigation of the property. RSA 80:19-a. If the property is contaminated, the town can refuse to accept a tax deed. RSA 80:76. The governing body can also refuse a tax deed whenever ownership might expose the town to undesirable liabilities or other obligations, such as environmental cleanup costs, condominium fees, or mobile home park rent. The importance of the ability to refuse a tax deed is illustrated by the result in a case involving the Town of Londonderry. The town took a tax deed on a junkyard that contained hazardous waste. The abutting property owner sought damages from the town, as owner of the contaminated property, for the costs of cleaning wastes that spilled from the junkyard onto his property. Finding that the town was not a “qualifying holder” of the land, the Court held the town strictly liable for hazardous waste dumping and required it to pay for the cleanup. *Mailloux v. Londonderry*, 151 N.H. 555 (2004). Whenever a tax deed is refused, the town’s lien, the taxpayer’s right of redemption, and the accrual of interest all continue indefinitely until the tax is collected by other means, which includes “any remedy provided by law for the enforcement of other types of liens or attachments.” This means the tax lien continues until either the taxes are paid or the town accepts the deed. If circumstances change, the governing body can always instruct the collector to issue the tax deed again, and then accept it. If this occurs, all appropriate notices are again provided in a timely manner as required in RSA 80. Strict compliance with the law is required for the town to achieve proper title to the real property.

2. IMPACT OF A BANKRUPTCY FILING:

The tax deeding process can also be stopped or delayed if the owner files a petition for bankruptcy relief in the federal bankruptcy court. This might be in New Hampshire for a resident owner, or in any other state for a non-resident owner. It is beyond the scope of this overview to discuss the details of this very complex area of the law. We advise that local officials contact the town attorney as soon as they receive notice of a bankruptcy filing, and to take no further action until the status of the debtor in the federal court is clear. Since there are different types of bankruptcy relief, and the questions and answers that arise are extremely fact specific, there is no single response applicable to such filings.

D. What Happens with Tax-Deeded Property?

In all cases, a municipality may elect to keep tax deeded property and use it for public purposes, subject to a former owner's three-year right of repurchase. See RSA 80:91. Municipalities were once entitled to keep 100 percent of the proceeds from the sale of tax-deeded property, however, the 2020 decision of the New Hampshire Supreme Court in *Polonsky v. Town of Bedford (Polonsky II)* clarified that municipalities are not entitled to keep any of the "excess proceeds" from the sale of tax deeded property. See subsection 4 below. There is a three-year period after a tax deed is recorded during which former owners have certain rights. These are outlined below. (This three-year period is not to be confused with the two-year tax lien redemption period *before* the tax deed, although both periods relate to the legal rights of the landowner.) Here are the specifics:

1. FORMER OWNER'S RIGHT OF REPURCHASE

Under RSA 80:89, at any time during the three-year period, or until the property is sold after full compliance with RSA 80:89, any former owner can repurchase the property by paying "back taxes, interest, costs and penalty." This phrase is defined to include all taxes, interest and costs owed on the date of the tax deed; plus all taxes and interest that would have accrued since then if the owner had kept the property; plus all the town's legal fees; plus all the town's incidental expenses relating to the property, such as for repairs, improvements or marketing; plus an additional penalty of 10 percent of the property's equalized assessed value (RSA 80:90, I(f)), unless the property is the former owner's principal residence, or was the former owner's principal residence at the time of execution of the tax deed under RSA 80:76, in which case the additional penalty does not apply (RSA 80:89, II). This is often a substantial amount of money, especially for landowners who may have been experiencing financial difficulties. This law does not restrict the town from making alternative agreements with a former owner "as justice may require" under RSA 80:80, VI, if such authority was given to the board by vote of town meeting.

"Former owners" means any person in whom title to the property, or partial interest therein, was vested at the time of the tax deed, and shall include any heir, successor, or assign of any former owner, but not someone whose claim originated after the tax deed was recorded. If a former owner does exercise the right of repurchase, all liens and mortgages extinguished by the tax deed spring back into existence at the same proportional interests they held on the date of the tax deed.

If the town wishes to auction or convey the property during the three-year period, it may do so. It is not required to maintain ownership of the property for this period. The town must, however, notify all former owners of its intent to convey, giving them an advance opportunity to repurchase. Carefully consult the language of the statutes, specifically RSA 80:89, for details and timing of this notice.

2. PROCEEDS

If the property is sold to someone other than a former owner within the three-year period described above, RSA 80:88 requires that any proceeds a town receives over and above the "back taxes, interest, costs and penalty" (as defined previously) must be paid back to the former owner.

If there is more than one former owner or lienholder, the town may avoid a dispute as to who is entitled to these proceeds by filing a "bill of interpleader" with the superior court, depositing the amount in court, and letting the court distribute it based on the interests of the stakeholders at the time of the tax deed. The costs of this legal action are added to the amount the town can keep out of the proceeds.

3. TOWN AS OWNER

The law makes clear that the right of repurchase, or to “excess” proceeds, is the only right retained by former owners. A town can freely manage the property as its owner, “including leasing or encumbering all or any portion of the property” without any accountability or liability whatsoever to former owners. However, the property remains subject to other vested rights such as easements to cross the land. *Marshall v. Burke*, 162 N.H. 560 (2011).

4. CONSTITUTIONALITY

In *Polonsky v. Town of Bedford*, 173 N.H. 226 (2020), the New Hampshire Supreme Court ruled that the existing statutory provision in RSA 80:88 allowing municipalities to keep “excess proceeds” is unconstitutional. The statute has not yet been amended to reflect this decision.

When the New Hampshire Supreme Court originally heard this case, it determined that the Town had correctly tax-deeded the property in favor of the Town and held that the statutory scheme spanning RSA 80:88 - :90 prohibited a prior owner from claiming excess proceeds from any future sale of the property after the three year period lapsed. *Polonsky v. Bedford*, 171 N.H. 89 (2018) (*Polonsky I*). The Court then sent the case back to Superior Court to address whether RSA 80:89, VII constituted an unconstitutional taking in violation of Part I, Article 12 of the New Hampshire Constitution. Under RSA 80:89, VII the duty of a municipality to provide excess proceeds from the sale of property acquired by tax deed terminates three years after the recording date of the deed.

In *Polonsky II*, the Supreme Court ruled that the three-year limitation on the town’s duty to pay excess proceeds under RSA 80:89, VII is an unconstitutional taking under Part I, Article 12. Excess proceeds that were not returned because the three-year redemptive period expired can be recovered by the former owner. Based on the Court’s prior rulings in *Estate of Ireland v. Worcester Ins. Co.*, 149 N.H. 656 (2003) and in *Lee James Enterprises v. Town of Northumberland*, 149 N.H. 728 (2003) this decision will have a retrospective application of 10 years under RSA 80:78.

As a general rule, municipalities should sell tax deeded properties within three (3) years of recording the tax deed, following the procedures in RSA 80:88 and RSA 80:89. If there is some compelling reason to not re-sell (e.g. it is environmentally sensitive wetland/marsh) the municipality could vote to retain it (RSA 80:80(V)) at which point the municipality will need to tender a former owner a payment equal to fair market value, less all accrued taxes, interest and other items the municipality may retain. When tax deeded property is not sold within the first three years, the former owner must still be provided notice to re-acquire the property or paid any excess proceeds as provided under RSA 80:89 and RSA 80:90.

VIII. REVIEW

As a review of the time it takes, as well as the number of steps required, to collect taxes, consider the following example:

April 1, 2022: Assessment date for taxes based on 2021 appropriations. Select board begins to make annual list.

September 1, 2022: Last day for town to submit reports to the DRA for purposes of setting tax rate.

October 2022: Within 30 days after the DRA sets the tax rate, select board delivers tax warrant to tax collector.

November 2022: Within 30 days after receiving warrant, tax collector sends out tax bills.

December 1, 2022: Last day to pay taxes without interest (if tax bills were mailed on 11/1/21).

March 1, 2023: Last day for taxpayer to request abatement on 2022 taxes.

Spring 2023: Tax lien execution occurs if taxpayer has not paid in full (assume May 1).

May 1, 2025: If the taxpayer has not paid owed amounts in full, then the town, or the private purchaser, gets a tax deed for the entire property. See RSA 80:88 – :91 for information on distribution of proceeds from sale of tax deeded property.

More information is available from the New Hampshire Tax Collector's Association, whose website, <http://nhtaxcollectors.org>, contains many helpful checklists and much more detail than our overview discussion.

CHAPTER NINE

LIABILITY

I. BASIC CONCEPTS OF TORT LIABILITY

“Liability” is the term used when the law assesses responsibility for either doing or not doing something. Some liability is assumed voluntarily by agreement. The rules that regulate contracts allow parties to promise to buy or sell the things they need with assurance that such promises can be enforced. When it comes to liability for contracts to buy and sell goods and services, municipalities are subject to the same basic rules as individuals and corporations.

The law also assesses responsibility for conduct that results in a physical injury to a person, injury to the person’s property, or injury to a person’s other protected personal rights. These injuries are described as “torts.” The word “tort” is derived from the French word meaning “wrongs.” Basically, a tort is a private or civil (as opposed to criminal) injury for which our legal system provides a remedy to an injured plaintiff in the form of monetary damages. Although municipalities can be held liable for monetary damages arising out of these actions, they have some different responsibilities and some special protections that do not apply to individuals or private corporations. Municipalities, of course, act through their officials and employees. There are many special principles and statutes that control the liability of municipalities for the acts or omissions of their officials and employees.

The law does not require a municipality to guarantee that people using municipal property or taking part in municipal programs will always be safe. Some municipal activities are clearly required by the law, and some activities are clearly prohibited. In between, there is a wide range of decisions that are based upon experience, discretion and judgment. It is appropriate for municipal officials to be concerned about whether a particular policy or activity could result in injury to someone, even when the law would not hold the municipality liable for the injury. However, there are few activities that are completely risk free, and a municipality cannot base all public decisions upon a fear of claims or lawsuits.

Public officials should work with the municipal lawyer and risk management advisor to analyze risks and decide when the desire to prevent injury or the risk of liability is great enough that it should influence decisions. This should include consideration of the municipality’s longer-term interests. Important policies should not be defeated by an undue fear of liability, and quick settlement of claims may just attract additional claims. The municipal lawyer can make suggestions about preventing or avoiding liability based upon the reported experiences of others, but rarely will be able to say that a particular activity poses no risk of liability. The risk manager can also make suggestions about preventing injury and liability based upon the experience of others and can advise how to obtain sufficient insurance or pooled risk management coverage to protect against the financial consequences of negligence. Municipalities can also use the written safety program and joint loss management committee mandated under the workers compensation statute to assess and mitigate hazards. *See* RSA 281-A:64. It is appropriate and lawful for a municipality to acquire liability insurance or pooled risk management coverage to protect against losses that exceed the statutory limits. The advantages and disadvantages of relying on statutory limited liability, liability insurance and pooled risk management coverage should be thoroughly discussed with the town’s professional advisors. RSA 507-B:7-a.

The remainder of this chapter discusses the legal principles underlying tort liability and the special defenses available to municipalities when claims are brought forward. Selected activities that tend to generate

significant litigation are discussed. The focus is on state law tort liability, with a short discussion of federal civil rights claims.

Torts are divided into three separate categories based on the responsible party's behavior: intentional torts, negligence and strict liability. The vast majority of municipal tort liability results from intentional or negligent behavior.

A. Intentional Torts

Intentional torts include assault, battery, false imprisonment, trespass, libel and slander (also known as defamation). Municipal officials and employees may be sued directly under these theories of law in the same manner as a private citizen. The key allegation here is that the harm resulted from an intentional act that the defendant knew or should have known was both wrongful and would cause harm to the plaintiff.

B. Negligence

Negligence is defined as the failure to exercise that degree of care that a reasonably prudent person would exercise under similar circumstances. The injured party does not claim that the defendant intended to harm the plaintiff, but instead that the defendant was careless. Negligence is the theory of law under which the majority of claims against municipalities proceed.

In order to prevail in a negligence case, the plaintiff must prove four elements:

1. DUTY

The municipality (or the official or municipal employee) owed the plaintiff a legal "duty." A duty is, generally, an obligation to conform to a legal standard of reasonable conduct in light of apparent risk. For example, the town owes a duty of reasonable care in maintaining the town hall for use by the general public, but the town has no duty to maintain a tree located entirely on private property.

2. BREACH OF DUTY

The municipality (or the official or municipal employee) breached the duty or failed to act reasonably in light of some apparent risk. For example, the town failed to repair a broken railing on the town hall stairs, even though the local officials knew of the defect.

3. CAUSATION

The plaintiff must prove that as a direct, proximate and foreseeable result of the breach of duty, the plaintiff was injured. For example, as a direct result of failure to repair the broken railing, a person fell down the stairs and broke her arm.

4. DAMAGES

The plaintiff must show the losses suffered as a direct result of the injury, which are quantified as monetary compensation for the injury. For example, the person with the broken arm might seek to be reimbursed for medical expenses, time lost from work and the pain and suffering incurred by the trauma of the injury.

C. Strict Liability.

This relates to the imposition of liability upon an entity that controls something dangerous, and if an injury or loss occurs, that entity must pay damages regardless of how carefully they attempted to control the dangerous thing or process.

D. Statutory liability to employees, workers' compensation.

The workers' compensation statute replaces negligence in the employer-employee relationship for those situations where an employee experiences an injury or illness arising out of and in the course of employment. Under New Hampshire law, employees are deemed to have consented to be governed by the workers' compensation statute by virtue of the fact that they accepted an offer of employment. Municipal workers generally cannot bring a lawsuit in court for any work-related injury but must pursue the claim through the workers' compensation system administered by the state Department of Labor. Claims arising out of intentional torts and violations of civil rights are exceptions to this rule. These statutory claims will not be further discussed in this chapter.

E. Respondeat Superior: Vicarious Liability

Municipalities are subject to the common law tort doctrine of *respondeat superior*. That doctrine states that an employer is responsible for the negligence of an employee acting within the scope of the employee's duties. The liability is "vicarious" because there need not be any actual negligence on the part of the employer, the municipality. An employee is acting within the scope of employment when the act or omission:

- is of the kind the employee is employed to perform;
- occurs substantially within the authorized time and space limits; and
- is actuated, at least in part, by a purpose to serve the employer.

Porter v. Manchester, 151 N.H. 30, 40 (2004). The concept is interpreted broadly. For example, in *Daigle v. Portsmouth*, 129 N.H. 561 (1987), an off-duty Portsmouth police officer, stopping to help some Newington officers make an arrest, beat Daigle and left him lying on the ground. Portsmouth denied civil liability, arguing that the officer was acting outside the scope of his duties because (a) the officer was off duty and (b) his brutal attack was contrary to department policies. The New Hampshire Supreme Court held Portsmouth liable. The Court concluded that trained police officers are never really "off duty" if they are performing police work.

F. Statutes of Limitation

Citizens have a limited time to bring their claims before a court, as determined by statute; hence the term "statute of limitations." In New Hampshire, RSA chapter 508 specifies this time, which varies based upon the type of loss alleged. For example, if the claim involves title to real estate, the time limit is 20 years. RSA 508:2. If the claim is "personal," the time is generally shortened to three years. RSA 508:4. See RSA 507- B:7 regarding certain claims against municipalities. Any claim a person was subject to sexual assault or incest by a governmental unit may commence an action at any time after the injury occurred. RSA 507-B:7, II.

There are many exceptions to these general rules; the mere passage of time will not always protect against a claim of liability. Local officials should consult with the municipal attorney and/or insurance carrier when they suspect a claim may be forthcoming. The attorney and/or insurance carrier may make suggestions about preserving physical evidence, and taking statements from witnesses to preserve in writing the facts as understood by each of the parties involved. It is especially important to promptly notify the municipality's insurance carrier or risk manager of a potential claim as failure to provide timely notice could result in the claim being denied at a later time.

G. Waivers of Liability

In situations where there is an obvious risk of harm, parties often try to modify the scope of their legal duty to a person by having that person sign a document that purports to waive the ability to assert a claim for injuries that might result from the activity. In New Hampshire, these waiver agreements are strictly construed against the potential defendant. They will be enforced only if (a) they do not violate public policy; (b) the plaintiff understood the meaning of the agreement, or a reasonable person in his or her position would have understood the potential impact of the agreement; and (c) the plaintiff's claims were within the contemplation of the parties when they executed the waiver agreement. *Dean v. McDonald*, 147 N.H. 263 (2001). A waiver agreement must use plain language and be straightforward about its purpose in order to be enforceable. *Wright v. Loon Mountain Recreation Corp.*, 140 N.H. 166 (1995).

A waiver agreement will only protect against liability arising out of the activity described in the agreement. For example, if the waiver relates to riding on a fire truck in a parade, it will not protect against liability for riding on the truck at some other time. A waiver will not protect against liability arising out of an intentional wrongful act by a municipal employee.

Waiver documents should not be relied upon to protect the municipality against all possible liabilities arising out of the activity involved. For example, a waiver document signed by a parent to permit a child to play soccer in the recreation program will not protect the town if the soccer coach assaults the child. Even with a waiver document in hand, officials should still take all reasonable steps to prevent the harm from occurring at all. Staff and volunteers should be well trained, and municipal facilities should be well maintained.

II. LIMITED LIABILITY BY COMMON LAW

A. Common Law Municipal Immunity

Municipal immunity may have originated in the English common law in the case of *Russell v. Men of Devon*, 2 Term Rep. 667, 100 Eng. Rep. 359 (1789). At the time that case was decided, the idea of a municipal corporation was in its infancy, and lawsuits were brought against the entire population of a community. Because there were no municipal funds (or insurance) from which to pay a judgment, individual citizens were required to pay out of their own pockets. Thus, in *Russell*, the court held that it was better that an injured person be without remedy than to expose the public at large to liability.

The principle remained in the common law through judicial decision for most of the next 200 years. Courts continued to conclude that since a municipality derived no profit from the exercise of governmental functions performed for the public benefit, moneys raised by taxation for public use should not be diverted to payment of tort claims.

B. *Merrill v. Manchester*: Abolition of Common Law Immunity with Exceptions

In New Hampshire, the common law changed when the Supreme Court issued its decision in *Merrill v. Manchester*, 114 N.H. 722 (1974). The Court held that the doctrine of municipal immunity offended “the basic principles of equality of burdens and of elementary justice” and was “foreign to the spirit of our constitutional guarantee that every subject is entitled to a legal remedy for injuries he may receive in his person or property.” For these policy reasons, the Court overturned established precedent and abolished common law municipal immunity effective July

1, 1975, with two exceptions. Municipalities would remain immune from liability for acts and omissions constituting:

- the exercise of a legislative or judicial function; and
- the exercise of an executive or planning function involving the making of a basic policy decision characterized by the exercise of a high degree of official judgment or discretion.

As a result of the Court's decision, cities and towns became responsible for most injuries negligently caused by their agents and employees in the course of their employment or official duties.

The Court revisited the doctrine of municipal immunity in the case of *Everitt v. General Electric Co.*, 156 N.H. 202 (2007). The opinion contains a discussion of the history of the doctrine, and the policy determinations that are behind the protections afforded municipalities and their employees. The limits of these protections are defined, both as to municipal employees and the municipality itself.

C. Immunity for Legislative and Judicial Functions

Merrill v. Manchester cited *Hurley v. Hudson*, 112 N.H. 365 (1972), in preserving immunity for legislative and judicial functions. *Hurley* held that a town is not liable for property damage caused by the planning board's negligent approval of a subdivision with a defective drainage plan. Since then, the Court has frequently cited the rule of *Hurley* that "judicial, quasi-judicial, legislative, or quasi-legislative acts of a town ordinarily do not subject it to claims for damages." *Torromeo v. Fremont*, 148 N.H. 640, 644 (2002). The exceptions are where officials have acted in bad faith, *Win-Tasch Corp. v. Merrimack*, 120 N.H. 6 (1980), or where an ordinance or decision constitutes an unconstitutional taking of property, *Torromeo*, 148 N.H. at 644.

D. Immunity for Discretionary Functions

Municipalities and municipal officials continue to enjoy immunity for the "exercise of an executive or planning function involving the making of a basic policy decision characterized by the exercise of a high degree of official judgment or discretion." (This common law protection is also afforded by statute to some, but not all, municipal officials by RSA 31:104.) The rationale behind this partial immunity is the constitutional principle of separation of powers. The courts give great deference to the decisions entrusted by law to the other separate, but co-equal branches of government. However, there is no immunity for negligent implementation of a policy or plan.

These concepts are illustrated in a number of cases decided by the New Hampshire Supreme Court:

- ***Robinson v. Hillsborough County*, New Hampshire Supreme Court, No. 2014- 0648, (April 28, 2015).**

The plaintiff alleged that he reported a frayed cable on weight-lifting equipment to a corrections officer, who determined that the equipment was usable. The next day, the cable snapped, injuring the plaintiff. A governmental entity is immune from liability for injuries arising from planning or discretionary functions. Purely ministerial functions are not protected. For immunity to apply, the conduct that caused the injury must involve a "high degree of discretion and judgment . . . in weighing alternatives and making choices with respect to public policy and planning." However, a governmental entity may be subject to liability "when its employees negligently follow or fail to follow an established plan or standards." Here, the correctional facility had a procedure for creating work orders for equipment repairs. Determining whether to file a work order is not the type of discretion that governmental immunity protects from liability. These facts alleged the

negligent implementation of policy and not the “choice of policy or planning, involving consideration of competing economic, social, and political factors” necessary to invoke governmental immunity.

- ***Ford v. N.H. Dep’t of Transportation*, 163 N.H. 284 (2012)**

During an ice storm, a traffic light at the intersection of two State highways stopped working, and an accident occurred. Under discretionary function immunity, the State and its agencies are immune from liability for conduct that involves “the exercise or performance or the failure to exercise or perform a discretionary executive or planning function or duty on the part of the state or any state agency or at state officer, employee, or official acting within the scope of his office or employment.” RSA 541-B:19, I(c). (This is similar to municipal discretionary function immunity.) The State operates under the *Manual on Uniform Traffic Control Devices*, which contains “guidance” regarding alternative traffic direction during a period of failure. The Court held that the guidance portions of the document do not create mandatory duties on the part of the State. Therefore, the State had discretion in its response to traffic lights rendered inoperable because of severe weather-related power outages and was immune from liability.

- ***Appeal of Dep’t of Transportation*, 159 N.H. 72 (2009)**

A truck driver following a New Hampshire Department of Transportation (DOT) detour route did not observe a “trucks turn right” sign and then collided with a low-clearance railroad bridge. The detour plan had been developed by the Bureau of Traffic in consultation with the City of Dover using the *Manual on Uniform Traffic Control Devices*. There was no separate truck detour route because trucks were barred by a weight limitation from using the closed road in the first place. The Court concluded that the State was entitled to discretionary immunity because a detour plan involves “weighing alternatives and making choices with respect to public policy.”

- ***Tarbell Adm’r, Inc. v. Concord*, 157 N.H. 678 (2008)**

A property owner sued the city for damage to its building caused by water overflowing an emergency spillway from a pond maintained for the city water supply. The city had studied at length the risks and benefits of maintaining the water at the level that rose and overflowed in a heavy rainstorm. The Court held that there was discretionary immunity for the decision to maintain the water level but no immunity for alleged failure to clear brush and otherwise maintain the outlet.

- ***Delaney v. State*, 146 N.H. 173 (2001)**

This case illustrates that even if a plan is created to fix a problem, the plan must be followed using reasonable care. During heavy rain, water in nearby marshes periodically exceeded the drainage capacity of a culvert under Route 1-A in Hampton. The DOT hired a contractor to dig a trench from the ocean westward, past the plaintiff’s motel to Route 1-A, in order to drain accumulating water. The plan provided for the trench to be dug and opened on the outgoing tide. But the contractor completed the work during the incoming tide, which eroded the trench, flooded the motel and caused \$285,000 in damage. Although the DOT argued its decision to construct a trench was a discretionary policy decision immune from liability, the Court concluded that the DOT and the contractor had negligently implemented the trench-digging plan. Immunity was denied.

- ***Hacking v. Belmont*, 143 N.H. 546 (1999)**

A girl participating in a youth basketball program was injured when school district employees allegedly let the game get out of control. She sued both the school district and

the employees. The Court held that the district's decision to run a basketball program, and what training or supervision to provide when running the program, required a high degree of discretion. Therefore, the district was immune from liability with respect to those decisions. The decisions of the referees themselves, however, did not involve governmental planning or policy, so the referees were not immune from individual liability.

- ***Bergeron v. Manchester*, 140 N.H. 417 (1995)**

A motorist was killed in an accident at the junction of a city highway and a state highway where three previous accidents had occurred. Both the city and the state were sued. The plaintiff claimed that the accidents constituted "warrants" to justify installing a traffic signal under the state's *Traffic Control Standards, Statutes and Policies* manual. The Court found that both the city and the state had immunity for the exercise of a discretionary, policy-making decision not to install a traffic signal. The state manual created only guidelines, not inflexible mandates, so the state was found to be immune. As to the city, the Court concluded that it had never intended prior notice of a hazard to eliminate discretionary immunity.

- ***Gardner v. Concord*, 137 N.H. 253 (1993)**

The plaintiff claimed her slip-and-fall injury was caused by a "declivity" where a sidewalk crossed an abandoned alleyway, which had not been properly filled in, was not lighted and was obscured by parked cars. The Court held that if this alleged defect had been a result of a faulty plan, then there would be discretionary immunity. If the defect resulted from the negligent implementation of a plan or negligent work in the absence of a plan, then immunity would not apply. Most importantly, the burden of proof was on the municipality to show that there was a plan. No such proof existed, so the city was not immune.

- ***Sorenson v. Manchester*, 136 N.H. 692 (1993)**

The plaintiff claimed her husband's motorcycle crash and death were caused by the city's negligence in allowing parking on both sides of Amherst Street, leaving it too narrow for the safe passage of vehicles. The Court ruled that decisions about parking were discretionary functions, for which there was immunity.

E. 'Official Immunity' for Police Officers

In the case of *Everitt v. General Electric Co.*, 156 N.H. 202 (2007), the Supreme Court afforded "official immunity" to police officers to protect them from personal liability for the exercise of judgment and discretion in the performance of their duties. This extends the doctrine of "municipal immunity" to protect operational decisions that do not qualify as discretionary executive or policy decisions but, nevertheless, are deemed worthy of immunity protection. The question of whether municipalities themselves are entitled to immunity for police officers' decisions of this type remains open, as does the question of what other categories of officials and employees may be entitled to this sort of immunity.

There are limits to "official immunity." In *Osahenrumwen Ojo v. Lorenzo*, 164 N.H. 717 (2013), the plaintiff was arrested by a Manchester police officer for the serious charges of kidnapping and falsifying physical evidence, and the lesser charge of simple assault. The basis for the arrest was that the victim identified him from a photographic lineup, and he matched the victim's description of the assailant. A grand jury later returned an indictment against the plaintiff. After he had been in pretrial confinement for 17 months, the case was dismissed when the complainant moved out of the country. The plaintiff sued the city for the torts of false imprisonment and malicious prosecution. He argued that the complainant alleged the assailant

to be a black male in his early 20's with short dark hair and a beard. The plaintiff was actually 33 years old, bald and clean shaven. Thus, the plaintiff alleged the arrest itself was unreasonable and violated his civil rights. The Superior Court granted the City's motion to dismiss based upon official immunity, yet the Supreme Court reversed, saying that the facts as presented created a legitimate issue as to whether there was adequate probable cause for the arrest itself, requiring the matter to be fully litigated.

In *Huckins v. McSweeney*, 166 N.H. 176 (2014), the New Hampshire Supreme Court rejected an attempt to declare portions of the municipal liability statute, RSA chapter 507-B, unconstitutional. The decision reaffirmed that municipal employees, and the municipal employer, cannot be held liable for intentionally caused injuries so long as the employee was acting under a reasonable belief that the offending conduct was authorized by law. Huckins sued Officer McSweeney and the Town of Sanbornton claiming that the use of a stun gun to prevent Huckins from fleeing during a field sobriety test was an actionable personal injury claim notwithstanding RSA chapter 507-B. The Court reaffirmed its prior decisions that there is no violation of the New Hampshire Constitution when the State immunizes itself and its municipalities from liability for intentional torts by governmental employees acting under a reasonable belief that the offending conduct was authorized by law. *See also, Hansen v. Town of Ossipee and Police Officer Shane Emerson*, 2014 D.N.H. 072 (April 11, 2014).

In 2015, the New Hampshire Supreme Court held that a police officer must engage in reckless or wanton conduct in order to be denied immunity. *Farrelly v. City of Concord*, 168 N.H. 430 (2015). The Court had to reconcile the standards for immunity articulated in both *Huckins* ("immunity applies to intentional torts committed by government officials or employees who act under a reasonable belief in the lawfulness of their conduct") and in *Everitt* ("municipal police officers are immune from personal liability for decisions, acts or omissions that are . . . not made in a wanton or reckless manner"). The Court determined that the "reasonable belief" an officer is required to have for immunity to apply must both be a subjective belief that the conduct was lawful, and must be objectively reasonable. However, the objective reasonableness is viewed "from the perspective of the actor in question," asking whether the unlawfulness of the conduct "would have been apparent to an objectively reasonable officer standing in the defendant's shoes." Importantly, the Court went on to say that, in order to determine that an officer had not acted "reasonably," the plaintiff must prove more than negligence—it must be established that the officer acted recklessly or wantonly as to the lawfulness of their conduct.

A police officer will also be immune from liability if he or she follows an order to arrest that appears lawful based on the circumstances. In *Baer v. Leach*, 2014 D.N.H. 214 (November 24, 2015), Baer, who was attending a school board meeting, was arrested for being disruptive. The charges against Baer were ultimately dropped, and Baer then sued the officer. The U.S. District Court determined that Leach, the arresting officer, was immune from liability because he had sufficient reason to believe that the arrest was lawful based on the circumstances. Specifically, Leach had observed Baer disregarding the rules governing the public meeting—namely, that public comment was not a "Question and Answer" session and subsequently by interrupting after his allotted time had ended. Furthermore, when the board chair tried to regain order multiple times to allow others to speak, Baer continued to interrupt, mocking them and stating, "Why don't you arrest me?" The chair finally instructed Leach to arrest Baer. These facts demonstrated to Leach that Baer was disrupting the meeting. Although the judge did say that there is no "magic number" of warnings necessary before someone can be removed from a meeting, these facts are instructive and show that multiple attempts to resolve the situation should be made before removal is even considered.

F. Limited Scope of Legal Duty

“Cities and towns have not been, and are not now, guarantors of public peace, safety and welfare.” *Doucette v. Bristol*, 138 N.H. 205 (1993). Some municipal governmental activities are deemed not to create a duty that people are entitled to rely on to protect them from injury. Examples:

- ***Dichiara v. Sanborn Regional School District*, 165 NH 694 (2013)**

Stephen Dichiara was injured while trying out for the Sanborn Regional High School basketball team and he brought a lawsuit against the basketball coach and the Sanborn Regional School District, alleging negligence. The trial court granted the defendants’ Motion for Summary Judgment on the grounds that defendant was entitled to governmental immunity under RSA 507-B. The Supreme Court affirmed. RSA 507-B limits governmental liability to claims of negligence “arising out of the ownership, occupation, maintenance or operation of all motor vehicles, and all premises.” Dichiara argued that the statute should be read to allow a plaintiff to recover against a governmental entity for all fault-based claims, regardless of whether the conduct was related to the ownership, occupation, maintenance, or operation motor vehicles or premises. The Court disagreed and held that upon the plain reading of RSA 507-B, the only exception to fault-based claims is triggered when there is a nexus between the claim and the governmental unit’s ownership, occupation, maintenance, or operation of a motor vehicle or premises.

- ***Trull v. Conway*, 140 N.H. 579 (1995)**

A police officer noted an icy condition on a state highway and assisted a motorist but then moved on to other duties. A motorist later in the evening had an accident caused by the icy road. The town was held to have no duty to warn the public of icy conditions on a state highway. The earlier case of *Hartman v. Hooksett*, 125 N.H. 34 (1984), had made a similar ruling in the case of a defect in a state highway.

- ***Ford v. N.H. Dep’t of Transportation*, 163 N.H. 284 (2012)**

During an ice storm, a traffic light at the intersection of two State highways in the Town of Windham stopped working, and an accident occurred. The injured plaintiff sued the Town for negligence. The Supreme Court held this case indistinguishable from *Trull*, and further determined that the Town could not be held liable because it had no control over the road or duty to repair it, and therefore no duty to warn of icy conditions.

- ***Cui v. Chief, Barrington Police Dep’t*, 155 N.H. 447 (2007)**

Until 2011, RSA 466:21 made municipalities responsible for the damage inflicted by stray dogs on other animals. The Court, however, held that there was no municipal duty to prevent a stray dog from entering the plaintiff’s yard and chewing on his dwelling.

- ***Stillwater Condominium Ass’n v. Salem*, 140 N.H. 505 (1995)**

The planning board approved a subdivision subject to installation of a line to connect with a municipal water system. The town did not require a bond prior to recording of the plan and issued certificates of occupancy without construction of the water line. The Court held that the town had no actionable duty to the purchasers of the condominium units who claimed to have relied on the town to require installation of the water line.

- ***Island Shores Estates Condo. Ass’n v. Concord*, 136 N.H. 300 (1992)**

A group of condominium unit owners claimed their units suffered from faulty construction and sued the city for deficient building inspection. The Court held that

the city owed no legal duty to the condominium owners. The Court wrote, “[W]e see no duty the [city] owed the plaintiffs, special or otherwise, that would sustain a claim for misrepresentation and make the...reliance [on the building inspection] justifiable. The representation [issuing certificates of occupancy] was not made to induce the plaintiff to vary its conduct.”

- ***Town of Londonderry v. Mesiti Development*, 168 N.H. 377 (2015)**

Several developers alleged that the Town had either breached a fiduciary obligation to the fee payors or was negligent *per se* in the administration of collected impact fees. The Court ruled that the impact fee statute, RSA 674:21, V, does not designate the Town as an escrow agent to hold collected impact fees for the benefit of fee payors and therefore does not impose fiduciary duties upon the Town. Concerning the argument by the fee payors that the Town’s maladministration of the collected impact fees amounted to negligence *per se* allowing the fee payors to recover damages, the Court found no articulated common law duty of care. The Court reiterated that municipalities do not assume a duty of care merely by virtue of having enacted regulations, citing to *Stillwater Condo. Assoc. v. Town of Salem*, 140 N.H. 505 (1995) (above). Similarly, the Court found that the fee payors failed to articulate any form of a common law duty of care owed by the Town such that the alleged mismanagement of the collected impact fees entitled them to recover money damages.

III. LIMITED LIABILITY BY STATUTE

A. RSA Chapter 507-B

In response to the *Merrill* case, the legislature enacted RSA 507-B:4 to limit the amount of money damages a municipality can be required to pay for claims for bodily injury, personal injury or property damage, arising out of the municipality’s ownership, occupation, maintenance or operation of motor vehicles and premises. “Property damage” has been held not to include real property. *Cannata v. Deerfield*, 132 N.H. 235 (1989). A fire department does not “occupy” premises when it is fighting a fire. *Farm Family Cas. Ins. Co. v. Rollinsford*, 155 N.H. 669 (2007). The plaintiff must establish a causal nexus between the injury and the municipality’s ownership, occupation, maintenance or operation of a motor vehicle or premises. *Crosby v. Strafford County Correctional*, No. 2014 DNH 100 (June 2, 2015).

The statutory limits for damages are \$325,000 per person and \$1 million per occurrence. These limits of liability, however, do not apply if the insurance coverage applicable to any particular claim exceeds the statutory liability limits. This principle was established in *Marcotte v. Timberlane Regional School Dist.*, 143 N.H. 331 (1999). In that case, an improperly secured metal soccer goal located on school property tipped over and killed a second-grade pupil. The school district’s liability insurance policy had a limit in excess of the statutory cap. The Court held that the policy limit, not the statutory cap, was applicable. This principle is now codified in RSA 507-B:7-a. The statute affords the same limits, and principles of coverage apply to individual officials so long as they act within the scope of their office and in good faith. See RSA 507-B:4, III. As mentioned previously, municipal officials should discuss with their legal and risk management advisors the advantages and disadvantages of liability insurance versus pooled risk management programs as they relate to RSA chapter 507-B.

A municipality is not liable, in the absence of gross negligence, for hazards on its premises caused

solely by snow, ice or other inclement weather if the municipality is acting under a policy or set of priorities for responding to the weather hazards. RSA 507-B:2-b.

B. Highways and Sidewalks, RSA 231:90 – :92-a

An example of a statute setting the scope of a legal duty is RSA 231:90 – :92-a, which establishes the scope of a municipality’s legal duty to travelers using public highways and sidewalks. A municipality’s sole legal duty is to correct “insufficiencies.” An “insufficiency” exists when a highway or sidewalk is either not safely passable by those persons or vehicles permitted to use such highway or sidewalk, or there exists a safety hazard not reasonably discoverable or reasonably avoidable by a person when using the highway or sidewalk in a reasonable, prudent and lawful manner. A dirt road is not “insufficient” simply because it is not paved and, if a pothole is visible and avoidable, it also does not constitute an insufficiency.

Even if an insufficiency does cause damage, there will be no liability (that is, no breach of duty) on the part of the municipality unless:

- The town had received a written notice of the insufficiency, warning it of the defect prior to the injury, and the town failed to post warning signs immediately and failed to develop a plan within 72 hours for repairing the insufficiency (such plan must then be implemented with “reasonable dispatch and in good faith”).
- The town had actual notice or knowledge of the insufficiency and exercised gross negligence or reckless disregard in responding to that knowledge. Officials whose knowledge will require a response are select board member or other chief executive officer (such as a town manager), town clerk, officials responsible for streets and highways, and on-duty police or fire personnel.
- The defect was caused by an intentional act of a municipal officer or employee, acting with gross negligence or reckless disregard of the hazard.

In the case of *Bowden v. N.H. Dep’t of Transportation*, 144 N.H. 491 (1999), the plaintiffs sued the state for negligence under a theory that their motorcycle accident was caused by a road surface defect. The Court concluded that notice of the defect alleged to cause an injury is required in advance of the accident in order to trigger a potential duty on the part of the defendant and that allegations of constructive notice will not suffice.

Bad Weather: Even if the injury was caused by an insufficiency and even if the town had knowledge of the insufficiency in advance, the town will not be liable if the insufficiency was caused by bad weather, so long as the town had a bad weather policy adopted in good faith prior to the storm and was following that policy without gross negligence or recklessness. This statutory protection, found at RSA 231:92-a, applies to public highways, bridges and sidewalks, but does not apply to public parking lots or driveways. See *Johnson v. Laconia*, 141 N.H. 379 (1996). As mentioned above, pursuant to RSA 507-B:2-b, a municipality or school district may have this type of protection for injuries suffered during bad weather on other types of properties it owns, operates or maintains, but the New Hampshire Supreme Court has not defined the scope of this protection in any reported decision.

In *Cloutier v. Berlin*, 154 N.H. 13 (2006), the court held that the insufficiency law does not mean that the municipality can never be liable for injuries resulting from defects in a highway, whether in good weather or bad, but it does create a special standard of care that is different from the standard expected of private corporations. The court also clarified that the presence or absence of liability insurance does not change the legal duty owed to users of the highway, but instead changes the amount of monetary damages that may be recovered from a municipality if it is found liable for the injuries caused by a highway defect.

In *Ford v. N.H. Dep't of Transportation*, 163 N.H. 284 (2012), the severe power outage following the 2008 ice storm rendered a traffic signal at the intersection of two state highways inoperable. Local police notified the NH DOT of the problem, but it had not been repaired some 18 hours later when a crash occurred. A person injured in the crash sued both the municipality and the state for negligence. The municipality was found not liable, since it had no duty to maintain the signals on a state highway, and no duty to provide traffic control on a state highway. The state was found not liable because it was following its bad weather policy in good faith and had no additional duty under either state or federal law to provide alternative traffic direction during the period the signal remained inoperable.

C. Good Faith Immunity for Certain Officials, RSA 31:104

Certain individual officials, acting in their official capacity and in good faith, are immune from personal liability for claims arising out of discretionary functions. The officials protected include, but are not limited to, members of governing bodies, planning boards and zoning boards of adjustment; city and town managers; county commissioners; regional planning commissioners; school superintendents; welfare officials; and town and city health officers. Obviously, this leaves many employees of municipalities without this type of protection. Note also that this section provides no protection to officials or employees who engage in an intentional tort.

D. Indemnification for Negligence, RSA 31:105

The governing body of a municipality may vote to indemnify from loss any municipal official or employee against whom a claim is brought after such vote. Indemnification in the context of this statute means to reimburse the official or employee for any financial loss or expense, including legal fees and costs, arising out of a claim brought against an official or employee in his or her personal capacity. Minutes of the meeting during which the vote is taken should clearly reflect the action. The vote need not be reaffirmed in subsequent years. Once adopted, the decision to indemnify is applicable only to actions constituting negligence and within the scope of the person's employment or office. Indemnification will not be available for intentional or malicious acts.

E. Indemnification for Civil Rights Violations, RSA 31:106

RSA 31:106 requires that all municipalities, without the need for local approval, indemnify officers and employees from damages and awards of attorney's fees for civil rights violations arising out of the scope of employment or office unless the act or omission was committed with malice.

F. Protection from Attachment, RSA 31:108

Attachment of an official's or employee's personal assets to secure a judgment is not permissible in those cases where immunity has been granted (RSA 31:104) or indemnification is available (RSA 31:105 and RSA 31:106).

G. Show Cause Hearing, RSA 491:24

Any time a local official is sued and bad faith is alleged, the trial court must hold a preliminary hearing within 90 days to determine whether there is any basis for the claim. If there is not, and if the judge thinks the suit was filed only to harass the local official, the official may receive his or her costs and attorney's fees incurred in defending the matter.

H. Immunity for Volunteers, RSA 508:17

Municipal volunteers are immune from liability for negligent acts. In order to be entitled to immunity, there must be a written record indicating that the person is, in fact, recognized by the municipality as a volunteer. The volunteer must have acted in good faith and within the scope of his or her recognized functions and the damage or injury must not have been caused by willful, wanton or grossly negligent misconduct. Be cautious of the definition of “volunteer.” “Volunteer” means an individual performing services for a nonprofit organization or government entity who does not receive compensation, other than reimbursement for expenses actually incurred for such services. In the case of volunteer athletic coaches or sports officials, such volunteers shall possess proper certification or validation of competence in the rules, procedures, practices, and programs of the athletic activity.

Although RSA 508:17 no longer requires that a volunteer have prior written approval to act, NHMA recommends that cities and towns continue to require such written authorization for volunteer work. The written authorization should include, at a minimum: (a) the scope of work the volunteer is authorized to do, including the applicable time period, (b) any specific limitations on the scope of work and (c) to whom the volunteer should report.

I. Immunity for Fire and Rescue Members, RSA 508:12-b

Volunteer, “part paid” and “call” members of municipal fire departments and rescue squads are immune from personal liability for personal injury or property damage “arising out of any act performed or occurring in the furtherance of his [or her] official duties.” Immunity is not available for damages arising out of willful misconduct, gross negligence or operation under the influence of drugs or alcohol. This statute does not affect the liability of the municipality served by these volunteers. “Call” member means any member other than a full-time paid employee who receives payment for each emergency response. “Official duties” mean emergency duties only. “Part paid” member means any member other than a full-time paid employee who receives an annual retainer or stipend of less than \$5,000 for his services as a member.

J. Limited Duty for Fire Departments and Firefighting, RSA 154:1-d

RSA 154:1-d establishes that firefighting or other emergency services provided by a fire department shall not create a duty to any person affected by the response or nonresponse to a call, and the tactics used in firefighting. It also provides that the decisions of fire chiefs shall be entitled to discretionary immunity and makes clear that firefighters, paid and unpaid, are covered by RSA 31:105 and RSA 31:106.

Landowners are also protected against liability to municipal employees injured during an official response to a request for service. RSA 507:8-h, The Firefighters’ Rule, provides that a public safety officer has no cause of action for injuries incurred during the performance of duties incidental to and inherent in the officer’s official engagement arising from any negligent conduct of the person requiring assistance or of the owner or lessee of the premises.

K. Limited Liability for Skateboarding Facilities, RSA 507-B:11

In the absence of gross negligence, municipalities are immune from injuries caused by operation of a facility, without charge, for skateboarding, rollerblading, stunt biking or roller skiing.

L. Immunity for Emergency Management Activities, RSA 21-P:41

Municipalities and emergency management workers are immune from liability for bodily injury and property damage arising out of activities relating to emergency management.

M. Frivolous Lawsuits

RSA 507:15-a provides some relief for municipalities (and any other defendant in a civil lawsuit) when they are being sued repeatedly by a vexatious litigant. A “vexatious litigant” is defined as an individual who has been found by a judge to have filed three or more frivolous lawsuits which the judge finds, by clear and convincing evidence, were initiated for the primary purpose of harassment. RSA 507:15-a, I. The court may require a vexatious litigant to (1) retain an attorney or other person of good character to represent him or her in all actions; or (2) post a cash or surety bond sufficient to cover all attorneys’ fees and anticipated damages. This statute can provide some relief to a municipality which is being harassed by repeated lawsuits by ensuring the plaintiff will be able to pay the municipality its attorneys’ fees and damages if the plaintiff loses and the court orders the plaintiff to pay the municipality those costs.

IV. LIABILITY FOR SELECTED ACTIVITIES

A. Recreation Land

Many towns and cities have hesitated to open their lands for recreational activities out of fear that someone may be injured and bring a claim against the municipality. As a general rule, municipalities are immune from liability for recreational activities on municipal land so long as the recreational property is open to members of the general public and there must be no charge for use of the property. Further, municipalities must comply with the terms of RSA 212:34, which provides that all landowners, including municipalities, have no duty of care to keep premises safe for entry or use, or to give any warning of hazardous conditions, uses, structures, or activities unless:

- There is a willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity;
- The landowner charges a fee for entry to or use of the premises;
- The injury results from actions of those who have permission to use the property, and the landowner owed a duty to keep the injured person safe from harm; or
- The injury results from an intentional act of the landowner.

RSA 508:14 (pertaining to landowners allowing recreational use, nonprofit trail maintenance, and pick-your-own/ cut-your-own produce), RSA 231-A:8 (pertaining to municipal trails), and RSA 507-B:11 (pertaining to skateboarding, rollerblading, stunt biking, and roller skiing facilities) all provide further protection from liability.

There are two illustrative cases which do not involve municipalities, but which demonstrate the potential for landowner liability when the land is not open to the general public or requires paid use:

- ***Gordon-Couture v. Brown*, 152 N.H. 265 (2005)**
A young child drowned in a private landowner’s pond during a birthday party. The landowner was not immune from liability because the land was being used for a private activity and was not open to the general public.

- ***Soraghan v. Mt. Cranmore Resort, Inc.*, 152 N.H. 399 (2005)**

A mother was injured while attending a ski meet for which her daughter and the daughter's ski team paid to participate. The landowner was not immune because the team paid for use of the land.

In both of these cases, the plaintiff had permission to be on the land and claimed that the injury was the result of negligent maintenance of the property or a failure to properly supervise those using the property. In both cases, the defendants argued that the "recreational use" statutes provided them with immunity from liability, but that argument was not persuasive.

Contrast the above cases with the following three cases, all of which involve municipalities:

- *Kurowski v. Town of Chester*, 170 N.H. 307 (2017)

The decision in *Kurowski* follows from a prior decision, *In Coan v. N.H. Dep't of Environmental Services*, 161 N.H. 1 (2010). In *Coan*, the State was held not liable for the drownings of swimmers caused by the State's release of water from an upstream dam without warning because of the immunity provision of RSA 508:14 and the swimmers had accessed the water from State-owned recreational land.

In *Kurowski*, the Court held that the Town of Chester was not liable for injuries suffered by a minor during his use of a rope swing at the (open to the public and free of charge) town pond and conservation area. Despite the fact that the select board had been informed on several prior occasions by residents about the possibility of injury due to use of the rope swing, the Court ruled that, per RSA 212:34, V(a), it was necessary to demonstrate that the town had actual or constructive knowledge that an injury was probable, as opposed to a possible, result of the danger posed by the rope swing. An allegation that a landowner knew about a particular hazard and did nothing is insufficient to establish that the landowner knew or should have known that injury would probably result from that hazard.

- *Dolbeare v. City of Laconia*, 168 N.H. 52 (2015)

In *Dolbeare*, the Plaintiff filed a negligence and nuisance suit against Laconia due to an injury on a (free and open to the public) city-owned playground. The Court held that the "recreational immunity" statutes applied, and Laconia was not liable for the injury. Further, the Court found that use of the playground consisted "recreational activity."

- *Reed v. City of Portsmouth*, No. 12-CV-164-JD, 2013 WL 1386613 (D.N.H. April 3, 2013)

A woman was walking along a public street in Portsmouth and noticed a statue with a plaque in a public park. She entered the park to get a closer look and was injured when she fell into a hole in the lawn that was obscured by the grass. She sued the city for negligence. The city sought summary judgment alleging it was immune from suit as a result of the "recreational use statutes," RSA 508:14 and RSA 212:34. The Plaintiff claimed that the "recreational use statutes" did not apply and, if they did, walking across the grass did not constitute a "recreational activity." The Court held that the statutes did protect municipalities and that pedestrian use of the park constituted a "recreational activity."

Based on these cases, a municipality does not run an unreasonable risk of liability merely because it allows recreational activities on municipal property, such as hiking, dirt biking, hunting, swimming without a lifeguard or other recreational activities involving inherent risks of personal injury. NHMA does, however, make the following recommendations:

- Governing bodies and recreation committees should obtain legal advice and consult with the municipality's liability coverage carrier before imposing rules that might serve to exclude the general public from a property.
- Neither the municipality, nor any other group allowed to use the land, should be permitted to charge fees for recreational activities.

- Inspection of the property should be conducted to determine if there are any hazards present other than those inherent in a sport, if the municipality actively encourages such activity or even just has actual knowledge that the activity will occur. Inspections can help avoid liability for “willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity.” Inspectors should search for hazards that are not reasonably discoverable by the users. The municipality should keep on file a written report of the inspection, detailing either that no such hazards were found, or, if they were found, what steps were taken to eliminate the hazards or warn users against them.
- Since not all risks of liability can ever be eliminated, it is advisable to purchase liability insurance or join a pooled risk management program, particularly if the municipality wants to adopt a rule to control the premises by excluding some members of the public, or if a fee is charged for the use of the property.

B. Employment

Litigation by employees is an expanding source of liability for municipalities. In recent years, New Hampshire Supreme Court decisions have highlighted the risk in cases where a terminated employee alleges retaliation for the employee’s public criticism of the municipality’s policies. These cases couple “wrongful termination” tort claims with First Amendment freedom of speech civil rights claims. In *Porter v. Manchester*, 151 N.H. 30 (2004) (*Porter I*), and 155 N.H. 149 (2007) (*Porter II*), the plaintiff was forced out of his job as a welfare caseworker by an intolerable pattern of abuse from his department head, the elected welfare commissioner, after Porter criticized her to other city officials and in the press. The plaintiff was awarded damages for lost future earnings and emotional distress and, under federal civil rights law, 42 U.S.C. § 1983, he was awarded punitive damages and attorney’s fees.

In *Snelling v. Claremont*, 155 N.H. 674 (2007), the plaintiff city assessor was fired after he criticized the unfairness of the city’s tax system in the press, including unfair tax abatement advantages taken by city councilors. In his suit for wrongful termination and civil rights violations, Snelling was awarded damages for lost wages and emotional distress, punitive damages and attorney’s fees.

Municipalities must also be cognizant of RSA chapter 98-E, pertaining to free speech rights of municipal employees.

C. Land Use Controls

Land use control consists of enactment and administration of ordinances and regulations. As discussed above in section II, C, regarding immunity for legislative and quasi-judicial decisions, this rarely gives rise to liability for damages. In *Win-Tasch Corp. v. Merrimack*, 120 N.H. 6 (1980), the town was held liable for economic damages to a developer arising out the refusal of the town officials to acknowledge vested rights in a subdivision. The conduct constituted “bad faith,” which the Court held created an exception to immunity.

The other basis for damages is where the restrictions of an ordinance are so severe as to constitute a regulatory taking. This is a complex area arising directly from constitutional principles and is closely related to the issue of eminent domain. It is not an easy claim for the plaintiff, as shown in the following cases:

- In *Smith v. Wolfeboro*, 136 N.H. 337 (1992), the cost of delay required to pursue land use approvals, including appeals in court, does not constitute a permanent or temporary taking of property.
- A regulatory taking claim is not valid unless the municipality has made a final decision as to the applicability of the regulations to the property in question. *Hill-Grant Living Trust v. Kearsarge*

Lighting Precinct, 159 N.H. 529 (2009) (denial of a variance not a taking where ZBA was willing to consider a different variance application).

- The Town of Lyme owned land with frontage on a pond which was used as a recreation area. Over several years, the Town lowered the water level in the pond to increase the size of the town beach and improve recreation fields. These actions also affected abutting landowners, converting a large area of submerged wetlands into mud and draining the water away from the shallow shoreline adjoining their properties. The plaintiffs sued the Town, alleging among other things that the Town had “taken” their property without just compensation by “inverse condemnation,” where the government takes property “in fact” but does not formally exercise its eminent domain authority. To rise to the level of inverse condemnation, the government must substantially interfere with, or deprive a person of, the use of his property in whole or in part. The interference must be sufficiently direct, peculiar, and of a significant magnitude so that fairness and justice require compensation to the landowner. However, the Court noted that the specific interference alleged here simply wasn’t significant enough to support a taking claim. *Morrissey v. Lyme*, 162 N.H. 777 (2011).
- *J.K.S. Realty, LLC v. Nashua*, 164 N.H. 228 (2012). Since 1985, plaintiff’s parcel had been under consideration for inclusion in a major road project which had not yet been constructed. Although the plan seriously impacted the marketing and development of the property, the “mere plotting and planning by a governmental body in anticipation of taking the land for public use does not, in and of itself constitute a taking.”

D. Sewers and Drains

Historically, municipalities were liable for ordinary negligence for damage caused to private property by malfunctioning municipal sewer and drainage systems. *Mitchel v. Dover*, 98 N.H. 285 (1953); *Allen v. Hampton*, 107 N.H. 377 (1966). The rationale for denying immunity was that, in installing and maintaining such systems, the municipality acted in a proprietary, not governmental, capacity. In the aftermath of *Merrill v. Manchester*, the standard for liability in such cases has been unclear. *Tarbell Adm’r, Inc. v. Concord*, 157 N.H. 678 (2008), held that the doctrine of discretionary immunity applies to damage caused by water escaping from a pond that is part of the municipal water supply. The same reasoning may apply to municipal sewer and storm water drainage systems. Some uncertainty also remains due to the related doctrine of private nuisance, which also deals with property damage resulting from misuse of real property, including municipal property.

E. Nuisance

In *Tarbell*, the Court held that the city did not have immunity from the plaintiff’s claim for property damage under the theory that water escaping the city’s reservoir was a private nuisance. 157 N.H. 678 (2008). The Court reaffirmed a traditional rule that municipalities are liable for damage caused by a municipality’s use of its own property in an “unlawful or unreasonable manner,” previously expressed in cases such as *Ferguson v. Keene*, 111 N.H. 222 (1971) (municipal airport operations). In contrast, “[m]ere annoyance or inconvenience will not support an action for a nuisance.” *Morrissey v. Lyme*, 162 N.H. 777 (2011).

The municipality in *Morrissey* lowered the water level in a pond, which affected the water level on abutting properties as well. However, “merely converting certain submerged wetlands to mud, and lowering the water level of the pond, thereby allegedly compromising, in an undefined way,” an abutter’s access to the water of a pond, was not enough to constitute a substantial and unreasonable interference with their property.

F. Hazardous Waste

RSA 507-B:9 provides that a municipality shall not be liable for personal injury, bodily injury or property damage caused by a pollutant incident, including, but not limited to, per and polyfluorochemical contamination, unless the acts or omissions of municipal agents were unreasonable. “Pollutant incident” is defined to include release of various sorts of pollutants, including hazardous waste under RSA chapter 147-B, into land, water or air. RSA 507-B:9, III provides that municipalities shall not be liable by strict liability. However, in *Mailloux v. Londonderry*, 151 N.H. 555 (2004), the town was held strictly liable under RSA 147-B for pollution damage to abutting property after it acquired polluted property by tax deed. Mortgagors and other creditors who acquire property in order to sell it to satisfy a debt are exempt from strict liability under RSA 147-B for hazardous waste on the property if it is sold within three years. The town could not successfully qualify for the exemption because it held the property for more than three years. Towns contemplating a tax deed of land should take all reasonable steps to ascertain whether it is polluted and, if so, should consider declining to accept a tax deed under RSA 80:76, II.

G. Police Activities

By its nature, police work produces a significant amount of municipal bodily and personal injury tort litigation. As examples:

- ***Hartgers v. Plaistow*, 141 N.H. 253 (1996)**
The town was not liable for malicious prosecution and negligent training and supervision because police had probable cause to arrest the plaintiff on a bad check charge, even though the charge turned out to be unfounded.
- ***Daigle v. Portsmouth*, 129 N.H. 561 (1987)**
The city was vicariously liable for a beating administered to the plaintiff by an off-duty police officer from another town assisting its own officers.
- ***Weldy v. Kingston*, 128 N.H. 325 (1986)**
The town was liable for injuries sustained by teenagers whose car had been stopped earlier in the evening by police, who confiscated beer but did not detain the teens, even though the officers believed the teens had been drinking.

Contrast *Weldy* with *Everitt v. General Electric Co.*, 156 N.H. 202 (2007), which indicates that a town may not be liable for injuries sustained by a passenger of a vehicle whose driver had earlier that day been stopped by the police and, upon noticing the driver’s abnormal behavior, performed field sobriety testing on him.
- ***Cutter v. Farmington*, 126 N.H. 836 (1985)**
The town was liable for the negligent hiring and supervision of a police officer whose incompetent use of handcuffs caused permanent injuries to the plaintiff.

There are, of course, limits on the scope of the town’s duty for police activities. *Hartman v. Hooksett*, 125 N.H. 34 (1984) (no duty to warn public of a defect in state high- way); *Trull v. Conway*, 140 N.H. 579 (1995) (no duty to warn public of icy conditions on a state highway). The doctrine of “official immunity” for police activities, also appears to be a significant limitation on liability for police activities. *Everitt v. General Electric Co.*, 156 N.H. 202 (2007). Furthermore, as stated by the New Hampshire Supreme Court in *Huckins v. McSweeney*, 166 N.H. 176 (2014), there is no violation of the New Hampshire Constitution when the State immunizes itself and its municipalities from liability for intentional torts by governmental employees acting under a reasonable belief that the offending conduct was authorized by law.

H. Defamation at Public Meetings

The protection granted to speakers in a quasi-judicial forum such as a land use board is “qualified.” That is, the speaker’s immunity from suit may be lost if the communication was not “published on a lawful occasion, in good faith, for a justifiable purpose, and with belief, founded on reasonable grounds, of its truth.” *Pickering v. Frink*, 123 N.H. 326, 328 (1983); *Supry v. Bolduc*, 112 N.H. 274 (1972).

However, when a legislative body such as the town meeting is convened to perform its duties, the immunity afforded is absolute, as shown in *Voelbel v. Bridgewater*, 144 N.H. 599 (1999). The plaintiff sued a town select board member for allegedly defamatory remarks made during a town meeting. In concluding that the select board member enjoyed immunity for the comments, the Court wrote, “We need not decide whether the selectman’s comments . . . were defamatory because, even assuming that they were, we conclude that the sounder rule of law favors granting municipal officials, acting in a legislative capacity, absolute immunity for their comments made during a town meeting regarding town matters.”

This immunity does not extend to a meeting of the select board. *Pierson v. Hubbard*, 147 N.H. 760 (2002). Plaintiffs brought a defamation claim against a town clerk/tax collector, arising out of certain comments made by her at a select board meeting. The comments related to certain allegedly outrageous conduct of the plaintiffs following a funeral. The Supreme Court held that Hubbard’s comments were not legislative, but administrative and ministerial. Therefore, the comments were not absolutely privileged, and Hubbard was not absolutely immune from suit.

I. Invasion of Privacy

In deciding whether disclosure of documents under the Right to Know Law would constitute an “invasion of privacy,” RSA 91-A:5, IV, municipal officials should be aware that invasion of privacy can constitute a tort. “One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.” *Lovejoy v. Linehan*, 161 N.H. 483, 486 (2011). During an election campaign for sheriff, Linehan, the incumbent, released to the press a record showing that Lovejoy, the challenger, had been convicted of criminal assault. Release of the record was unlawful because the conviction had been annulled. Nevertheless, the Court held that Linehan was not liable for invasion of privacy because the annulled record was a matter of public concern in the election campaign.

V. ATTORNEY’S FEES IN STATE COURT

As a general rule, every litigant pays his or her own attorney’s fees. There are, however, certain exceptions to this rule that are important in the municipal context.

A. Conferring Benefit on the Municipality

In *Irwin Marine, Inc. v. Blizzard, Inc.*, 126 N.H. 271 (1985), the plaintiff, who had submitted a bid to buy city property, sued the City of Laconia because the bidding procedure was unfair. The Court required the city to pay the plaintiff’s attorney’s fees because the lawsuit “conferred a substantial benefit on the public” by improving fairness within the bidding process. The same result may occur in a suit under the Right-to-Know Law if a plaintiff successfully asserts a claim that a municipality

has failed in its duties to make meetings and records accessible to the public. However, where landowners benefited only themselves by successfully challenging an off-site improvement fee imposed by a town, no attorney's fees were awarded. *Simonsen v. Derry*, 145 N.H. 382 (2000).

B. Bad Faith

In *Funtown v. Conway*, 127 N.H. 312 (1985), the Court held that a building permit had been denied in bad faith because: (1) a town official wrote a satirical article in the newspaper about the project; (2) the police chief presented biased neighbors' views in the guise of official testimony on the project; and (3) the town intentionally delayed the project until the zoning ordinance could be changed to prohibit the project. Based upon the finding of bad faith, the Court upheld the award of attorney's fees. However, in *Dow v. Effingham*, 148 N.H. 121 (2002), the alleged bad faith of a select board in proposing an ordinance for voters at town meeting was irrelevant because the decision involved a legislative determination to be made by the voters.

C. Clearly Defined Right

A further basis for awarding attorney's fees is where a party is "forced to seek judicial assistance to secure a clearly defined right." However, the Court has held that decisions of quasi-judicial boards like the ZBA are subject to principles of judicial immunity, and, therefore, attorney's fees may not be awarded unless the board acts outside its jurisdiction. *Taber v. Westmoreland*, 140 N.H. 613 (1996). The municipality is entitled to defend a quasi-judicial decision even if officials subjectively believe the decision was incorrect. If, however, property owners are compelled to bear the financial burden of protecting themselves from unconstitutional abuses of power, they will be entitled to an award of attorney's fees.

VI. FEDERAL CIVIL RIGHTS LIABILITY

A. The Cause of Action, 42 U.S.C. §1983

Under federal law (42 U.S.C. §1983, passed just after the Civil War), a citizen may be awarded money damages for a violation of his or her civil rights. In this context, "civil rights" means any right protected by the United States Constitution or any federal law enacted pursuant thereto. A claim under §1983 is established by proving two elements:

- The plaintiff was deprived of some right protected by the U.S. Constitution or by any federal law. It is not enough to show that there was a violation of a state law.
- The deprivation of rights occurred "under color of state law." Since all towns and cities are subdivisions of the state, anything done by their officers and employees is considered to be done under color of state law, whether acting in accordance with state law, or contrary to state law.

42 U.S.C. § 1983 provides that money damages may be paid to any citizen who is deprived of a federally protected right by any "person" acting under color of state law. In *Monell v. NYC Dep't of Social Services*, 436 U.S. 658 (1978), the United States Supreme Court held that a municipality, as a corporate entity, is a "person" that can be liable under

§ 1983. This may only occur if the municipality has adopted a policy or ordinance which, when implemented by its officers or employees, causes the deprivation of a right protected by a federal statute or the federal constitution.

This type of claim is frequently made, and it is not practical to attempt to abstract principles from the thousands of cases reported across the nation. The important thing for officials to know is that interference with constitutionally guaranteed rights can be the source of significant liability. If there is even a concern that future actions could cross this line, the municipal attorney should be consulted for specific advice.

B. Defenses to Individual Liability Under § 1983

1. GOOD FAITH IMMUNITY

As with state tort actions, individual officials may be shielded from liability on the basis of good faith immunity. Municipal officials will be shielded from liability under 42

U.S.C. § 1983 for conduct that violates the United States Constitution if their actions do not violate “clearly established statutory or constitutional rights of which a reasonable person would have known.” Whether a particular right is “clearly established” is based primarily upon court decisions. So, if it is a close case, and one of first impression, municipal officials will likely have immunity for the conduct. If, however, the conduct is obviously unconstitutional, giving the official “fair warning” that he or she is violating a person’s rights, the official will not have immunity for the conduct. *Hope v. Pelzer*, 536 U.S. 730 (2002).

2. LEGISLATIVE IMMUNITY

Legislative immunity will protect an individual who, when acting as a moderator during legislative deliberations, enforces a rule to keep the proceedings in order, so long as it is not “flagrantly violative of fundamental constitutional protections.” *Artus v. Atkinson*, 2009 D.N.H. 154, October 14, 2009.

3. QUALIFIED IMMUNITY

Municipal officials may be entitled to qualified immunity arising out of intentional conduct that causes an alleged injury that is actionable under § 1983. To determine whether qualified immunity applies, a court must engage in a two-part test and ask 1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right; and 2) if so, whether the right was “clearly established” at the time of the defendant’s alleged violation. *Conrad v. NH Department of Safety*, 167 N.H. 59 (2014).

4. INDEMNIFICATION

Since it is obviously difficult for municipal officials and employees to be aware of every §1983 court decision, they are afforded protection under New Hampshire’s indemnification statute. Pursuant to RSA 31:106, a municipality is required to indemnify its officials and employees for civil rights liability so long as such officers/employees were acting within the scope of their office/employment and were acting without malice. Unlike state tort indemnification pursuant to RSA 31:105, this statute applies automatically; it is not necessary for the governing body to vote to adopt it.

C. The Municipality’s Liability Under § 1983

Unlike state law tort claims where a municipality is responsible for the actions of its officers/employees under the doctrine of *respondeat superior*, a municipality itself will only be held liable under § 1983 if the plaintiff proves that the civil rights violation was the result of an official policy or custom (whether formal or informal). For example, an act of police brutality, as was the subject of the *Daigle* case discussed previously, would not result in liability on the part of the municipality itself unless the policymaking officials (such as the police chief) either knew this type of conduct

was occurring and did nothing to correct it (an official policy by omission) or the officials created an actual policy to engage in such conduct. In the absence of an official policy or custom, there is no municipal liability even though the conduct itself violated constitutional rights.

D. Attorney's Fees in § 1983 Cases

Although § 1983 cases are generally more difficult to prove than state law tort claims, they are, nonetheless, attractive to plaintiffs since the law requires attorney's fees to be awarded to plaintiffs who prevail in § 1983 cases. As highlighted previously, attorney's fees are awarded under state law in only limited circumstances.

VII. SUMMARY ADVICE

- Be sure RSA 31:105 has been adopted by the municipality's governing body.
- Do not undertake any activity unless the municipality is fully committed to doing it properly. It is better to not provide a particular service than to provide a service negligently.
- Always act in good faith, and do not use your official position for personal gain or to make someone's life miserable. Seek legal advice when in doubt.
- Carry adequate liability coverage or join a pooled risk management program. Many entities offer loss prevention programs.
- Do not allow an uninformed fear of liability to set policy for the municipality.

CHAPTER TEN

STREETS AND HIGHWAYS

This chapter provides a very brief overview of the law related to streets and highways. For more comprehensive information in this area, we suggest referring to NHMA's publication: *A Hard Road to Travel*.

I. DEFINITION OF PUBLIC HIGHWAY

A public highway is a right of travel held in trust by, and maintained by, a municipality (or the state) for the traveling public. It is more than the area that is paved; it includes areas to the side where signs are placed and snow is plowed, the area under the road where utility pipes are buried, and the air above the road where traffic signals and electric and telephone wires are hung on poles. Once the highway has come into existence, the public's right to travel upon the way does not depend upon who owns the land underneath the road, but the owners retain residual property rights. The presumption in New Hampshire law is that the underlying land ownership remains with the abutters to the centerline. Any timber or other materials taken from this type of highway right of way belongs to the underlying abutting property owner and not the municipality. *Laconia v. Morin*, 92 N.H. 314 (1943).

If the land upon which a highway is built is actually owned by the municipality, the right of way is the length and width of land described in the deed of conveyance, and the municipality controls all property rights in this area. In many cases, highways were established by public use, referred to as "prescription." In these cases, the right of way may vary in width, based upon the actual amount of land that has been occupied by the public for the purpose of travel and maintenance.

A. Viatic Use

Members of the public walking, bicycling or driving on streets and highways in a motor vehicle enjoy the right to travel, or "viatic use." This includes the right to watch parades, *Varney v. Manchester*, 58 N.H. 430 (1878), and park vehicles, *Opinion of the Justices*, 94, N.H. 501 (1947). This right remains with the public until the highway has been formally discontinued, even if no person actually travels over the highway for many years. For an example of this, See *Gill v. Gerrato*, 154 N.H. 36 (2006), where the court found a public road to remain in existence today, even though it has not been used as such since some- time in the early 1700s. However, sunbathing, picnicking, loitering or playing ball are not viatic uses, and a town cannot create a park or playground in an unused highway. *Hartford v. Gilmanton*, 101 N.H. 425 (1958).

B. Utility Use

Highways are a convenient area to place public utilities, both on poles above the ground and in pipes or conduits under the ground. Regulated public utilities have been granted statutory rights to place their equipment in the highway right of way, so long as they apply for and receive a license from the municipality. See RSA 231:160 – :182 and *Rye v. PSNH*, 130 N.H. 365 (1988). The license

must be granted unless the installation somehow interferes with the right of travel. The utilities may also allow others, such as cable television providers, to attach their equipment to the poles or install their equipment in underground conduits. Disputes between the various utilities are resolved by the Public Utilities Commission (PUC) pursuant to RSA 374:34-a. Municipal licenses may be modified to promote the public interest, and municipalities have an interest in requiring additional pole attachments to be licensed in the interest of public safety and to keep track of taxable property. As to telecommunications providers, federal law is also applicable, specifically the Telecommunications Act of 1996, which is administered by the Federal Communication Commission. On some issues, federal law preempts any inconsistent state or local regulation of telecommunications services and equipment.

When granting licenses to place telecommunications equipment within the highway right of way municipalities must comply with both federal and state laws regulating personal wireless telecommunications facilities. Both Congress (with the 1996 Telecommunications Act, (“TCA”) and amendments thereto) and the NH Legislature (with RSA chapter 12-K, significantly amended in 2013) have passed laws to promote and streamline the deployment of wireless communications. The Federal Communications Commission (“FCC”) has also issued regulations to speed deployment of small cell wireless facilities, including an October 2018 final rule: “Accelerating Wireless and Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment,” effective January 14, 2019.

Although the TCA preserves local authority to regulate personal wireless service facilities, the act (1) bars municipalities from discriminating among providers of telecommunications services; (2) requires that municipalities comply with procedural requirements for making decisions; and (3) generally bars a municipality from effectively prohibiting an entity from providing telecommunications services.

C. Signs in the Right of Way

Official traffic control signs, of which there are several types, are placed in the highway right of way by the governmental agency that regulates the highway. See RSA 236:1, RSA 41:11 and RSA 47:17.

Advertising signs may not be placed in the right of way on trees, utility poles, or highway signs. RSA 236:75. Municipalities may use the power of zoning granted by RSA 674:16 to regulate advertising signs on private property. These regulations must seek to control the size and placement of the sign, rather than the words used. Sign regulation raises complex constitutional questions involving freedom of speech and the eminent domain power.

II. CREATION OF PUBLIC HIGHWAYS

Under New Hampshire law, there are four ways to create a public highway. The four methods established in RSA 229:1 are prescription, dedication and acceptance, layout, and highways constructed on town-owned land. *Mahoney v. Canterbury*, 150 N.H. 148 (2003). The public highway includes any bridge if the road it services is public, *Blagbrough v. Wilton*, 145 N.H. 118 (2000), and any sidewalks in the right of way, *Gossler v. Miller*, 107 N.H. 303 (1966).

A. Prescription

At common law, a highway was created when land was used by the public for travel for 20 consecutive years or more without the permission of the landowner. The legislature changed this

rule in 1968, such that public travel can no longer serve as the basis for creating a new highway. Many highways in the state were created by prescription and remain public highways unless they are discontinued by a vote of the legislative body. Private landowners cannot obtain property rights against the public through prescription. RSA 236:30. It is still possible to create easements over privately owned land by prescription for drainage and other purposes. To the extent a claim is made that public use of a private road has ripened into public highway by prescription, mere public use is insufficient. The adverse use must be such that a reasonable person in the position of the owner would understand that a claim of right to the property was being made. *Town of Dunbarton v. Michael Guiney*, 173 N.H. 1 (2020).

B. Dedication and Acceptance

A highway is created when land has been dedicated for public use and accepted by the municipality. This is a two-part process:

1. DEDICATION

A dedication is some voluntary action by the landowner showing a clear and unequivocal intent that the road be accepted and used now or in the future by the public for the purpose of travel. The most common way to dedicate property for a public highway is the recording of a plan approved by the planning board that shows the highway. RSA 674:40. However, dedication may also be implied from other conduct of the owner. *Hersh v. Plonski*, 156 N.H. 511 (2007). Regardless of how clear the intent of the landowner may be, dedication alone does not complete the process of creating a public highway.

2. ACCEPTANCE

A separate act of acceptance is also required. An example of an express act of acceptance is a vote of the legislative body. In cities, acceptance of new streets requires a vote of the council. The town meeting may delegate this authority to the select board under RSA 674:40-a. See *Neville v. Highfields Farm, Inc.*, 144 N.H. 419 (1999). If acceptance authority has been delegated to the select board, a highway may be accepted by the board only if the highway has prior planning board approval. A street which has not received prior planning board approval cannot be accepted without a vote of the legislative body under RSA 674:40, IIII. Acceptance may also be implied by conduct of the municipality. Thus, actions such as repairing a street, removing snow from it, or patrolling the area by police may result in an implied acceptance of the street. *Hersh v. Plonski*, 156 N.H. 511 (2007).

C. Highway Layout

The third method of creating a new highway is the process of layout, a form of eminent domain. Note that this method creates a viatic easement over privately owned land. The fee title to the land under the road will remain with the abutting landowners following the creation of the highway.

1. LAYOUT OF A NEW HIGHWAY

The layout process for a new highway, found at RSA 231:8 – :20, requires a petition to the governing body, notice to abutters, a public hearing by the governing body, a decision to lay out the boundaries of the new highway, and the payment of damages, if any, for taking of interests in land. The governing body must find that there is “occasion,” that is, public necessity, for the layout. In *Rodgers Dev. Co. v. Tilton*, 147 N.H. 57 (2001), the Supreme Court articulated a two-step process for determining “occasion.” First, the public interest in the layout must outweigh the rights of the affected landowners. Second, the public

interest in the layout must outweigh the burden it imposes on the municipality. This test was affirmed in *Crowley v. Loudon*, 162 N.H. 768 (2011), where a request to lay out a “dead end” road was denied, reasoning that the public interest was minimal where the road had few residents and was already designated as an emergency lane.

2. ALTERING LAYOUT OF A CLASS VI HIGHWAY OR PRIVATE ROAD

New Hampshire law does not allow special assessments against landowners to pay the costs of upgrading existing Class IV or V highways. However, if a majority of the affected landowners agree, a municipality may lay out a new Class V highway over land currently classified as a Class VI highway or a private road and assess the landowners for the cost of bringing the road up to town standards, with the costs subject to collection in the same manner as property taxes. This is known as a “betterment assessment.” RSA 231:28 et seq. Such a layout, however, also requires a determination of “occasion.” *Green Crow Corp. v. New Ipswich*, 157 N.H. 344 (2008).

3. MAINTENANCE AFTER LAYOUT

After the layout process is completed, the town has a duty to maintain the new highway in the same manner as any other Class V highway. Under RSA 231:57 each town shall annually raise and appropriate a sum not less than $\frac{1}{4}$ of one percent of its assessed valuation for the repair of town highways and bridges.

D. Highways Constructed on Town-Owned Land

The fourth way a highway may be created is by constructing a road on property the municipality owns outright or on which it holds an easement. In *Polizzo v. Hampton*, 126 N.H. 398 (1985), the New Hampshire Supreme Court acknowledged this as an entirely distinct fourth category.

E. Recommendation

It can be advantageous for municipalities to require the landowner to convey the land on which a highway is actually built to the municipality as part of the dedication and acceptance process. This will help ensure that highway boundaries and locations of drainage easements and culverts will be clear. There are legal differences between land that is owned by the public in fee simple absolute and land where the municipality merely holds an easement interest allowing travel over the land. The differences can be significant under certain circumstances. See *Arcidi v. Rye*, 150 N.H. 694 (2004) for an example of a case where a town believed it could install a subsurface utility line under land on which it held an easement for travel, but the Supreme Court held that such a right was not included in the deed creating the interest. Similarly, in *Boyle v. City of Portsmouth*, 172 NH 781 (2020) verbal permission given to the City to place a sewer line on property owned by the State of New Hampshire, did not become a permanent easement when the property was conveyed to a third party. The municipal attorney should review all proposed deeds conveying rights to the municipality to assure that the property interest created is the interest intended.

Following the decision in *Hersh v. Plonski* (discussed in Section II (B)(1) above), governing bodies should be cautious not to provide municipal services in areas where highways are dedicated, but not yet accepted, in order to avoid a claim that a road has been impliedly accepted in its present state through the act of providing some level of services. The municipality will want to assure that a road meets all current specifications, and has been properly constructed, before accepting a road as Class V and undertaking perpetual duties of maintenance.

III. CLASSIFICATION OF HIGHWAYS (RSA 229:5)

A. State Highways

State highways include federal aid highways (Class I and II); highways on state-owned land (Class III); and highways to public waters (Class III-a).

B. Urban Compact Highways (Class IV)

Class IV highways are located in the “compact” areas of certain cities and towns designated by the legislature and certified by the commissioner of the state DOT to be mainly occupied by dwellings or businesses. Class IV highways are maintained by the towns and cities in which they are located. A list of municipalities in which the DOT commissioner has authority to designate urban compacts is set forth at RSA 229:5, V. The commissioner of transportation may establish additional compact sections in other cities and towns as agreed between the department and the municipality. The commissioner may review and adjust the compact limits for established compacts by agreement with the municipality.

C. Class V Highways

These are the roads a town or city has the duty to maintain. Class V highways are often described as “town roads” or “city streets.” Liability for maintenance of Class V highways is discussed in Chapter Nine.

D. Class VI Highways

These are public highways that do not fit into any other classification. Class VI status can be the result of intentional actions:

- The select board originally laid the road out as “subject to gates and bars,” which means that a fence and gate can be used to restrict, but not prevent, public access to the road (RSA 231:21); or
- The municipality discontinued a highway and made it “subject to gates and bars” (RSA 231:45).

Yet, Class VI status can also result from neglect, such as where the municipality failed to maintain a Class V road for a period of five years or more and its classification automatically changed to Class VI (RSA 229:5, VII).

A town has no duty to maintain a Class VI road and has no liability if a person is injured while traveling over the road. The road remains a public highway and the public may pass over it. The select board retains the right to regulate the use of the road, and the planning board has control of driveways. RSA 231:21-a. The town may authorize utility lines to be placed in the right of way of a Class VI road. *King v. Lyme*, 126 N.H. 279 (1985); RSA 231:160. Special care must be taken before the municipality authorizes new buildings or changes to existing structures on a Class VI road. See RSA 674:41 and section VIII below.

E. Creation of Road Files

Every municipality should compile and maintain information on the legal status, location and width of all highways in the city or town. Research should be done to determine how each road

became a public highway. Copies of both governing body and legislative body votes concerning each road should be added to the file. Road files should also contain copies of any plans depicting each road that the municipality creates or receives during planning board reviews. Other important information may be received from utilities. All deeds received should be promptly recorded at the county Registry of Deeds and copies of the recorded documents should be maintained in these files.

The classification of roads is important to assure that the municipality:

- receives all of the state aid it should pursuant to RSA Chapter 235;
- is not unintentionally causing a road to change from Class V to Class VI by reason of non-maintenance;
- is able to comply with all municipal accounting standards, including GASB 34;
- is able to properly regulate the roads for the safety of all travelers; and
- is able to properly plan and budget for winter and summer maintenance activities.

IV. HOW TO CHANGE FROM CLASS VI TO CLASS V

There are three ways by which a Class VI highway may be changed to a Class V highway:

A. Petition for Layout

Pursuant to RSA 231:8 or RSA 231:28, a select board may, upon petition, alter an existing highway using the layout process. If the Class VI highway at issue was created after the planning board came into existence in the municipality, then the reclassification must also comply with the provisions of RSA 674:40 relative to planning board and legislative body approval.

B. VOTE OF THE TOWN MEETING

Pursuant to RSA 231:22-a, the town meeting may vote to reclassify a highway from Class VI to Class V. The warrant article may be drafted by the select board or initiated by citizen petition pursuant to RSA 39:3.

C. Maintenance of a Class VI Highway

Under RSA 231:59, towns are not authorized to expend public funds to maintain Class VI highways. Nevertheless, a Class V highway that became Class VI due to failure to maintain automatically reverts back to Class V status if a town regularly maintains the road, on more than a seasonal basis, in a suitable condition for year-round travel for at least five successive years. RSA 229:5, VI. If there is a Class VI highway that the municipality wants to maintain for one reason or another without causing it to change to Class V status, the governing body should consider declaring it an “emergency lane” if it meets all the requirements of RSA 231:59-a.

V. DISCONTINUANCE OF HIGHWAYS

A. How to Discontinue a Highway

A Class IV, V, or VI highway remains a public highway unless and until it has been formally completely discontinued by vote of the town. *Marrone v. Hampton*, 123 N.H. 729 (1983). The procedure is set forth in RSA 231:43 – :50. The warrant article can be created by the select board or received as a result of a citizen petition pursuant to RSA 39:3. When drafting a warrant article or resolution for discontinuance, use the words “completely discontinue,” as opposed to words such as “abandon” or “give up,” to be sure that the intent of the vote is clear. If the intent is not clear, the law presumes that the vote was intended to create a Class VI highway, since there is a strong public policy favoring the continuation of public highways. Written notice must be given to all owners of land abutting the highway at least 14 days prior to the vote of the town, unless the warrant article was submitted by petition, in which case the petitioner bears the cost of notice. RSA 231:43, II. If the town meeting vote is at best ambiguous as to whether the town intended to completely discontinue a road as a town road then it will be concluded the town did not intend to unconditionally discontinue a road. *Town of Goshen v. Casagrande*, 170 N.H. (2018). A highway is not discontinued if the public merely abandons its right of travel. *Gill v. Gerrato*, 154 N.H. 36 (2006).

B. What Is the Effect of Discontinuance?

Discontinuance completely extinguishes the public right of travel. It is not possible to discontinue a highway but reserve a right to open it again later. A discontinued highway does not become a “private road” for the purpose of RSA 674:41, which would allow a building permit to be issued in the future. *Russell Forest Management, LLC v. Henniker*, 162 N.H. 141 (2011). See also section VIII (B) below. If the road must be recreated in the future, one of the methods of creation allowed by RSA 229:1 must be used. RSA 231:45 allows a municipality to use a warrant article to change the classification of a road from Class V to Class VI by making the road “subject to gates and bars.” The effect of this action is to extinguish the duty to maintain the road, but the highway remains in existence and open to public use.

C. Who Owns the Land Under the Road After Discontinuance?

If the highway was created in the form of a viatic easement, the right to possess the land reverts to the abutters, each of whom is presumed to own to the center line, absent evidence to the contrary. If the municipality owns the land under the highway in fee, the land remains in municipal ownership and is available for other uses. *Duchesnaye v. Silva*, 118 N.H. 728 (1978).

D. Are All Rights Extinguished by Discontinuance?

No. Pursuant to RSA 231:43, any owner whose property is landlocked by the discontinuance of a public highway will maintain an easement where an easement is reasonably necessary for access. To determine whether an easement is necessary the landlocked property owner does not need to show that there is no other means of access, only that any alternative access imposes measurable hardship that is unreasonable under the circumstances. *Lauren Shearer v. Ronald Raymond*, 174 N.H. 24 (2021). Use of the easement comes at the property owner’s own risk. This easement can be extinguished by a deed from the owner of the right that is recorded at the Registry of Deeds. Pursuant to RSA 231:46, existing utilities may remain in their former location unless the vote of

discontinuance requires them to be removed. There also can be additional grounds for claiming private access rights, such as the sale of lots with reference to a plat showing the road. *Duchesnaye v. Silva*, 118 N.H. 728 (1978).

E. A Discontinuance Vote May Be Challenged

Any person or other municipality aggrieved by the vote may appeal to the superior court seeking either monetary damages or an order preventing the discontinuance. If another municipality takes the appeal, it must show that the “aggrieved town’s interest in maintaining the highway is greater than the burden that maintenance of the road would impose on the town that voted to discontinue the road.” *Hinsdale v. Chesterfield*, 153 N.H. 70 (2005). Be cautious of any request to discontinue a highway that involves land that could be the subject of a subdivision request. If the highway is discontinued, and the land loses its frontage for zoning purposes, the loss in value could be substantial. This loss in value could be the measure of damages paid as a result of the discontinuance.

VI. CLASS A AND B TRAILS

A municipality may reclassify a Class V or VI highway as a trail by vote of the legislative body. RSA chapter 231-A. Although the public can continue to access the land, a trail does not have the status of a publicly approved street, and it cannot be used as a vehicular access for any new building or structure or for the expansion or enlargement of any existing building or structure. The town may also vote to enact use restrictions, such as not allowing the use of wheeled vehicles, or restricting use to foot travel only. Such regulations are enforceable in the same manner as traffic regulations, so long as they are posted where the trail crosses public highways. Aggrieved landowners have the same right of appeal to superior court and to seek damages as in the case of a highway discontinuance. There are three types of trails:

A. Class A Trails

Landowners can continue to use the trail for vehicular access for forestry, agriculture, and access to existing buildings, but any new development and all “expansion, enlargement, or increased intensity of any existing building or structure” is prohibited.

B. Class B Trails

Landowners have no special rights and must obey any trail use restrictions imposed on the public by the town.

C. Trails Created by Agreement

Class A or B trails may be established by agreement with a landowner, with approval by the legislative body. Trail use restrictions are set by agreement with the landowner. Land cannot be taken through eminent domain for this purpose.

VII. HIGHWAY MAINTENANCE AND REGULATION

A. Authority to Regulate Highways

RSA 41:11 and RSA 47:17, VII, VIII, and XVIII give the select board and city council broad authority to regulate all aspects of streets and highways. This authority does not include the power to close highways altogether, except for temporary construction periods or to react to an emergency. Without discontinuance, which requires a town meeting vote, all classes of highways remain public rights of way, and the public must be allowed some means of passage.

B. Weight Limits

Whether seasonal or otherwise, weight limits that are more restrictive than those imposed on all vehicles by RSA 266:17 –:26 may be enacted under RSA 231:191 in order to protect the road from unreasonable damage or excessive maintenance. This law requires a sign to be posted at all entrances to the road. Preexisting land uses may receive an exemption if it is shown that the weight limit causes unnecessary hardship, but such users may be required to post a bond and/or restore the road. The municipality may refuse the exemption if it would be detrimental to public safety. This power is often used to protect unpaved roads against rutting caused by heavy vehicle movements during the spring melt.

C. Maintenance Expenses

1. GENERAL RULE

A town or city may spend money to maintain only Class IV and V highways, not Class VI highways. RSA 231:59. Municipalities cannot spend public funds to maintain private roads or driveways, unless such maintenance is both subordinate and incidental to public highway maintenance and the landowner pays the costs incurred by the town. *Clapp v. Jaffrey*, 97 N.H. 456 (1952).

2. EMERGENCY LANE

Pursuant to RSA 231:59-a, a municipality may spend money to maintain a Class VI or private road if the road is declared to be an “emergency lane.” The purpose of this statute is to allow municipalities to protect persons and property by performing enough road maintenance to permit passage by fire equipment and emergency vehicles. In order to declare an emergency lane, the select board must hold a public hearing and make written findings “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.”

3. STATE PERMITTING

Municipalities are not exempt from the requirement to obtain permits under state and federal environmental laws prior to physically making changes affecting highways. Compliance with these requirements often poses significant design and budgetary challenges for the professional engineers who help plan and design highway improvement projects and for the local road agents and contractors who must keep highways passable and in good condition in all seasons. The legislature has directed the Department of Environmental Services to assist municipalities in the permitting process by allowing some repair projects to be exempt from permitting or to receive expedited consideration.

See, for example, RSA 482-A:3, IV(b), which exempts repair of roadside ditches from certain permitting, and RSA 482-A:3, XVII, which authorizes municipal employees to receive certifications that permit repair and replacement of culverts of a certain size without prior notification to NHDES.

4. DAMAGES FROM ROAD MAINTENANCE

RSA 231:75 sets forth the procedure for determining the existence and amount of damages caused to private property when a municipal highway is maintained or repaired in such a way as to change the grade or alter the drainage. It provides for notice by the select board to potentially affected landowners in advance of any work to be done, an opportunity for landowners to be heard, and a procedure for them to apply for damages. If a landowner is not satisfied with the damages awarded by the select board, he or she may appeal to the superior court. So long as the select board follows the procedure established in the law, the remedy provided in the law will be the landowner's exclusive remedy.

D. Private Activity Damaging Highways

1. GENERAL RULE

No person may excavate or disturb the surface, shoulders, or banks of any Class IV, V, or VI highway without first obtaining a permit. RSA 236:9.

2. SECURITY

A bond may be required to secure the cost of restoring the road to a condition at least equal to the condition that was present before the disturbance. The form of the bond is decided by the applicant, and can be in the form of cash, a letter of credit, or a bond issued by an insurance company. The legislature has amended this section of the law to require municipalities to apply this authority "equitably and reasonably" to all bonded vehicles using the highway, and not allow the type of commodity to be transported to be the determining factor for requiring the bond or the dollar amount of the bond. RSA 236:10, :11. A municipality may adopt an ordinance that assesses street damage fees in connection with permits to excavate that compensate for the reduction of pavement life, including additional charges when excavation occurs shortly after a municipal pavement project. *EnergyNorth Natural Gas, Inc. d/b/a National Grid NH v. Concord*, 164 N.H. 14 (2012). *Liberty Utilities v. City of Concord*, 2017 WL 3141176 (decided June 16, 2017).

3. LOGGING OPERATIONS

A road bond may be required for these operations, subject to the limitations noted above. However, the municipality may not refuse to sign the "intent to cut" form filed under the timber tax law, RSA chapter 79, or impose a bond under that law due to concerns about the road. A timber tax bond must relate only to the obligation to pay the timber tax.

E. Driveway Permits

Permits for driveways, entrances, exits, and other activities commonly known as "curb cuts" are regulated by RSA 236:13. The authority to regulate curb cuts is vested in the planning board, not the governing body (although the planning board could delegate administration of permits to the select board). Maintenance of private driveway connections, including structures such as culverts, remains the responsibility of the landowner even if they are located within the right of way. If any driveway connection threatens the integrity of the highway due to blocked culverts,

erosion, etc., the planning board (or its designee) may order the owner to repair it, failing which the municipality can perform the repair and charge its costs to the owner.

F. Trees Affecting the Right of Way

1. TRIMMING IN THE RIGHT OF WAY

Even though trees on the highway are not usually town-owned, the town does not always need owner permission to cut one down. Municipalities have strong incentive under current law to be vigilant about the condition of trees alongside public highways because they face liability for failure to do so. However, in the vast majority of cases, the abutting owner must be notified before action is taken. If the municipality would like to, and the owner is willing, the municipality may contract to have the abutter perform the removal and be paid by the town the fair value of the benefit the abutter has conferred upon the municipality. RSA 231:151.

If the abutter does not want to help or opposes the tree cutting, the public's viatic use rights include the right to cut trees and bushes within the limits of public highway rights of way that, in the judgment of the governing body, may cause damage or pose a safety hazard to the highway or interfere with public travel. In fact, RSA 231:150 requires such cutting "annually, and at other times when advisable." However, trees with a circumference of more than 15 inches at 4 feet above the ground cannot be cut until the owner is notified in writing by personal delivery or registered mail. Abutters are entitled to specific statutory notice and appeal rights.

In addition, RSA 231:145 gives municipalities a way to declare dead or diseased trees to be a public nuisance. The governing body may declare any tree, either alive or dead, situated within the highway limits to be a public nuisance by reason of unreasonable danger to the traveling public, spread of tree disease, or the reliability of utility equipment. The notice and hearing process is strictly controlled by RSA 231:146. In the case of annual roadside clearing under RSA 231:150 and nuisance trees under RSA 231:145, notice to the abutting owner can be omitted only if "the delay entailed by such notice would pose an imminent threat to safety or property." RSA 231:145; RSA 231:150. This requirement of owner notice before cutting trees applies to all roads, not just those designated as scenic. Note that in the case of public trees under care of a tree warden, the procedure outlined in RSA 231:144 (notice placed on the tree, etc.) is used instead.

2. CUTTING BY UTILITIES

Public utilities also have a statutory duty to maintain the reliability of their services and to protect the value of their equipment placed into the public right of way by license. These duties are enforced by the Public Utilities Commission acting under RSA chapter 374 and its associated administrative rules. Yet, if either the municipality or the utility fails to obtain the consent of a tree owner, there may be liability for significant damages resulting from the injury or removal of the vegetation. Removal of a tree is allowed if it constitutes a "public nuisance by reason of unreasonable danger to the traveling public, spread of tree disease, or the reliability of equipment installed at or upon utility facilities." The public utility may petition the governing body under the procedures of RSA 231:145. The removal may be immediate if there is an "imminent threat to safety or property." The statute is clear that the municipality's ability to remove nuisance trees in no way relieves public utilities of their responsibility to identify, ask permission to cut, and then remove trees or limbs threatening transmission lines. Alternatively, a utility may use the procedure contained in RSA 231:172. At least 45 days in advance of a non-emergency

effort to prune or remove a shade or ornamental tree, notice must be provided to the landowner. Notice is given in person or sent by ordinary mail (not included in a utility or other communication), to abutting owners by the name and address on the municipal tax records. Alternatively, notice may be sent separately by electronic mail (but not as part of a utility bill or other regular communication) if the landowner has established regular electronic mail communication with the utility. The notice must include the name and contact information of a representative of the utility who may be contacted to schedule a personal consultation regarding the proposed activities. If the landowner does nothing within 45 days after notice is mailed, the cutting or removal may proceed.

If the landowner contacts the utility to schedule a personal consultation and then objects, a hearing is available before the local governing body, who shall determine if the action is necessary and assess any damages against the utility to compensate the owner for loss of the tree. Note, however, that if the abutting owner (or a prior owner of that property) has granted the utility an easement that includes the right of the utility to cut or remove trees within the easement area, this process is not necessary because the easement already constitutes sufficient consent. It is important to note, finally, that when the tree is located along a road formally declared a scenic road, the additional proceedings required under the scenic road statute apply.

3. LIABILITY

In the case of *Pesaturo v. Kinne*, 161 N.H. 550 (2011), the Supreme Court articulated an important new rule:

“[W]hen a tree is decayed or defective [a landowner] has a duty to maintain the tree to eliminate this dangerous condition. ... [A] landowner who knows or should know that his tree is decayed or defective and fails to maintain the tree reasonably is liable for injuries proximately caused by the tree, even when the harm occurs outside of his property lines...”

Although municipalities usually do not own trees in the right of way, they do have the authority to remove them when they become dangerous. This case suggests that municipalities (as well as the tree owners themselves) may be exposed to liability for negligence if they fail to deal with obviously decayed trees affecting the right of way.

G. Citizen Liability for Damage

Under RSA 236:38, any person who willfully causes damage to a highway shall be guilty of a misdemeanor. Pursuant to RSA 236:39, anyone whose conduct causes damage to a public highway is liable to the town for the costs of repairing the damage. The person is also responsible for any money damages and costs incurred by a municipality that is compelled to pay a third party injured as a result of such damage. These provisions are used to recover costs of damage caused by motor vehicle accidents as well as intentional destruction of highway improvements. RSA 236:39 incorporates the tort liability rules and procedures for contribution and joint and several liability. Amendments made to this statute in 2021 provide that that anyone who damages a highway will be liable to the municipality, for full and current replacement costs, not reduced for depreciation, of protective barriers and any structure or device that is part of the highway. These amendments apply to to all pending claims, whether the damages were incurred before or after the effective date of that amendment, July 1, 2021.

H. The Insufficiency Law

Municipalities have been granted substantial protection against liability arising out of maintenance of streets, highways, bridges, and sidewalks by RSA 231:90 – :94. If a person is injured as a result of an “insufficiency” in the highway, the municipality is not liable for damages unless it had received prior notice of the problem and failed to act or was grossly negligent in its response to the report, or a municipal employee intentionally caused the defect. When notice is received of a defect, the municipality must investigate the issue immediately, take steps to warn travelers of the danger and develop a plan to repair the defect. Minor defects such as cracks in a sidewalk do not create an insufficiency. Instead, the problem must be severe enough to render the highway incapable of safe passage. For more information on the issue of municipal liability, see Chapter Nine.

I. Licensing of Utilities

Since at least 1881, municipalities have licensed the placement of utility poles in highway rights of way pursuant to RSA 231:159 – :182. The utility submits a petition for a pole or conduit license to the governing body, which authorizes the placement of the actual utility equipment. This area of the law is complex, and local officials should use the opportunity to review and understand all of the potential impacts of granting the right to install these uses in the right of way, and should not just sign the license documents provided by the utilities without review. Here are two examples of such complexities:

Taxation: The New Hampshire Supreme Court determined in *Verizon New England, Inc. v. Rochester*, 151 N.H. 263 (2004) that such property is subject to the property tax and that pole licenses may be amended by the municipality when the public good requires that the terms of the licenses be changed. In addition, when the planning board reviews a subdivision or a site plan application, the placement of utilities is an issue for the board to consider. Planning board approvals of utility placement are treated the same as the issuance of a pole license by the governing body.

Collocation and Modification of Wireless Facilities: In 2013, the legislature made substantial changes to the process for locating Personal Wireless Service Facilities. RSA 12-K now provides that collocation applications and modification applications with respect to personal wireless service facilities (PWSFs) may be reviewed by local authorities for compliance with building permit requirements but shall not otherwise be subject to zoning or land use requirements. The law establishes a 45-day period for a land use board to review an application for a collocation or modification; the application is deemed approved if the board does not act within the 45-day period. The law’s limitations do not apply to applications for the installation of new facilities or substantial modifications to existing facilities. “Substantial modification” is defined in the law.

VIII. HIGHWAY ISSUES IN PLANNING AND ZONING

A. Planning Board Authority

The planning board cannot accept or approve highways on its own authority. “Acceptance” can only be accomplished using the methods described previously (that is, layout; dedication and acceptance). *Beck v. Auburn*, 121 N.H. 996 (1981); *See also Neville v. Highfields Farm, Inc.*, 144 N.H. 419 (1999). However, once subdivision authority has been received from the town meeting,

the planning board does have the authority to adopt the construction standards for new streets and accesses to a highway pursuant to its power to adopt subdivision regulations under RSA 674:36 and site review regulations under RSA 674:44.

B. State Land Use Regulation by Way of Highway Classification

The legislature has primarily placed responsibility for regulation of land use upon the municipalities through the comprehensive statutes contained in RSA chapters 672 through RSA chapters 677. An exception to this delegation is contained in RSA 674:41, which prevents municipalities from approving the construction of buildings upon private roads or Class VI roads except in limited circumstances. Under this statute, no building shall be constructed upon any lot in the municipality, nor shall a building permit be issued unless the street giving access to the lot is one of the following:

- a Class V highway or better;
- a road shown on a plat approved by the planning board or shown on the official map of the municipality;
- a Class VI highway, provided that the governing body, after consulting with the planning board, has authorized the issuance of a building permit for the erection of buildings on that Class VI highway or portion of it. If the governing body has voted to permit the building, the owner must file notice in the Registry of Deeds acknowledging that the town is not liable for maintenance nor liable for any damages resulting from the use of the road; or
- a private road, provided that the governing body, after consulting with the planning board, has authorized the issuance of a building permit for the erection of buildings on that private road or portion of it. If the governing body has voted to permit the building, the owner must file notice in the Registry of Deeds acknowledging that the town is neither liable for maintenance nor liable for any damages resulting from the use of the road.

The phrase “the street giving access to the lot” means a street or way abutting the lot and upon which the lot has frontage. RSA 674:41, III. Denial of a building permit under RSA 674:41 was upheld in *Vachon v. New Durham*, 131 N.H. 623 (1989). This law supersedes any less stringent local ordinance. Building is not allowed unless the lot complies with the statute. Exemptions from the provisions of the statute may be granted only under the terms set forth in RSA 674:41, II, which allows the owner to apply to the ZBA for relief from the terms of the statute. If a landowner is denied relief by the ZBA, the time limits for appeal to the superior court must be strictly observed. *Bosonetto v. Richmond*, 163 N.H. 736 (2012).

IX. THE STATUS OF ROADS

It can be very difficult for local officials to accurately classify a section of highway, or to determine all of the legal issues affecting the owners of property adjacent to the road, or to consider all of the potential risks associated with decisions made upon classification, maintenance, or regulation of that section of highway. In such cases of uncertainty, local officials want to make decisions that will bind all of these interested parties into the future. However, their authority to act is strictly defined by state statute. The Supreme Court has held that a select board has no authority to hold an adjudicative proceeding under RSA Chapter 43, or any other statute, to make such binding determinations.

Instead, such authority is provided only to the court system. That is, when local officials are uncertain about issues of land ownership, road classification, or their duties along a highway, a lawsuit must be filed

in the superior court seeking a decision on such matters. *See Gordon v. Rye*, 162 N.H. 144 (2011). *See also Town of Dunbarton v. Michael Guiney*, 173 N.H. 1 (2020) (Town brought declaratory judgment action to determine private way had become a public highway by prescription)

Such an action may not be filed in the local circuit court - district division. In the matter of *Wells Fargo Bank v. Schultz*, 164 N.H. 608 (2013) a landowner whose mortgage had been foreclosed sought to defend an action brought against him by the bank to regain possession of the property. The allegation was that the bank's real estate title was defective. The circuit court refused to rule on these arguments, reasoning that it had no jurisdictional authority to adjudicate real estate title issues. Upon appeal, the Supreme Court affirmed, finding that such claims must be litigated in the Superior Court.

CHAPTER ELEVEN

PUBLIC SAFETY

I. FIRE PROTECTION

A. Department Organization

There is no statutory requirement for any municipality to create a fire department. If a municipality decides to create such a department, RSA 154:1 sets out five options for the administrative organization of a department in a town, or in a village district or precinct department organized under RSA 52:1, I(a). Although these five schemes give great flexibility, the statute also authorizes a municipality to create a unique local form of organization. RSA 154:1, III. The five options are:

- a fire chief appointed by the governing body or the town manager, if any, with firefighters appointed by the fire chief;
- a fire chief appointed by the governing body or the town manager, if any, with firefighters appointed by the governing body or town manager upon recommendation of the fire chief;
- a fire chief elected by the legislative body pursuant to RSA 669:17, with firefighters appointed by the fire chief;
- firewards of any number, as determined by the legislative body, either elected (pursuant to RSA 669:17) or appointed by the governing body, with a fire chief appointed by the firewards and firefighters appointed by the fire chief; or
- firewards of any number, as determined by the legislative body, either elected (pursuant to RSA 669:17) or appointed by the governing body, with a fire chief and firefighters appointed by the firewards.

The firewards, fire engineers or fire commissioners of a town, if any, constitute a board that must elect a clerk. This board can adopt a badge of office. RSA 154:1, VII and VIII. Under RSA 154:1, RSA 154:1(d) or RSA 154:1(e), the firewards, if any, may be elected or appointed, and (depending upon the authority given them by the annual town or village district meeting) may appoint the fire chief and, if so delegated, firefighters.

In addition, a town may establish a revolving fund for the purpose of providing fire service or both fire and ambulance service. RSA 31:95-h.

Note that there is no authority for other legal entities to be formally associated with a municipal fire department. It is common for members of fire departments to create a New Hampshire non-profit corporation whose purpose is to provide support and fundraising for the municipal fire department. While these corporations and their members provide valuable support and assistance to the fire department, they are separate legal entities governed by their members, with separate finances and an individual corporate identity under state law through the corporations division of the Secretary of State's Office. Their decisions do not control the finances of the fire department, or override administrative decisions of the fire chief, and funds should not be commingled between the non-profit corporation and the fire department. When funds are donated to the municipality by the non-profit, that donation should go through the usual procedure of acceptance by the select

board under RSA 31:95-b, and the funds should be handled by the municipality under municipal budgeting, finance, auditing and recordkeeping requirements.

B. Fire Chief

Subject to written formal policies that have been adopted by the “appointing authority,” the fire chief has organizational and administrative control of the fire department and appoints the necessary officers, unless otherwise regulated by statute or local ordinance. RSA 154:1, VI and RSA 154:5. Except as provided in RSA chapter 227-L and RSA chapter 154, the firewards, fire engineers and fire chiefs have control of all firefighters, officers and fire apparatus. RSA 154:2.

1. TENURE AND REMOVAL OF APPOINTED CHIEF

The fire chief is appointed either for an indefinite period, or for a definite period as determined by the appointing authority, either the governing body or the town meeting. Either way, tenure depends on good conduct and efficiency. Technical qualification by training or experience is a statutory prerequisite to appointment, although there are no minimum standards for such training imposed by statute. The chief must have “the ability to command firefighters and hold their respect and confidence.” RSA 154:5, I.

The fire chief has special protections built into the statute against suspension or dismissal from the position. The fire chief may be suspended or dismissed only for cause, and after being presented with reasons in writing. After suspension or dismissal, the statute entitles the fire chief to a hearing on the merits or reasonableness of the suspension or dismissal, in superior court, provided the chief petitions the court for a hearing within 45 days of the action. RSA 154:5, II. The court may affirm, modify or negate the suspension or dismissal based on its findings.

2. COMPENSATION

As specified by RSA 154:15 and RSA 154:16, compensation of the chief and the firefighters is set by the council, aldermen or town meeting.

3. GENERAL POWERS AND DUTIES

In addition to control of firefighters and firefighting equipment under RSA 154:2, the fire chief has the authority to enforce local or state laws and rules pertaining to the control of combustible or hazardous materials, the design of exits and other fire safety measures.

- a. **Department administration.** Firefighters are organized in companies, appoint officers, meet for drills and are subject to duties as directed or approved by the chief, firewards, or engineers. RSA 154:4. Although a fire chief has wide latitude in the operation of the fire department, the chief is subject to formal written policies adopted by the appointing authority. Bills for the operation of the department are approved or disapproved by the chief and presented for payment, within the limits of the funds appropriated, to the town official designated for this purpose by statute, local ordinance or town meeting. RSA 154:15.
- b. **Equipment.** RSA 154:6 requires the chief to see that all fire apparatus is in proper working order and that all water sources are kept in order within the available funds. The chief is required to report annually to the town the condition of all fire apparatus and the amount spent for repairs. Under RSA 154:8, the chief has the authority to direct the use of all apparatus, persons and proceedings relating to any fire or other emergency.
- c. **Damage to property.** Property owners may be compensated for damage done to any building or property by order of the fire officer in charge, and the select board may assess a tax to pay the damages, unless the fire began in the building or the building would have burned if it had

not been removed or destroyed. The property owner must apply to the select board to appraise the damage. RSA 154:11.

If the select board fails after three months following the application to appraise the damage and assess the tax, the injured party may petition the superior court under RSA 154:12.

- d. **Training of firefighters.** Pursuant to RSA 154:4, firefighters are organized under the direction of the chief, who is responsible to see to their training and preparation for their functions. RSA 276-A:23 and RSA 276-A:24 authorize youths aged 16 and 17 to be trained in tasks that support firefighting, and to be certified as junior firefighters, provided, however, youths are prohibited from performing hazardous duties.

4. POWERS DURING AN EMERGENCY

- a. **Scene of emergency.** The fire officer in charge at a fire, service call or other emergency has the authority to control and direct the activities at the scene; order any persons to leave the scene; blockade any public highway, street or private right of way; trespass without liability while at the scene; and enter any building where a fire is in progress or where there is reasonable cause to believe a fire is in progress. Other specific grants of authority are listed in RSA 154:7, :7-a and :7-b. Fire department personnel have authority under RSA 154:7, II(b) to order people to leave any building or place in the vicinity of the emergency to protect people from injury or remove them from interfering with duties. *State v. Bernard*, 158 N.H. 43 (2008).
- b. **Police officers.** Note that so long as the fire department is involved in the emergency aspects of a response, it is the fire chief who controls and directs activities at the scene. As such the fire chief is the “incident commander.” The police department supports the response by directing traffic, gathering investigative information, and preserving and collecting evidence. See RSA 154:7, III.
- c. **Emergency management.** In the event of a disaster which extends beyond the boundaries of the town or district, the fire chief and other emergency response officials of the town, including the select board, are subject to the statewide Incident Command System (ICS) adopted pursuant to RSA 21- P:52, and perform services under the direction of state officials, including the governor. This authority is further subject to control of federal officials acting pursuant to the National Incident Management System (NIMS). While the emergency management director of a municipality has many tasks to perform to prevent disaster, or assure resources are there for a response and recovery, those duties do not include direct command of personnel who respond to an incident.

C. Liability of Fire Department Limited

The “public duty rule” in RSA 154:1-d shields a municipal or state-certified private fire department from liability for a variety of emergency response actions. This statute provides protection from liability for the failure of the department to respond to a fire or other emergency; undertake particular inspections; maintain any level of personnel, equipment or facilities; provide equivalent allocation of resources; or adopt, use or avoid any particular strategy or tactic in responding to a fire or other emergency. This protection from liability extends to any firefighter, paid or volunteer, who is acting in an official capacity under the direction or supervision of the fire chief (or his or her designee), or who is participating in a fire department activity sanctioned by the select board, and it includes indemnification for civil rights damage under RSA 31:106 and for any other accidental damages under RSA 31:105 if the town has adopted that section. The fire chief and his or her subordinates are also protected from liability for decisions concerning the allocation and assignment of firefighters and equipment, so long as there is an absence of malice or bad faith, “even when such decisions are made rapidly in response to the exigencies of an emergency.” RSA 154:1-d.

D. Liability of Volunteers Limited

RSA 508:12-b shields volunteer fire department, emergency service and rescue squad personnel from liability under certain circumstances. According to the statute, volunteer, “part paid” or “call” members shall not be held personally liable resulting from any lawsuit to recover for personal injury or property damage “arising out of any act performed or occurring in the furtherance of his [or her] official duties.” The term “official duties” refers to emergency duties only. A “call” member is defined as one who is other than a full-time paid employee who receives payment for each emergency response. A “part paid” member is other than a full-time paid employee who receives an annual stipend of less than \$5,000 for his or her services.

The statute does not shield volunteers from liability for damage resulting from willful misconduct, gross negligence or operation of vehicles under the influence of drugs or alcohol.

E. Fire Standards and Training Commission

No one may be appointed as a full-time career firefighter, except on a temporary or probationary basis, unless that person has completed a program of fire training consisting of an accredited certification program meeting the objectives of a nationally accepted standard regarding firefighter professional qualifications. RSA 21-P:29, I. The Fire Standards and Training Commission within the New Hampshire Department of Safety establishes minimum educational, training, selection and certification standards for fire service personnel. It also advises on instruction and research methods for determining and dealing with the causes and prevention of fire, firefighting and rescue techniques, and the administration and management of all fire departments. RSA 21- P:25 – :33.

F. Fire Hazards

State law authorizes the fire chief or firewards to establish regulations about kindling, guarding, safekeeping, preventing and extinguishing fires and for removal of combustibles from any building or place. The statute requires the appropriate local official to confer with “recognized authorities” and the state fire marshal when drawing up such regulations. RSA 154:18. The regulations must be signed by the official, recorded by the town clerk and posted in two or more public places 30 days before they take effect. Breach of such a regulation is a violation. Under RSA 154:19, the select board is given the authority to establish the regulations in towns that do not have a fire chief or firewards. This authority to adopt local regulations is limited by recent changes in the statutes relative to the State Fire Code and the State Building Code, which are discussed in section G below.

1. DANGEROUS BUILDINGS

If the fire chief deems a building to be dangerous to the property of others, he or she may give the owner written notice to repair or alter the hazards. If corrections are not made within five days after notice is given (unless a request for an extension has been granted), the owner is guilty of a violation and by statute becomes liable for property consumed by fire communicated from the hazardous building. RSA 154:20 – :21. As noted in Chapter Three, these powers supplement the authority of the governing body to deal with these issues pursuant to RSA chapter 155-B.

2. ORDERING A BUILDING VACATED

The fire chief or state fire marshal has the authority to order occupants to vacate a building if the official determines that the condition of the building constitutes “a clear and imminent danger” to the life or safety of occupants or others. RSA 154:21-a. The

order is subject to RSA 147:16-a, which sets out the procedure that must be followed when ordering a building vacated.

3. HAZARDOUS MATERIALS ACCIDENTS

RSA 154:8-a excuses from civil liability or penalty any person providing assistance at the request of state, county or local officials in charge of an emergency from the results of attempting to mitigate discharge of hazardous materials or of attempting to prevent, clean up or dispose of such discharge. This immunity does not cover those who may have caused the discharge, or who receive compensation other than out of pocket expenses for rendering assistance. Moreover, the immunity granted does not affect the liability of an individual for gross negligence or willful, reckless or wanton misconduct. Towns may seek reimbursement for the costs of equipment and personnel from the person whose acts or omissions caused the emergency response.

4. INSPECTION OF SCHOOL BUILDINGS

Pursuant to RSA 153:14, II(b), each local fire chief shall annually inspect all school buildings within his or her jurisdiction while school is in session and submit a written report to the state fire marshal on the condition of all such school buildings. A copy of the report shall be furnished to the school district superintendent and school board members. The report shall detail any state fire code compliance issues in each school building. The report shall be submitted no later than December 15 each year. The powers described in this section differ from the authority of the local building inspector, who derives his authority to act from the decisions of the legislative body to adopt zoning or adopt a local enforcement scheme for administration of the state building code. For a more complete review of this issue, see RSA chapter 155-A, and RSA 674:51 – :52-a. The fire chief and the local building inspector will often work together closely to identify and seek resolutions of hazardous conditions using their different abilities and statutory powers.

G. The State Fire Code and the State Building Code

1. RSA CHAPTER 155-A was passed to reduce the number of conflicts between the two codes, create a less burdensome regulatory process, ratify the adoption of code versions in current use, and define the authority of the state fire marshal and state building code review boards to amend adopted codes.

- a. The state fire code is defined in RSA 153:1, VI-a as the Life Safety Code 2015 edition and the Uniform Fire Code NFPA 1, 2015 edition, as published by the National Fire Protection Association and as amended by the state board of fire control and ratified by the general court pursuant to RSA 153:5. RSA 153:I, VI-a also says that provisions of any other national code, model code, or standard referred to within a code listed in this definition shall be included in the state fire code unless amended in accordance with RSA 153:5.
- b. The state building code is defined in RSA 155-A:1, IV as the adoption of six of the International Code Council Codes, 2015 editions, and now includes the International Swimming Pool and Spa Code 2015, and the National Electric Code, 2017 edition. Changes to the codes must be approved by the above noted state officials or agencies and ratified by the state legislature.

2. APPLICABILITY

Both of these codes apply in all municipalities in the state, whether or not there is a local zoning ordinance, or local adoption of a building code, or local adoption of a code

enforcement process. Both codes govern the construction and renovation of buildings. The state fire code also governs the fire safety requirements of existing buildings.

3. LOCAL REGULATIONS, PRACTICES AND PROCEDURES

- a. Pursuant to RSA 155-A:3 and RSA 153:5, V, municipalities may adopt by ordinance additional regulations affecting building codes or fire codes, provided that such regulations are not less stringent than the applicable state code and these local regulations, policies, practices, or procedures do not prevent effective enforcement of the state codes.
- b. The issuance of permits and the collection of fees under the state building code is reserved to counties, towns, cities and village districts by RSA 155- A:2.
- c. There is no requirement for a municipality to adopt a local enforcement mechanism, issue permits, or to appoint a local building inspector to administer the state building code. In the absence of such a process, a contractor constructing anything, other than a one or two-family dwelling, must notify the state fire marshal prior to commencing construction. RSA 155-A:2, VI. Fees may be charged by the state fire marshal to issue a permit under the code. RSA 155-A:2, III.
- d. The local fire chief is the person designated to administer the state fire code within the municipality. If there is no local fire chief, the state fire code shall be administered by the state fire marshal upon the written request of the municipality.
- e. Pursuant to RSA 155-A:2, VI, municipalities may contract with another municipality or with a qualified third party to perform services in administering the state building code instead of appointing their own building inspector.

4. ENFORCEMENT

- a. The municipal fire chief, or his or her representative, is designated as the “local enforcement agency” for the State Fire Code. RSA 155-A:1, III; RSA 154:2, II.
- b. For those municipalities who have adopted a local enforcement process pursuant to RSA 674:51 or RSA 47:22, the “local enforcement agency” is the building inspector or other local official qualified and authorized to make inspections and to enforce the applicable codes and local regulations.
- c. In the absence of any local enforcement process or the presence of a local fire chief, the enforcement responsibility falls to the state fire marshal, subject to fees that may be charged for the benefit of the state. See RSA 155-A:2, III.

5. EXEMPTIONS AND APPEALS

- a. The state fire marshal may exempt a building, structure or equipment from the state fire code if he or she finds that such exemption does not constitute a hazard to the public welfare and safety, pursuant to RSA 153:5, IV and RSA 153:8-a, I(c).
- b. There is no process to obtain an exemption from the application of the state building code, but the state building code review board may consider a variance from its requirements pursuant to RSA 155-A:2, X.
- c. Pursuant to RSA 155-A:2, II, if there are conflicts between the two codes, the one with the greater degree of life safety shall take precedence. If code officials cannot agree on the issue, the property owner may notify officials of which code shall apply, and after two days without decision by the local officials, such election shall not be grounds for denial of a certificate of occupancy. There appears to be no appeal from such a property owner decision.

- d. RSA 674:34 provides for a local appeal process for state building code and state fire code issues. These appeals will be heard by the local building code board of appeals if one has been established, or more often by the local zoning board of adjustment, in accordance with RSA 673:1, V. This significantly increases the number of matters which could come before most local ZBAs. While the local building code of appeals has no authority to waive code requirements, it does determine whether or not the local enforcement officials have followed the “true intent of the code”; whether the cited “provisions of the code do not fully apply”; or whether “an equally good or better form of construction is proposed.”
- e. Local building and fire officials are required to provide information on the local and state appeals procedures when issuing a building permit, reviewing plans, or issuing a notice of violation. RSA 153:14, V; RSA 155-A:7, IV.

6. BUILDING INSPECTION

- a. The fire chief may inspect any building when there is reason to believe that hazardous or combustible materials are liable to be accumulated there. RSA 154:2.
- b. If owner consent for such an inspection is denied, the chief may obtain an administrative inspection warrant under RSA 595-B. *See* RSA 154:2, III. These powers supplement the authority granted to the governing body by RSA 155-B to deal with hazardous or dilapidated buildings. This statute empowers municipalities to impose liens to assist in recovering costs incurred in abating these situations. The fire chief is a key member of the local team that identifies and acts to abate the dangers posed by such properties.
- c. RSA 155-A:2, VII provides that no municipality shall be liable for the failure of a contractor to comply with the provisions of the state building code. Thus, while there is a measure of liability protection afforded to the process of granting a building permit or certificate of occupancy, care should still be utilized in the inspection process. This will afford both the greatest level of safety to building occupants, and the greatest level of protection against future claims that negligence in inspection resulted in a defect that caused personal injury or property loss.

H. Aid to Other Districts

Under the terms of RSA 154:24 – :30, any city, town, village or fire district may vote to authorize its fire department to go to the aid of another city, town, village or fire district within or outside the state. While extending this aid, firefighters are subject to the control and direction of the chief fire official of the assisted municipality, and they have the same immunities and privileges as if performing the same duties in their own respective city, town, village or fire district. Expenses incurred by any fire department in rendering aid outside the limits of its jurisdiction may be charged to the city, town, village or fire district whose officials requested aid. However, any municipality or district may extend aid by donating equipment and services while assuming the liability for loss or damage to the equipment under RSA 154:27.

Any municipal or district fire department aided by another department may compensate the district for employee services or payments for injury or death. At the request of any chief of an organized fire department within the state, the fire marshal shall give all help and assistance possible in coordinating the services of fire departments giving the mutual aid in the extinguishment of fires.

A town with no fire department may seek reimbursement from local tax-exempt charitable, educational or religious organizations that receive fire aid from an outside fire department that then bills the town for its service. RSA 72:22-a.

I. District Fire Mutual Aid Systems

A mutual aid system coordinates the services of all member fire departments to provide better and more efficient cooperation in the protection against fire within the district. RSA 154:30-a – :30-h provide that whenever 10 or more municipalities within the state have voted to authorize their fire departments to provide aid to other departments, as provided in RSA 154:24 – :30, they may form a district fire mutual aid system. The mutual aid system is a public municipal corporation. If a group of fewer than 10 municipalities wish to form a mutual aid system, they must petition the state fire marshal for permission. RSA 154:30-a.

1. POWERS AND DUTIES

The functions of a mutual aid system are set out in RSA 154:30-c. A district fire mutual aid system may:

- establish plans for the coordination of all municipal services performed by it;
- within the limits of available funds, acquire and operate property and equipment, including a dispatch center;
- provide communications service, radio repair and maintenance service to its member municipalities and fire departments or persons and firms under contract with a member municipality or fire department;
- provide private fire, burglary and supervisory alarm service;
- provide dispatch and communications service for police and emergency medical services of member municipalities and fire departments or for such services as are under contract with member municipalities and fire departments;
- extend the advantages of group purchasing for services performed by it to municipalities and fire departments in the system; and
- provide and operate training programs for firemen and emergency medical technicians.

2. ORGANIZATIONAL MEETING

RSA 154:30-a – :30-h outline the formation and organization of district fire mutual aid systems. An organizational meeting elects a board of directors, which becomes the governing body of the system.

3. JOINING AND WITHDRAWAL

Additional municipalities within or outside the state may subsequently join a system subject to the approval of the board of directors. Municipalities that do not have active fire departments may be admitted as members upon conditions as the board of directors may establish. Private fire departments within or outside the state may also be accepted as members, with equal voting rights, by the board of directors, under arrangements as mutually agreed. A municipality or private fire department may, by vote of its governing board, withdraw from a mutual aid system, but withdrawal is not effective until 90 days after written notice of withdrawal has been delivered to one of the officers of the system.

4. APPROPRIATIONS

Municipalities belonging to a mutual aid system may raise and appropriate money for the purpose of the system. Counties in which a system is established may raise and appropriate money for the purposes of the system, provided that where not all the municipalities in the county belong to the system, county appropriations may be made only by a two-thirds vote of the county convention present and voting. RSA 154:30-f.

5. LIMITATION ON LIABILITY

Mutual aid systems, including member municipalities, have statutory immunity from liability imposed by law for failure to respond, or to respond reasonably, for the purpose of extinguishing any fire. RSA 154:30-e.

J. Forest Fire Payments

RSA 227-L:22 provides that the expenses of fighting forest and brush fires in towns, and other expenses lawfully incurred by wardens and deputy wardens preventing forest fires, are shared equally by the municipality and the state, except as otherwise provided. Where the costs to the town of suppressing and preventing forest fires, excluding the initial cost of firefighting equipment, exceeds 0.25 percent of the local equalized assessed valuation in a given fiscal year, the state will pay the excess amount. The warden is responsible for providing the select board a statement of the expenses incurred by the town, or by the town or city that responded upon request to the forest or brush fire. Upon receipt and approval of the statement, the select board draws an order upon the treasurer for payment.

K. State Fire Marshal

RSA 153:14, I gives the state fire marshal authority to issue regulations under certain circumstances. These regulations pertain to keeping, storage, use, manufacture, sale, handling, transportation or other disposition of highly flammable materials and rubbish, and the state fire marshal may prescribe the materials and construction of receptacles and buildings to be used for any of these purposes. The statute limits the state fire marshal's authority in this area to cover cities, towns, village districts and precincts lacking local laws and ordinances. It also applies to those cities, towns, village districts and precincts whose existent laws and ordinances "do not afford the necessary fire safety measures."

Under RSA 153:4-a, the state fire marshal has the power to approve, disapprove or allow exceptions to any fire safety regulations of any state agency except fire safety rules established under RSA 227-L (Woodland Fire Control). The fire marshal also certifies private firefighting units and supervises and enforces all laws of the state relative to the protection of life and property from fire, fire hazards and related matters. Under RSA 153:4-a, I, the marshal assists towns in supervising and enforcing local ordinances relative to:

- prevention of fires;
- storage, sale and use of combustibles;
- installation and maintenance of automatic or other fire alarm systems and fire extinguishing equipment;
- construction, maintenance and regulation of fire escapes;
- means and adequacy of exit, in case of fire, from factories, asylums, hotels, hospitals, churches, schools, halls, theaters, amphitheaters, nursing and convalescent homes, and all other places in which numbers of persons work, live or congregate;
- investigation of the cause, origin and circumstances of fires; and
- transportation, storage and physical handling of flammable liquids and gases that the state fire marshal believes to be dangerous.

1. RULES

RSA 153:5 allows the fire marshal, with the board of fire control, to adopt rules with the approval of the commissioner of safety. making amendments to the state fire code.

Such amendment may not require automatic fire suppression or sprinkler systems in detached one or 2 family dwellings in a structure used only for residential purposes. RSA 153:5, III and RSA 153:10, III

RSA 153:5 was amended in 2010 to prohibit the state fire marshal from adopting rules that “require automatic suppressant or sprinkler systems in detached one-or 2-family” residences. However, in a 2012 decision, the New Hampshire Supreme Court found that a fire chief could still require sprinklers in a one-family home in certain circumstances. The homeowner argued that the fire chief had violated this law by requiring a sprinkler system in the one-family home. Interestingly, the court disagreed, noting that except for the sprinkler issue, the law still permits the state fire marshal to “adopt the most recent edition of the National Fire Protection Association (NFPA) code” as rules. The court found that the state had indeed adopted the most recent NFPA code as rules for New Hampshire. Despite the prohibition of RSA 153:5, the rules permit a fire chief to require sprinklers when “site conditions or unique structure designs ... result in a fire department access road design that does not meet the specific requirements” of the NFPA Fire Code. It appears, therefore, that if the local fire chief finds specific site conditions that make access difficult, sprinklers may be required for one and two- family structures despite the prohibition in RSA 153:5 against such a requirement. *Atkinson v. Malborn Realty Trust*, 164 N.H. 62 (2012).

The legislature also amended RSA 674:36 and RSA 674:51 to permit an applicant before a planning board seeking subdivision approval for new homes, or an owner seeking modification to an existing home, to voluntarily propose the installation of such sprinklers. Upon acceptance of the offer, the condition requiring such installation becomes enforceable. RSA 674:36, IV and RSA 674:51, V.

2. FIRE WARNING DEVICES AND CARBON MONOXIDE DETECTORS

RSA 153:10-a has been amended to require automatic fire detection devices in all single-family homes renovated after January 1, 2010. Carbon monoxide detectors are also required in all buildings unless there is no attached garage, and there is no combustion of solid, liquid or gas fuel in an appliance. These requirements are enforced by rules to be adopted by the state fire marshal. *See* RSA 153:10-a, III.

3. ENHANCED AUTHORITY TO ISSUE CITATIONS

RSA 21-P:4 has been amended to allow the commissioner of safety to delegate enforcement of the permissible fireworks law and laws relative to licensing of fuel gas fitters, electricians, and plumbers to the state fire marshal, or the local fire chief, or the local building inspector.

II. POLICE PROTECTION

Like the organization of the fire service, the lines of authority and interrelationships among and between police and other local officials are subject to wide local variation. While organization is important, the need for cooperation between the governing body and the police chief cannot be overstated. There is no duty for any municipality to create a police force. If one is created, all officers must be certified by the Police Standards and Training Council prior to exercising any police powers.

A. Elected Police Officers

RSA 41:47 provides that an annual town meeting may vote to elect, by ballot, one or more permanent police officers for full-time duty. The election of the actual officer(s), however, is not held until the first annual town meeting after such vote.

1. TERM

Any elected police officer who is in compliance with the education and training requirements established by the Police Standards and Training Council under RSA 106-F:3, RSA 106-F:5 and RSA 106-F:6 shall continue to hold office during good behavior, unless removed for cause by the select board during the elected term. RSA 41:48. The statute also requires that removal of an elected police officer can only be accomplished after giving the officer notice of the contemplated action and opportunity for a hearing, or unless the town votes under RSA 41:47 to rescind its prior decision to have elected officers. RSA 41:48.

2. SALARY AND BENEFITS

An elected officer is considered by law to be a permanent police officer entitled to retirement benefits if otherwise qualified. The salary of the elected police officer is fixed by vote of town meeting in accordance with RSA 31:9-b. The compensation of an elected officer typically takes the form of a line item in the budget developed from pay scales approved by the select board.

B. Appointed Police Officers

RSA 105:4 is a broad grant authorizing the select board, or the police chief under the select board's direction, to employ police officers in the detection and conviction of criminals and the prevention of crime in the town, and in the preservation of order on public or special occasions. In addition, under RSA 105:1, when the select board members deem it necessary, they may appoint "special" police officers who continue in office during the pleasure of the select board, or until their successors are chosen or appointed.

1. 'SPECIAL' OFFICER

The New Hampshire Supreme Court said that the term "special police officer," as used in RSA 105:1, means all officers who are appointed by the select board rather than elected, regardless of whether they are full or part-time, permanent or temporary.

N.H. Municipal Workers' Comp. Fund v. Smith, 124 N.H. 526, 531 (1984). The Court went on to acknowledge that terminology varies and "[t]he result is a multitude of terms used to describe part-time police officers."

2. REMOVAL FOR CAUSE

RSA 105:1 states that all "special" officers serve "during the pleasure of the selectmen." However, RSA 41:48 states that any officer who is either elected or appointed for full-time duty under the provisions of RSA 105:1 shall hold office, if he or she meets the training and certification requirements of RSA 106-L:6, unless removed for cause by the select board. While these statutes are inconsistent, it likely means that whether an officer is appointed on a full-time basis as a "special police officer" under RSA 105:1, or appointed as a full-time police officer under RSA 105:4, or is elected under RSA 41:47, such officers cannot be removed except for cause and only after notice and a hearing. A more difficult question is whether special officers appointed for permanent part-time duty serve "at the

pleasure” of the select board or may be removed only for cause. The statute indicates that they can be removed without cause, since RSA 41:48 protects only elected or permanent full-time officers.

As Attorney Peter J. Loughlin has written, the authority to terminate a public employee without cause “does not mean that [he or she] can be discharged arbitrarily, illegally, or in bad faith. Such a dismissal could lead to a cause of action against the governmental employer. As a practical matter, no public or private employee, including anyone who would traditionally be considered to be an ‘at-will’ employee, can be discharged for reasons of malice, bad faith or retaliation.” Loughlin, 13 *N.H. Practice: Local Government Law*, 14-64, § 427.

3. APPOINTMENT IN WRITING

RSA 105:2 requires appointment of police officers to be made in writing by the select board and recorded, with a certificate of the oath of office, by the town clerk. All police officers are by virtue of their appointment constables and conservators of the peace. They receive compensation as voted by town meeting, usually via a line item in the budget. RSA 105:3.

4. NAME TAG

Every police officer must wear a name tag while on active duty, except when performing special duty that would be compromised if the identity of the person as a police officer were disclosed (undercover assignments). RSA 105:3-a.

5. POLICE PERSONNEL FILES

Police personnel files not only document the essential details of the employment relationship between the police officer and the municipality, they can also play an important role in the prosecution of criminal cases. Police personnel files are generally confidential by statute, but there are certain circumstances where disclosure of material in those files is mandated. RSA 105:13-b; *Gantert v. City of Rochester*, 168 N.H. 640 (2016).

In *State v. Laurie*, 139 N.H. 325 (1995), the New Hampshire Supreme Court held that the state has an obligation to disclose to a criminal defendant information in a police officer’s personnel file that could be used by the defense to impeach the officer’s credibility or character when the officer is a potential prosecution witness in a criminal case. Subsequent action by the legislature mandated that when an officer is a witness in a criminal case his or her personnel file cannot be disclosed unless the presiding judge makes a specific ruling that probable cause exists to believe the file contains evidence relevant to the criminal case. RSA 105:13-b. *See also Duchesne v. Hillsborough County Attorney*, 167 N.H. 774 (2015) (discussing *Laurie*, RSA 105:13-b, and action by the N.H. Attorney General’s Office). However, in a recent ruling by the NH Supreme court it was determined that information about a police officer that is not kept by the officer’s employer in the officer’s personnel file is not protected from disclosure under RSA 105:13-b. The Exculpatory Evidence Schedule (a/k/a Laurie List) is not a record exempt from disclosure as an internal personnel practice. Disclosure of the EES must be evaluated by examining whether disclosure would be an invasion of privacy using the privacy balancing test. *N.H. Ctr. For Pub. Interest Journalism v. N.H. Dept. of Justice*, 2020 N.H. Lexis 174 (N.H. Supreme Court, decided October 30, 2020).

As a consequence of the ruling in *Laurie*, legislative action, and the subsequent ruling in *Gantert* and *Duchesne*, the N.H. Attorney General’s Office has issued a series of memoranda detailing when and what information must be disclosed from a police officer’s personnel file. The most recent memorandum, issued April 30, 2018, attempts

to clarify an overhaul of a 2004 memorandum, which was rescinded and replaced in 2017. Legal challenges are ongoing, but it is clear that that an officer who has been placed on the “Laurie list,” also known as the “Exculpatory Evidence Schedule,” must be provided with an opportunity to challenge that designation in order to satisfy due process concerns. *Gantert*.

In 2021, the legislature added a provision to the statute under RSA 105:13-d. This addition to the statute allows the department of justice to voluntarily maintain an exculpatory evidence schedule consisting of a list of all current or former law enforcement officers whose personnel information contain potentially exculpatory evidence. The statute explicitly states that this list shall be considered a public record under RSA 91-A.

In December of 2021, the Attorney General’s Office released a list of officers whose names appear on the Exculpatory Evidence Schedule, as well as a brief description as to why their name was included on the list. How the release of this list will affect the disclosure of information contained within a police personnel file has yet to be determined. However, the courts have ruled that the protections afforded by RSA 105:13-b will not protect information related to the Exculpatory Evidence Schedule. *New Hampshire Center for Public Interest Journalism v. NH Dept. of Justice*.

Consultation with the municipal attorney and appropriate County Attorney is strongly advised prior to taking action involving Laurie disclosures due to the rapid change in the law in this area.

C. Appointed Police Chief

Under the authority of RSA 105:1, the select board may designate one of the police officers as chief of police or superintendent. The chief exercises authority over and supervises the other appointed police officers, and those officers are accountable and responsible to the chief. Nevertheless, none of the authority granted by that statute is to be construed to prevent a town from electing police officers under the provisions of RSA 41:47.

In addition to powers spelled out in RSA 105:1, RSA 105:2-a grants an appointed police chief additional powers, subject to formal policies adopted by the select board. The appointed chief of police has authority to direct and control all employees of the department in their normal duties and is responsible for the efficient and economical use of all department equipment. As noted above, cooperation between the select board and the police chief is essential for operations to run smoothly.

1. TERM IN OFFICE

In *Kassotis v. Town of Fitzwilliam*, 166 N.H. 648 (2014), the New Hampshire Supreme Court stated that a police chief may be hired under RSA 105:2-a for a fixed term. Kassotis and the Town of Fitzwilliam entered into a two-year contract to have him serve as the Town’s Chief of Police. The contract provided that it would continue after its expiration date until a new contract had been mutually agreed upon or until either party provided notice of intent not to negotiate a renewal of the contract. Within the stipulated time for notice, the Fitzwilliam Select Board notified Kassotis of its intent not to negotiate a renewal of the contract. Both the Superior and Supreme Court agreed with the Town that non-renewal of the two-year contract was not a dismissal as contemplated by RSA 105:2-a and so therefore the Town was not required to demonstrate just or substantial cause for the non-renewal of the contract. Supreme Court agreed with cases from other jurisdictions that found that the failure to renew a public employee contract was not a dismissal from employment. When negotiating an agreement to hire a police chief for a fixed term, the contract should state the beginning and ending date of the contract, and

state that the contract would continue from its expiration date until a new contract has been mutually agreed upon, unless one party notifies the other party of its intent not to negotiate a renewal of the contract.

After this decision, the legislature amended RSA 105:1 to state: “The designation as chief of police by the selectmen may be in the form of a contract specifying that the authority of the designee ceases on the date stated in the contract, regardless of whether a successor has been designated.”

D. Cause for Removal

Like the fire chief, a police chief has special statutory protection in the process of suspension or dismissal from the position. Any permanent full-time elected or appointed police officer, including a chief, can be removed only for cause. Consultation with the municipal attorney is strongly advised prior to taking such an action. In *Ingersoll v. Williams*, 118 N.H. 135 (1978), the New Hampshire Supreme Court explained that “for cause”:

[R]estrict[s] the scope of the superior authority’s power to terminate an employee. That authority can no longer dismiss a subordinate for personal dislike, political disagreement, or reasons of that nature. The substance of the reason for dismissal must turn on some substantial cause, such as corruption or inefficiency in office, infraction of the rules governing the police force, the commission of an infamous crime, or the conviction of a misdemeanor and sentence to imprisonment for a term.

1. SUBSTANTIAL CAUSE

Other cases have, to a certain degree, interpreted the type of behavior that amounts to “substantial cause.” For example, in *Blake v. Pittsfield*, 124 N.H. 555 (1984), the dismissal of the police chief was upheld where he violated RSA 32:10 (part of the Municipal Budget Law) by substantially overspending his budget over a three-year period despite warnings from the select board. The Court wrote that “substantial cause” to support removal “must be one which specially relates to and affects the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public, before a removal is justified.”

2. NOT NECESSARILY CRIMINAL CONDUCT

While the cause must be “substantial,” it is clear that the cause need not amount to criminal conduct or be a violation of state law. For example, in *Cheney v. Somersworth*, 122 N.H. 130 (1982), the Court held that disobeying an order was the sort of infraction of police force rules that was sufficient grounds for removal. More recently, in *Yoder v. Middleton*, 152 N.H. 363 (2005), the Court found that substantial cause existed to remove a police chief who made a series of inconsistent statements when confronted by select board as to whether he had stolen ammunition from the police department. Although the chief had not been charged with a misdemeanor, he had violated the police department’s policy of truthfulness in an investigation and his inconsistent statements created grave doubts as to his ability to hold a position demanding honor and integrity.

3. PROCEDURE FOR REMOVAL

There is an important difference in procedure for removing appointed rather than elected police chiefs. Elected chiefs must be given written notice of the reasons for termination and an opportunity to be heard prior to dismissal. Appointed chiefs must be presented with a specification of the reasons for dismissal but are not entitled a hearing prior to dismissal.

- a. **Appointed police chiefs.** RSA 105:2-a provides that any appointed police chief may be dismissed or suspended without pay only after being given a written specification of the reasons. Again, no pre-termination or pre-suspension hearing is required. The chief is entitled to a hearing in superior court if he or she files a petition within 45 days of the suspension or dismissal. After a hearing, the court has the power to affirm, modify or negate the suspension or dismissal. This procedure differs from the procedure for dismissing an elected police chief, or an elected or appointed police officer.
- b. **Elected police chiefs.** The removal of an elected police chief is governed by RSA 41:48, which requires that the chief must be given notice and a hearing by the select board before being dismissed. This procedure also applies to suspension, although unlike RSA 105:2-a, RSA 41:48 does not refer to suspension, with or without pay. The dismissal or suspension is also subject to review in superior court if the chief wishes to pursue the matter.
- c. **Elected or appointed police officers.** RSA 41:48 also provides that the removal of full-time ordinary police officers, whether they are elected or appointed, is handled in the same manner as the procedure for elected chiefs. Notice of the contemplated action and an opportunity for a hearing before the select board must be given before the action is taken.

4. WHO INITIATES REMOVAL OF OFFICERS?

Either the chief or the select board may initiate proceedings to remove an elected or appointed police officer. Under RSA 41:48, when a select board seeks to remove a police officer, the officer is notified and afforded a hearing before the board. The board is both prosecutor and judge. *Appeal of Pelham*, 124 N.H. 131, 136 (1983). The officer's rights are safeguarded by the ability to seek judicial review of the board's findings and decision. (However, if the officer is part of a bargaining unit covered by a collective bargaining agreement, the situation may be somewhat different. Please refer to the discussion of collective bargaining agreements in Chapter Twelve or contact your labor attorney for more information.)

E. Police Regulations

Under RSA 105:6 and RSA 105:7, all police regulations must be approved by the select board, recorded as approved with the town clerk and published in a newspaper in circulation in the town or (if there is no such paper) posted in two or more public places before they legally take effect. Police regulations may concern parking, height and construction of awnings and fixtures in front or rear of buildings, and obstructions in streets.

F. Police at Public Meetings or Functions

RSA 105:9 requires any person desiring to conduct a public dance, circus or carnival to make application for police attendance at that function. Any person who fails to do so is guilty of a criminal violation. The chief of police, subject to written approval of the select board, reviews the application and decides whether police attendance is necessary. If so, the chief details one or more officers to attend, whose services are paid for by the applicant.

In addition, the statute gives the police chief the authority to assign police details to any public meetings or functions that the chief determines may create traffic problems, lead to a public disturbance or public nuisance, or endanger public health, safety or welfare. The applicant or

sponsor of the public meeting or function may be charged for the services of those police officers, unless the charge is waived by the chief. The statute also provides that the town will not be held liable for any decision not to detail police officers to attend such a public meeting or function.

The “special detail” authority is very important to the operations of a police department, and to governing bodies. Since officers assigned to the details are paid, the details allow officers to substantially supplement their base compensation. Municipalities send invoices to users for the costs of the details, and must keep accurate records in order to assure that the officers are accurately compensated, the impacts upon overtime pay and retirement benefit obligations are accurately computed, and other costs such as fuel and repair for cruisers used in the details are accurately billed and allocated to the function. If the police chief does not allocate detail work fairly, or in accordance with a collective bargaining agreement, there is a negative impact upon morale or a potential for a successful grievance under the collective bargaining agreement. Some municipalities have created a revolving fund under RSA 31:95-h, I(c) in order to isolate the function from the ordinary budgeting and financial reporting of the department, and to assure that funds received from such details will be used for police purposes rather than for support of the general fund.

G. Extended Authority of Police

The authority of any police officer extends to any town or city in the state, provided the police chief of the requesting town or city requests the assistance of the officer. This request must be made pursuant to a written agreement specifying terms and conditions of requesting and/or rendering such assistance. RSA 48:11-a and RSA 105:13. In the absence of a written agreement, any officer may exercise temporary police authority in another jurisdiction based upon either an oral request from an officer of that jurisdiction or an instruction from a public safety dispatch center, including the ability to hold an arrested person in need of medical treatment in temporary custody until medically cleared to enter a state or county correctional facility or municipal jail. The officer responding is under the command of officers from the receiving jurisdiction, and the temporary authority ends when the responding officer is relieved of responsibility by an officer of the receiving jurisdiction.

H. Body Cameras

RSA Chapter 105-D established regulations for the use of body-worn cameras (BWCs) by police officers. No law enforcement agency is required to use BWCs, but departments are encouraged to start using them. Under RSA 105-D:3 the Department of Safety has established a fund to help equip officers with body-worn cameras and agency vehicle with dashboard cameras. If an agency chooses to implement the use of body-worn cameras, the agency and its officers must comply with this law. Among other things, the law establishes requirements as to when BWCs may be used, when they should be activated and requires that an individual be informed as soon as practicable that he or she is being recorded, and gives individuals the right not to be recorded in certain circumstances. It establishes requirements for the storage of BWC recordings and exempts the recordings from disclosure under the Right-to-Know Law except in certain circumstances.

I. Education and Training

RSA 106-L:6 provides that no one may be appointed as a police officer except on a probationary or temporary basis unless the person has satisfactorily completed a preparatory program of police training at a school approved by the Police Standards and Training Council. Further, no police officer shall have a probationary or temporary status extended beyond two years in order

to remain in technical compliance with this statute. Elected police officers must also comply with the educational and training requirements within six months of election to office. The Police Standards and Training Council may reimburse political subdivisions for a portion of the expenses incurred by the officers in attendance at approved training programs. RSA 106-L:9.

J. Police Commission

RSA 105-C:1 authorizes a town, on the regular ballot for the election of town officers, to adopt RSA chapter 105-C and establish a police commission. The commission consists of three commissioners who have been residents of the town for at least three years. They may be elected or appointed by the governor with the consent of the council. No select board member, treasurer, tax collector, auditor, highway agent or head of a police department may serve as a commissioner. The commission appoints police personnel and police chiefs, fixes salaries and removes personnel for cause. RSA 105-C:4. A town may rescind a vote to establish a police commission by an article in the warrant as provided in RSA 39:3.

K. State Police

State Police employees have jurisdiction on all turnpikes, toll roads and interstate highways. RSA 106-B:15. However, nothing in the law is intended to limit the authority of local police officers. A state trooper may not act within the limits of a town having a population of more than 3,000 or of any city, except when the officer witnesses a crime; is in pursuit of a law violator or suspected violator; is in search of a person wanted for a crime committed outside the town limits or a witness to that crime; when traveling through the town; when acting as an agent of the director of motor vehicles enforcing rules pertaining to driver licenses, registrations and the inspection of motor vehicles; is faced with public safety exigent circumstances or when enforcing the motor vehicle laws or the regulations relative to the transportation of hazardous materials when requested to act by an official of another law enforcement agency; or when ordered by the governor.

L. Disposition of Property Held By Police

Police departments may find themselves in possession of lost or abandoned property which can begin to fill up property storage rooms. RSA 471-C:13 provides that police departments may return the property to the finder after a period of either 90 or 180 days depending on the value of the property. If the property could not be returned to the finder, it shall be sold at public auction with the proceeds to be turned over to the town or city treasurer.

If the property in question is determined, in good faith, to have no monetary value, then the department may destroy or dispose of the property instead of attempting to sell it at public auction.

III. ANIMAL CONTROL

A. Dog Licensing

RSA 466:1 requires every owner or keeper of a dog over three months old to license it with the town clerk annually (on or before April 30). The owner or keeper is also required to make the licensed dog wear a collar with a metal tag showing the name of the town, the year of issue and

the registered number. Except for the purposes of notification and forfeiture procedures described below, or pursuant to a court order, or for certain safety and health reasons, no dog or registration records, information or lists may be sold, rented, transferred or otherwise made available in whole or in part, in any form or format, directly or indirectly, to another person. RSA 466:1-d. The clerk must keep a record of all licenses issued, with the name of the owner and the name, description and number of the dog. The license fees for different categories of dogs are set out in RSA 466:4. The town clerk keeps \$1 from each license fee and submits 50 cents to the state treasurer for the operation of the veterinary diagnostic laboratory. RSA 466:9.

1. FORFEITURE

Dog owners who fail to license or renew the license of their dog must pay \$25 to the town under RSA 466:13. If the forfeiture is not made to the clerk within 15 calendar days of the notice of forfeiture, the case shall be disposed of in district court. The town clerk is required to annually, between June 1 and June 20, forward to the select board a list of dog owners who have not renewed their dog licenses. Within 20 days from June 20, the select board must issue a warrant to a local official authorized to issue a civil forfeiture for each unlicensed dog. The civil forfeiture is to be sent to the dog owner by certified mail, delivered in hand or left at the dog owner's abode. RSA 466:14.

The civil forfeiture warrant may also authorize a local law enforcement officer to seize an unlicensed dog. However, before an unlicensed dog may be seized, a written warning must be given to the dog owner. If a dog is seized, it shall be held in a town holding facility for seven days. If the owner does not license the dog by the end of the seven days, title to the dog passes to the holding facility. The dog owner must pay the facility a "necessary and reasonable sum" for each day the dog is kept, plus any veterinary fees incurred to benefit the dog. RSA 466:14.

The law enforcement officer authorized to issue the civil forfeitures must return the warrant to the select board on or before August 31, stating the number of owners who received and paid the civil forfeiture, the number of dogs seized and the number of owners who received a district court summons. RSA 466:16.

If the officer authorized to issue civil forfeitures is someone other than a law enforcement officer already employed under regular pay (in other words, an animal control officer as opposed to a regular town police officer), RSA 466:15 provides for that person's compensation to be determined by the select board.

2. LOCAL ORDINANCES

RSA 466:39 allows towns to enact additional ordinances governing the licensing or restraining of dogs and to fix penalties for violations not exceeding \$50. However, any annual license fee is limited to no more than \$1 in addition to the fees set out in RSA 466:4.

3. EXEMPT DOGS

RSA 466:8 lists types of dogs whose owners or keepers are exempt, not from the licensing requirement, but from the license fee. Dogs that have served with the forces of the United States and have received an honorable discharge and a service animal dog as defined in RSA 167-D:1, IV. The owner of a dog that is a service animal may elect for the registration and licensing of such dog to be permanent and not subject to annual renewal so long as such dog has met the requirements of this statute.

4. LICENSING CATS

The select board may vote to require licensing of cats in the same manner as dogs are required to be licensed. If the town elects to license cats, the same penalties apply for unlicensed cats as for unlicensed dogs. RSA 466:13-a.

5. REPORT OF EUTHANIZATION

With the owner's consent, a veterinarian may report the euthanizing or death during treatment of a licensed dog to the town or city clerk in order to have the record reflect that the dog was euthanized or died. A veterinarian providing such a report may also provide the town or city clerk with the mailing and street addresses of the owner of the dog. Written reports, if any, shall be destroyed after receipt by the town or city clerk, and any resulting record reflecting the dog's death shall not specify the manner or cause of death.

B. Dog Control Law

Town meeting voters may adopt the provisions of RSA 466:30-a to make it unlawful for dogs to run at large "except when accompanied by the owner or custodian, and when used for hunting, for guarding, working, or herding livestock, for supervised competition and exhibition, or training for such." "Accompanied" does not necessarily mean within reach or sight of the person. Any authorized person may seize, impound or restrain any dog in violation of this prohibition and deliver the dog to a person or shelter authorized to board dogs. Seized dogs shall be handled as strays or abandoned dogs. RSA 466:30-a,III. A dog which is a menace, a nuisance, or is vicious (as defined in RSA 466:31, II) shall be taken into custody by the police or constable of the town, or other person authorized by the town, and shall be disposed of as a court may order. RSA 466:31, III. Any person who violates this statute is guilty of a violation and is liable for a civil forfeiture to be paid to the town (penalties range from \$25 to \$400). RSA 466:31-a, II.

Adoption of the dog control law permits, but does not compel, law enforcement officers of the town to impound dogs and issue notices of violation to their owners under these statutes. Under a general negligence theory, towns have no legal duty to prevent a stray dog from wandering onto private property and causing damage to property, and therefore a town cannot be held liable for failure to remove a stray dog. *Cui v. Chief, Barrington Police Dep't*, 155 N.H. 447 (2007).

The provisions of the dog control law can be adopted by annual town meeting voters through a petitioned warrant article or a question placed on the ballot by the select board. The question must go on the official ballot (used for the election of officers) with the wording as prescribed in RSA 466:30-b, I(a). The select board must hold a public hearing on the question at least 15 days but not more than 30 days before the annual meeting. Notice of the hearing shall be posted in two public places in town and published in a newspaper in circulation in the town at least seven days in advance of the hearing. RSA 466:30-b, II.

C. Shelter for Dogs

Pursuant to RSA 644:8, IV-a, animal control officers may take dogs into temporary protective custody to protect against abuse or neglect, which includes the lack of adequate shelter or physical space for the animal to remain clean, dry and protected from the extremes of weather. The costs, if any, incurred in boarding and treating the animal, pending disposition of the case, and in disposing of the animal, upon a conviction of said person for cruelty to animals, shall be borne by the person so convicted.

IV. EMERGENCY MANAGEMENT

According to the New Hampshire Division of Homeland Security and Emergency Management, there are four steps to emergency management: mitigation, planning, response, and recovery. Preparedness is an ongoing process. Plans should be improved continuously to reflect new experiences, new threats, new resources and technologies, and changes in finances and personnel. Local officials are not only involved with their local Emergency Management Plan, but also play roles (whether they know it or not) in regional, state, multi-state and federal response plans. In addition, certain entities within each municipality, such as each public and non-public school, must provide their emergency response plan to local emergency authorities in the municipality in which they are located. RSA 189:64.

A. Federal Emergency Management

Federal emergency management is coordinated by the Federal Emergency Management Agency (FEMA), which is part of the U.S. Department of Homeland Security. FEMA prepares the nation for hazards, manages federal response and recovery efforts regarding any national emergency incident, and administers the National Flood Insurance Program. FEMA also coordinates the development and administration of the National Incident Management System (NIMS). NIMS provides a uniform set of processes and procedures for emergency responders at all levels of government to use in responding to public emergencies. The National Integration Center Incident Management Systems Integration Division (IMSI) publishes the standards, guidelines and compliance protocols used to determine whether a governmental unit has implemented NIMS properly. Compliance is required in order to receive federal emergency preparedness funds. The State of New Hampshire adopted a statewide incident control system based on NIMS to ensure state compliance with the program. RSA 21-P:52. However, local and regional plans must comply as well.

B. Multi-State Planning

New Hampshire is part of the only “all-hazards” multi-state consortium to support multi-state emergency preparedness planning. The Northeast States Emergency Consortium (NSEC) includes Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York and Vermont. Funded by the federal Department of Homeland Security, NSEC is a nonprofit organization that develops, promotes and coordinates “all-hazard” emergency management activities among its member states and assists with coordination between its members and the federal Department of Homeland Security. <http://nsec.org/about-nsec/>.

C. State Emergency Planning

Under RSA 21-P:34 – :38, New Hampshire’s overall state emergency response system operates under the direction of the governor and New Hampshire’s director of Homeland Security and Emergency Management (HSEM). The HSEM and the New Hampshire Department of Health and Human Services (DHHS) have developed an all-hazards emergency preparedness plan for the state. The state Emergency Operations Plan (EOP) addresses a wide variety of issues, including terrorism; transportation; communications and alerts; public works and engineering; firefighting; public information; health and medical services; search and rescue; food and water; energy; law enforcement and security; animal health; and hazardous materials.

Under RSA 4:45, the governor has the power to declare a state of emergency by executive order, as does the legislature by a concurrent resolution of the House and Senate. A “state of emergency” is

a condition, situation or set of circumstances deemed to be so extremely hazardous or dangerous to life or property that it is necessary and essential to invoke, require or utilize extraordinary measures, actions and procedures to lessen or mitigate possible harm. RSA 21-P:35, VIII. During a state of emergency, the governor has emergency powers to enforce laws, rules and regulations regarding emergency management; to assume control of all emergency management forces in the state; to manage emergency materials and services; and to order evacuations. RSA 4:45.

In a public health emergency, the commissioner of the DHHS is empowered to investigate outbreaks; order quarantine and isolation to prevent the spread of a disease; order persons who pose a threat to the life and health of the public to receive treatment and care to eliminate the threat; purchase and distribute vaccines and treatment; establish acute care centers; and educate the public about communicable diseases. RSA 141-C:4; RSA 141-C:26. The commissioner may also order anyone who is suspected of having or carrying a communicable disease to undergo diagnostic testing. RSA 141-C:9. In certain situations, the commissioner may order any public building to be closed and/or decontaminated and may cancel public events or gatherings. RSA 141-C:16-a, :16-b.

Please note that the Covid-19 pandemic has caused significant legislative interest in revising the statutes pertaining to public health emergencies. As Covid-19 is an ongoing issue, it is a good idea to consult NHMA's website, <https://www.nhmunicipal.org/>, for any pertinent updates on public health rules, regulations, and laws as the state and nation work to control the pandemic.

D. New Hampshire's 'All Health Hazard Regions'

New Hampshire's 234 municipalities are divided into 19 All Health Hazard Regions (AHHRs). The AHHRs receive state funding to develop regional public health emergency response plans for large-scale public health events that would require a response exceeding the capacity of a single municipality. AHHR plans should coordinate with and complement the local municipal Emergency Management Plans, and vice versa.

E. Municipal Emergency Preparedness

RSA 21-P:39 requires New Hampshire municipalities to establish a local emergency management organization "in accordance with the state emergency management plan and program." The local emergency management organization must perform emergency management functions within the territorial limits of the municipality. It is the duty of every organization for emergency management to execute and enforce the orders, rules and regulations made by the governor. RSA 21-P:45.

A director is appointed by the municipality's governing body (select board) and has direct responsibility for the organization, administration and operation of the organization, subject to the direction and control of the select board. The director may be one of the members of the select board. Until a local director is appointed, the chief elected official (select board in towns) is directly responsible for establishing, administering and operating the local organization. The state director must be notified of the appointment and removal of a local director. RSA 21-P:39. In the event of a declared disaster or public health or public safety incident, the state may assume command and make such orders as are required to protect the public health. These powers are broad, and are set forth in RSA chapter 141-C.

1. ADMINISTRATION

In carrying out its duties under the statute, each municipality in which any disaster occurs has the power to enter into contracts and incur obligations necessary to combat the

disaster, protect the health and safety of persons and property, and provide emergency assistance to the victims. RSA 21-P:39, III. The importance of putting these contingency plans and arrangements into place *before* an emergency arises cannot be overstated. When a crisis occurs, the municipality may implement the plan and exercise emergency powers, in some cases “without regard to time-consuming procedures and formalities prescribed by law,” although all constitutional requirements must be met. RSA 21-P:39, III. For example, one important constitutional limitation on local power is that private property may not be “taken” by the government without just compensation.

2. MUTUAL AID ARRANGEMENTS

The local director of each local organization for emergency management may, with approval of the commissioner and in collaboration with other agencies within the state, develop mutual aid arrangements for reciprocal civil defense aid and assistance in case of disaster too great to be dealt with unassisted. RSA 21-P:40.

3. APPROPRIATIONS

Under RSA 21-P:43, each political subdivision has the power to make appropriations for the payment of expenses of its local organization for emergency management. In addition, the municipality may accept emergency management services, equipment, supplies, materials or funds from any person, firm or corporation by way of gift, grant or loan.

4. MEETINGS

In response to a disaster, the local emergency management organization may meet at any place within or outside the town to establish and designate by ordinance or resolution other sites or temporary locations for the government of the town to meet to conduct the public business during the emergency. Such sites may be within or outside the town boundaries but must be within the state. RSA 21-P:39, IV. “Disaster” in this case refers to the events described in RSA 21-P:35, V, which include but are not limited to fire, flood, earthquake, windstorm, wave actions, technological incidents, oil or chemical spill, or water contamination requiring emergency action to avert danger or damage, epidemic, air contamination, blight, drought, infestation, explosion or riot.

5. LOCAL EMERGENCY MANAGEMENT PLANS – PRACTICAL ISSUES

A local emergency management plan should address as many aspects of a public emergency as possible. The plan should be developed with input from all municipal departments, including the governing body, police, fire, EMT, health officer, public works, water, sewer, waste disposal, financial and recordkeeping. Emergencies may have an effect on “ordinary” operations such as computer systems, payroll, record-keeping and legal notices. Administrative staff should be consulted about the effect of emergencies on their operations to minimize interruptions and avoid additional problems. And while the portions of a plan addressing terrorism are confidential under RSA 91-A:5, VI, emergency response plans should generally be shared with everyone in local government who needs to know.

Many organizational tasks and processes will be spelled out in the local Emergency Management Plan and in the All Health Hazard Regional Plan. Providing much of the framework for those plans, however, is the basic structure of state and local government. Each official in a municipality has statutory duties and responsibilities. The plan that is developed should take advantage of this natural organizational structure so that each official is assigned duties that are compatible with his or her statutory function.

As a practical matter, it is a good idea to keep and refine plan documentation created in response to the Covid-19 pandemic for future reference.

CHAPTER TWELVE

MUNICIPAL EMPLOYMENT

The interplay between employment law and municipal law is extremely complex. Management of a single employee may raise questions under federal law, state law, local policies and individual or collectively bargained contracts. Thus, these materials are designed to serve as a source of basic information and a starting point for questions. For answers to more complicated questions, contact NHMA's Legal Services staff or the town's regular attorney. NHMA members may also use our Employment Law Hotline sponsored by the law firm of DrummondWoodsum by calling 603-623-2500 and receive up to a half hour of consultation with an employment attorney free of charge. Other sources of helpful information in this area may come from a municipality's property liability insurance carrier in the form of trainings and workshops designed to reduce risk, and also from websites maintained by the U.S. Department of Labor, <https://www.dol.gov/> the U.S. Internal Revenue Service, <https://www.irs.gov/> and the New Hampshire Department of Labor, <https://www.nh.gov/labor/>.

I. EMPLOYEE/EMPLOYER RELATIONSHIP

A. Why Is It Important to Know Whether a Person Is an 'Employee'?

Generally, when a person performs work for a municipality with an expectation of compensation, an employment relationship is created. It is important to know whether someone is an employee of a municipality because state and federal laws impose certain duties on all employers, including municipalities. Those laws define "employee" in a variety of ways, for various purposes, including wage and hour protections; anti-discrimination laws; workers' compensation benefits; federal income tax and social security withholding; and safety and health regulations. Each law defines the term "employee" somewhat differently, and thus the same person may be an "employee" under one statute, but not under another. Thus, do not focus on whether the person is an elected or appointed official, or is a traditional employee, instead, focus upon your duties to that person under each applicable state or federal law.

"Is this person an employee or not?" When this question arises, the first thing to consider is, "for what purpose?" That can help direct you toward the correct answer. Remember that the answer may be different depending upon the purpose of the question.

B. Duties of Employers

If a person is, in fact, an "employee," then the municipality is the "employer." Several different federal and state laws impose duties upon the municipality as an employer. The governing body of the municipality, usually the select board, is responsible to perform the duties of the employer, including, but not limited to:

- the duty to determine who is and who is not an employee;
- the duty to compensate the employee fairly for the work performed;

- the duty to set forth the terms and conditions of the work, whether there is a collective bargaining agreement;
- the duty to evaluate the work, prevent misconduct, impose discipline or terminate the employment relationship fairly;
- the duty to maintain working conditions that reasonably protect the health and safety of the employee; and
- the duty to protect the civil right of the employee to be free from discrimination or unlawful interference with the employment relationship.

C. Who Is an Employee?

RSA 275:4, II defines an “employee” as “every person who may be permitted, required, or directed by any employer, in consideration of direct or indirect gain or profit, to engage in any employment” with certain exceptions. This statute is intended to define the term “employee” for purposes of New Hampshire’s various statutes regarding employment, including laws on discrimination and conditions of employment, the Whistleblower’s Protection Act, the Crime Victim Leave Act, the Minimum Wage Law and the Workers’ Compensation statute. RSA 275:4, II is intended to clarify the distinction between independent contractors and employees. There are certain exceptions to the definition, and a 7-factor test to determine whether someone is an independent contractor (the person must meet all seven factors). Each applicable employment related statute may need to be consulted for specific variations in the definition of “employee” that include or exclude certain groups of people for certain purposes.

D. Who Is Not an Employee?

Does the payment of money for work always create an employment relationship? Not always. The following situations are examples of persons who perform work for a municipality but are not treated as employees.

1. VOLUNTEERS

Individuals who volunteer or donate their services to a municipality, without expectation of any compensation, are not considered employees under either state law or the federal Fair Labor Standards Act (FLSA).

However, it is critical to note the difference between the state and federal law. Under the FLSA (the overtime statute, discussed more below), in order to qualify as a volunteer, the individual cannot receive more than nominal compensation and reimbursement for expenses. 29 C.F.R. §553.106(a) and 29 U.S.C. §203(e) (4)(A). To avoid establishing an employee-employer relationship with a volunteer, the municipality should avoid compensation that is tied to productivity or the number of hours of service provided to the municipality. If a volunteer works year-round, a stipend is permitted and per call compensation is permissible. 29 C.F.R. §553.106(e). Federal regulations allow local governments to pay for the expenses of training, uniforms, retirement plans, workers’ compensation, health insurance and travel without disturbing a person’s volunteer status. 29 C.F.R. §553.106(b)-(e).

State law, on the other hand, is more restrictive. A volunteer must be a person who serves without the expectation of compensation, although reimbursement for out-of-pocket expenses (such as training, uniforms, mileage) may be permitted. *See* RSA 275:4, II (an employee is a person who works “in consideration of direct or indirect gain or profit”). RSA 281-A:2, VII(b) exempts from the definition of “employee” most volunteers who perform service for which “no significant remuneration is provided . . .” The law is

more restrictive still when it comes to volunteer, call or part-paid fire-fighters. Those individuals appear not to be included in the definition of “volunteer” for purposes of the New Hampshire Minimum Wage Law, which means that if they receive any compensation at all other than reimbursement for out-of-pocket expenses, they must be paid at least minimum wage. This issue has not yet been clarified in New Hampshire, but caution is advised. In a case from Michigan, decided by the Federal Sixth Circuit Court of Appeals, “volunteer” firefighters who were paid \$15.00 per hour when they responded to calls were regarded as “employees” under the Family Medical Leave Act (FMLA) and the Fair Labor Standards Act (FLSA) because this was more than a nominal fee for this type of work. *Mendel v. Gibraltar*, 727 F.3d 565 (6th Cir. 2013).

Employees may not volunteer to do the same type of work they do as a paid employee for the same employer. 29 U.S.C. § 203(e)(4)(A)(ii). Given the overtime pay requirements of the FLSA (discussed later in this chapter) and the tightness of municipal budgets, an employee might ask if he or she may volunteer a portion of his or her time for services without pay. The FLSA, however, prohibits an individual from being both a paid employee and an unpaid volunteer while performing the same or similar services for which he or she is employed. An employee could volunteer to perform other services that were not the “same or similar” to his or her paid position, but the two positions must be different to pass the test. For example, a firefighter might volunteer as a part-time referee in a town-sponsored basketball league but could not volunteer for any services involving fighting fires, inspecting buildings or any of the other services that are a part of the firefighting job.

Even though volunteers may not be treated as employees of the municipality, the municipality may be responsible if volunteers perform wrongful acts when performing volunteer duties. Therefore, all volunteers must comply with any bylaws or regulations adopted by the governing body relative to services provided by the town or the use of town property. That is, they must comply with the rules that apply to all other citizens, even though they are performing volunteer work for the town.

2. ELECTED/APPOINTED OFFICIALS

Many elected and appointed officials are not regarded as employees of the municipality in the sense that they independently perform duties prescribed by governing statutes and are not subject to supervision by the governing body.

For example, the town clerk is elected, compensation is set by the voters and the duties are prescribed in the applicable statutes. Therefore, the clerk decides what his or her hours will be, when to take time off and how to run the office. If the voters are dissatisfied with the clerk’s performance, the remedy is to turn the clerk out of office at election time by voting for someone else. The select board is only given authority by the statutes to remove the town clerk for insanity or incapacity (RSA 41:12), or for irregular accounting (RSA 41:16-c).

Other officials in this category include the tax collector, treasurer, planning and zoning board members, budget committee and conservation commission members, and the selectpersons themselves. Specific statutes apply to most of these positions that describe how to remove these officials from office for cause.

In *Porter v. Manchester*, 155 N.H. 149 (2007), the Supreme Court held that an elected official can be regarded as an employee for purposes of the doctrine of *respondeat superior*, under which an employer is vicariously liable for the tortious acts of its employee acting within the scope of his or her employment. The Court applied a ten-part analysis of the “totality of the circumstances” to determine that the elected welfare commissioner was a city employee. The case resulted in the city being held liable for the wrongful acts of the welfare commissioner which caused the unlawful termination of a subordinate in the welfare department. Thus, for purposes of

liability, the municipality may be responsible if elected officials or appointed officials perform wrongful acts when acting in those capacities. Therefore, each of these persons must comply with policies adopted by the governing body designed to avoid liability relative to employment practices, services provided by the town or the use of town property.

The Internal Revenue Service (IRS) generally regards elected and appointed officials as employees whose compensation is subject to withholding for income tax purposes and for Social Security and Medicare withholding. See information available at www.irs.gov, including *Public Employer Tax Guide* for federal, state and local governments and **Publication 963**. Only officials paid directly by fees from the public are viewed as not subject to income tax withholding.

Elected officials are exempt from the federal and state laws relative to weekly payment of wages, minimum wage and overtime laws. 29 C.F.R. § 553.11; N.H. Admin. Code Lab 803.05 (g).

3. INDEPENDENT CONTRACTORS

It is not always easy to determine whether a person providing services to the municipality is actually an independent contractor. RSA 275:4, II includes a test to make this determination. The person must meet all the following seven conditions to be considered an independent contractor:

- The person possesses or has applied for a federal employer identification number or social security number, or in the alternative, has agreed in writing to carry out the responsibilities imposed on employers under RSA chapter 275.
- The person has control and discretion over the means and manner of performance of the work, in that the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the employer.
- The person has control over the time when the work is performed, and the time of performance is not dictated by the employer. However, this shall not prohibit the employer from reaching an agreement with the person as to completion schedule, range of work hours, and maximum number of work hours to be provided by the person, and in the case of entertainment, the time such entertainment is to be presented.
- The person hires and pays the person's assistants, if any, and to the extent such assistants are employees, supervises the details of the assistants' work.
- The person holds himself or herself out to be in business for himself or herself or is registered with the state as a business and the person has continuing or recurring business liabilities or obligations.
- The person is responsible for satisfactory completion of work and may be held contractually responsible for failure to complete the work.
- The person is not required to work exclusively for the employer.

When the status of a worker is questionable under the test, the NH DOL will tend to find an employment relationship exists because that relationship provides more protection for the worker. This means that it is quite important to clarify the details of an independent contractor relationship under the statutory definition.

While a thorough discussion of this issue is beyond the scope of this chapter, it is clear that the presence of a written agreement merely stating that the person is "independent" or a "contractor" is not enough. In general terms, the issue is who has control over the work (*what* will be done and *how* will it be done), which must be determined for each

person on a case-by-case basis. For example, if the person doing the work does not provide his or her own tools or the supplies to perform the work, is told when and where to report for work, what work to perform on a given day, or otherwise is not permitted to manage the work, it is likely that the person will be regarded as an employee, not an independent contractor, of the municipality.

A municipality may wish to have a person performing services regarded as an independent contractor, since that avoids the duty to withhold employment and other taxes and shifts the duty to provide insurance and safety and health protections for the person over to the true employer. Independent contractor status may be appropriate for some part-time or intermittent services. To reach this result, there should be a written contract with the person that specifies the price to be paid and the specifications for the work but does not seek to control all aspects of the daily performance of the work. Incorrectly designating workers as independent contractors can result in significant repercussions on the municipality from the IRS, the state Department of Labor and the affected workers. For more information, consult the publications of the IRS or obtain advice from the town's attorney.

E. Employment At-Will Doctrine

1. DEFINITION

In New Hampshire, an employee is said to be “at will” if there is no written contract of employment, applicable collective bargaining agreement, or a definite term of employment set by statute. The doctrine provides that an employee may be terminated at any time, for any reason not otherwise prohibited by law. The employee is also permitted to terminate the relationship at any time, and for any reason. In either case, neither the employee nor the employer has any further liability to the other when the relationship ends.

2. CAUTIONS AND EXCEPTIONS

A municipal employer should not rely exclusively on the doctrine when making the decision to terminate the services of an employee, since there have been many exceptions to the doctrine imposed both by statute and by court decisions. These include:

- Court decisions recognizing the claim of “wrongful termination” or “constructive discharge.”
- Court decisions recognizing the terms of employee handbooks and personnel policies as promises similar to a contract of employment.
- State and federal laws against discrimination, including but not limited to RSA 354-A.
- Statutes defining the employment duties and methods required to terminate local officials such as the town clerk, the tax collector, the treasurer, the police chief, the fire chief and the library director.

There will be more information on the discipline and termination of municipal employees, as well as discussion of laws that protect the health and safety and civil rights of such employees later in this chapter.

II. COLLECTIVE BARGAINING AND UNIONS

A. Introduction

Collective bargaining by public employees, the organization of employees into bargaining units and related topics are regulated in New Hampshire by RSA chapter 273-A, which creates the Public Employee Labor Relations Board (PELRB). The purpose of RSA chapter 273-A is to “foster harmonious and cooperative relations between public employers and their employees and to protect the public by encouraging the orderly and uninterrupted operation of government...by...acknowledging the right of public employees to organize and to be represented for the purpose of bargaining collectively with the state or any political subdivision thereof...[and]...requiring public employers to negotiate in good faith[.]”

The PELRB is the forum where disputes between public employers and public employees are resolved. In return, public employees do not have the right to strike or take other actions to suspend work that would be available to employee groups in the private sector. Although there is a statute, RSA 31:3, which may appear to provide a separate local option for entering into collective bargaining arrangements, the New Hampshire Supreme Court has held that RSA 273-A preempts this statute. *Professional Fire Fighters of Wolfeboro, IAFF Local 3708 v. Wolfeboro*, 164 N.H. 18 (2012).

B. Who May Organize

With a few important exceptions, any person employed on a full-time basis by a public employer (municipality) is entitled to organize. RSA 273-A:1 defines “public employee” as “any person employed by a public employer except:

- persons elected by popular vote;
- persons appointed to office by the chief executive officer or legislative body of the public employer;
- persons whose duties imply a confidential relationship to the public employer; or
- persons in a probationary or temporary status, or employed seasonally, irregularly or on call.

Thus, elected officials and certain appointed officials would not qualify for inclusion in employee unions.

C. Bargaining Unit Certification

The PELRB oversees certifying employee groups who have organized into “bargaining units” in accordance with RSA 273-A:8. This group may contain probationary employees, but does not include persons who are employed seasonally, irregularly, or on call.” RSA 273-A:1, IX. The PELRB may not certify a bargaining unit with fewer than ten employees with the same “community of interest.” There must be at least ten qualifying employees at the time of the PELRB hearing and decision on the certification (rather than simply at the time the petition is made to the PELRB). *Appeal of Deerfield*, 162 N.H. 601 (2011). Thus, even though considered glorified patrol officers by the Chief, a sergeant and corporal whose job description demonstrated they had supervisory authority over other officers required they be excluded from a proposed bargaining unit. *Appeal of Town of Loudon*, 2020 N.H. Lexis 42 (N.H. Supreme Court, decided March 17, 2020). A temporary fluctuation in membership below ten may not warrant decertification, but a more

permanent reduction in membership may warrant that action. However, only the PELRB has the authority, upon a petition filed with it for that purpose, to determine if a unit of less than ten members should be decertified. *Appeal of the Town of Brookline*, 166 NH 201 (2014). While there are many decisions of the PELRB and the New Hampshire Supreme Court on the meaning of “community of interest,” the central idea is that the group members share skills and working conditions that make it reasonable for them to negotiate jointly with the employer.

Once the bargaining unit is certified, it may then determine whether to be represented in negotiations by an “employee organization” (a.k.a. a union). A petition may be filed with the PELRB either by the bargaining unit or the public employer for this purpose, and the PELRB then monitors an election to determine who will serve as the exclusive representative of the unit. Based upon the results of the election, the PELRB certifies who will serve as such exclusive representative for the purpose of negotiating a collective bargaining agreement with the employer in accordance with RSA 273-A:10.

D. Collective Bargaining Agreements

1. TERMS AND CONDITIONS OF EMPLOYMENT

The union and the municipality’s “employer board” (city council, select board, school board, etc.) must bargain in good faith concerning the “terms and conditions of employment,” RSA 273-A:3, I, defined as “wages, hours and other conditions of employment.” RSA 273-A:1, XI. A three-pronged test has been adopted by the Supreme Court to determine whether a particular term or condition is a mandatory subject of bargaining:

First, “[t]o be negotiable, the subject matter of the [proposal] must not be reserved to the exclusive managerial authority of the public employer by the constitution, or by statute or statutorily adopted regulation...Second, the proposal must primarily affect the terms and conditions of employment, rather than matters of broad managerial policy...Third, if the proposal were incorporated into a negotiated agreement, neither the resulting contract provision nor the applicable grievance process may interfere with public control of governmental functions contrary to the provisions of RSA 273-A:1, XI [reserving matters of managerial policy to the employer]...Negotiation over the public employer’s action is mandatory only if all three prongs are met.”

Appeal of Kennedy, 162 N.H. 109 (2011) (citations omitted).

When a collective bargaining agreement is reached, the “cost items” must be submitted to the legislative body of the municipality for approval. “Cost item” is defined as “any benefit...whose implementation requires an appropriation[.]” RSA 273-A:1, IV.

If any part of the submission is rejected, either party may reopen negotiations. A legislative body may not modify any cost item placed before it for approval. RSA 273-A:3, II(b). A multi-year collective bargaining agreement is binding only if the financial terms for each year of the contract are adequately disclosed during presentation of the cost items for approval. *Appeal of Sanborn Reg’l Sch. Bd.*, 133 N.H. 513 (1990).

2. EXPIRED COLLECTIVE BARGAINING AGREEMENTS

Once a collective bargaining agreement is in place with the bargaining unit, the terms and conditions of the agreement do not automatically become meaningless when the term of the agreement ends. The legislature has repealed the so-called “evergreen law” which under RSA 273-A:12, VII kept the terms of the agreement in full force and effect. However, the judicial doctrine of “maintaining status quo” recognized by the Court as

part of the employer's duty to bargain in good faith requires working conditions to be maintained while new bargaining takes place. See *Appeal of Alton School District*, 140 N.H. 303 (1995). This doctrine does not require the payment of step increases found in the agreement after the date of expiration of the agreement. If such increases are granted after expiration, they may be later rescinded. *Appeal of Laconia Patrolman Association*, 164 N.H. 552 (2013). Although the status quo period requires employers to maintain the current terms and conditions of employment during negotiations, an employer's "past practices" during the status quo period do not create legally-enforceable terms. Only terms agreed to and memorialized in the CBA are legally enforceable. *Appeal of Professional Fire Fighters of Hudson, IAFF Local 3154*, 167 N.H. 46 (2014).

E. Prohibited Practices

1. UNFAIR LABOR PRACTICE

RSA 275-A:5, I outlines public employer conduct that is prohibited by the statute. This conduct is commonly referred to as an unfair labor practice. There are nine subsections to this paragraph, and public employers should be aware of this statute and should keep in mind that interference with employee attempts to organize, even before any "union" is in place, may be deemed an unfair labor practice. Once a collective bargaining agreement (CBA) is negotiated and ratified, the town must consider the terms of that agreement when making any decisions regarding union member employees covered by that agreement.

2. TERMS AND CONDITIONS

A common unfair labor practice claim is that the employer unilaterally changed the "terms and conditions" of a bargaining unit member's employment. This act is a prohibited practice under RSA 275-A:5, but is often met with the defense that the employer municipality was exercising "managerial prerogative" and that the change concerned an issue of managerial policy not subject to bargaining requirements. See the test articulated in *Appeal of Kennedy*, quoted in section D, 1 above.

3. AGENCY FEES

In *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), the United States Supreme Court held that the collection of "agency fees" is unconstitutional. "Agency fees" are those fees assessed by a union to represent non-members. In the context of public employment, the organization formed to represent public employees who choose to organize under RSA 273-A may be designated as the exclusive representative of all similarly situated employees. For example, the "patrolman's union" may represent all patrolmen, regardless of whether they are members of the union. That bargaining unit is charged with representing all employees at bargaining, regardless of whether they belong to the bargaining unit. Under the Illinois law held unconstitutional in *Janus*, public employees were forced to contribute to their representative unions, even if they chose not to belong to those unions. The Court held that non-members could not be charged a fee (the "agency fee" or "fair-share payment") to subsidize that representation. Importantly, the Court's holding was limited to non-union members and provisions of collective bargaining agreements requiring them to pay agency fees. It did not affect the fees charged to union members.

F. Obtain Additional Legal Advice

When employees in the town may be considering representation by a union, municipal officials should consult with legal counsel in order to avoid inadvertently committing an unfair labor practice before the bargaining unit is even certified. In addition, if employees are already represented by a union, additional legal advice may be needed to resolve disputes that arise under the contract, to take personnel actions, impose discipline or to renegotiate the terms of the employment contract when required.

III. HIRING OF EMPLOYEES

As employers, municipalities must be mindful of the anti-discrimination requirements that apply to all employers in New Hampshire. The application and interview process is the way employers gather the information they need to make a hiring decision. That process should be conducted fairly, impartially and without any discrimination against applicants. Although this may seem like obvious advice, it is advisable for employers to review anti-discrimination guidelines periodically because it can be easy for employers engaged in a dialogue with applicants to inadvertently bring the conversation into a problematic area.

A. New Hampshire Law

RSA 354-A, the New Hampshire statute on the Commission for Human Rights (the Anti-Discrimination Law), applies equally to public and private employers, prohibits certain discriminatory acts against employees and potential employees. See RSA 354-A:2, VII. RSA 354-A:7, I provides that it is an unlawful discriminatory practice for any employer to refuse to hire or employ any individual because of age, sex, gender identity, race, color, marital status, physical or mental disability, religious creed, or national origin unless it is based on a bona fide occupational qualification. It is also unlawful for any employer or employment agency to advertise a position, or use any application form, or make any inquiry or record in connection with employment that expresses, directly or indirectly, any limitation, specification or discrimination as to age, sex, gender identity, race, color, marital status, physical or mental handicap, religious creed, national origin or sexual orientation, unless based upon a bona fide occupational qualification. RSA 354-A:7, III. It is important to note that the exception for a “bona fide occupational qualification” has its limits and should be used sparingly. *Dothard v. Rawlinson*, 433 U.S. 321 (1977). Furthermore, not only will the employer be liable for engaging in the prohibited discriminatory conduct, but any employee who participates in any such unlawful conduct may also be personally liable. *E.E.O.C. v. Fred Fuller Oil Co.*, 2014 W.L. 347635, No. 13-CV-295- PB (D.N.H. Jan. 31, 2014).

Employers covered by the law (those with six or more employees) are required to provide qualified individuals with disabilities with reasonable accommodations in the workplace. Covered employers are required to “make reasonable accommodations for the known physical or mental limitations of a qualified individual with a disability who is an applicant or employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the employer.” RSA 354-A:7, VII(a). It is also an unlawful discriminatory practice for an employer to deny employment opportunities, compensation, terms, conditions or privileges of employment to a job applicant or employee who is a qualified individual with a disability, if the denial is based on the need of the employer to make reasonable accommodations for those disabilities. RSA 354-A:7, VII(b).

These provisions are similar to those in the Americans with Disabilities Act (ADA, discussed more

fully in the next section). New Hampshire law now defines a “qualified individual with a disability” as “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” RSA 354-A:2, XIV-a. To determine which are the “essential functions” of a position, the statute provides that “consideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.” *Id.* If someone is a qualified individual with a disability, a municipal employer may now be required under state law (as well as the ADA) to provide reasonable accommodation to that individual. “Reasonable accommodations,” as defined in RSA 354-A:2, XIV-b, may include:

- making existing facilities used by employees readily accessible to and usable by individuals with disabilities;
- job restructuring;
- part-time or modified work schedules;
- reassignment to a vacant position;
- acquisition or modification of equipment or devices;
- appropriate adjustment or modifications of examinations, training materials or policies;
- the provision of qualified readers or interpreters; and
- other similar accommodations for individuals with disabilities.

Even if an employee or applicant is a qualified individual with a disability, the employer is not required to provide reasonable accommodations if the employer can demonstrate that doing so would impose an undue hardship on the operation of the employer’s business. An “undue hardship” is “an action requiring significant difficulty or expense, when considered in light of” the following factors listed in RSA 354-A:2, XIV-d:

- the nature and cost of the accommodation needed;
- the overall financial resources of the facility involved in the provision of the reasonable accommodation, the number of persons employed at such facility, the effect on expenses and resource, or the impact otherwise of such accommodation upon the operation of the facility;
- the overall financial resources of the employer, the overall size of the business of an employer with respect to the number of its employees, and the number, type and location of its facilities; and
- the type of operation(s) of the employer, including the composition, structure and functions of the workforce of the employer, the geographic separateness, administrative or fiscal relationship of the facility in question to the employer.

To address these requirements, municipalities (particularly those with little or no experience under the federal ADA) may wish to consult with their local or employment counsel, with NHMA Legal Services attorneys or call the Employment Law Hotline at 603-623-2500 to determine whether job descriptions should be updated to reflect “essential functions” of each position and to prepare for the potential need to provide reasonable accommodations to qualified individuals with a disability. These statutory provisions are enforced by the New Hampshire Commission on Human Rights. RSA 354-A:5.

B. Federal Law

The Americans with Disabilities Act, 42 U.S.C. §12101 et seq., prohibits discrimination in employment based on physical or mental disability. “Disability” is defined broadly and includes:

physical or mental impairments that substantially limit one or more of the major life activities of an individual; a record of such an impairment; or being regarded as having such an impairment. Title II of the ADA requires that all municipalities, regardless of the number of individuals they employ, comply with certain requirements. In particular, no qualified individual with a disability may be excluded from participation in, or denied the benefits of, the services, programs or activities of a municipality or be subject to discrimination by a municipality because of a disability. 42 U.S.C. §12132; 28 C.F.R. Part 35. This means that municipal employers must make “reasonable accommodations” to the known physical or mental disabilities of otherwise qualified people unless it would result in an “undue hardship” to the municipality as the employer. Municipalities may not refuse to hire or promote qualified individuals with disabilities on the basis of stereotypes and myths about the individual’s disability.

Under the ADA, an employer may not ask about the existence, nature or severity of a disability, and may not conduct medical examinations until after it makes a conditional job offer to the applicant. This prohibition helps to prevent employers from making hiring decisions based upon disabilities. Before an offer of employment has been issued to an individual, an employer may only ask about an applicant’s ability to perform specific job-related functions and other questions that are not related to any disability.

C. General Guidelines

Given these laws and rules, the hiring process should be narrowly designed to help the employer learn about the applicant’s ability to perform the duties of the position. It is not about the applicant’s culture, background, family, gender or physical attributes. As a general guideline, certain topics should be considered “off-limits” and simply should never be discussed in a job application or interview:

- age (although an employer may ask whether an applicant is 18 years or older);
- race;
- national origin (although it would be permissible to ask whether an applicant has the legal right to work in this country);
- gender;
- religion;
- sexual orientation;
- marital status, maiden name, or any information about children or other dependents (including asking whether there are any);
- pregnancy;
- arrest records that did not result in convictions (although an employer may ask about convictions that have not been annulled or any pending felony charges);
- disability (a proper inquiry would be whether the applicant has the ability to perform essential job functions with or without reasonable accommodations);
- height and weight (unless it relates to essential functions of the job as established by valid guidelines); and
- military history.

Employers are also prohibited from requiring an employee or prospective employee to disclose log-in information for accessing a personal social networking account or to add the employer or anyone else to a list of contacts associated with a personal electronic mail account. RSA 275:73 - :75.

Topics that may be discussed include:

- information on an applicant’s resume or application, including an inquiry into gaps in employment;
 - prior experience;
 - ability to perform the job (can the applicant perform the “essential functions” of the job, including any physical requirements, either with or without reasonable accommodation); and
 - references (personal and work-related, but not relatives).
- For more information on this topic, employers may refer to the regulations of the New Hampshire Commission on Human Rights, and to the website of the U.S. Equal Employment Opportunity Commission (www.eeoc.gov). Municipal employers with questions about these issues are encouraged to consult with their town legal counsel.

D. Background Investigations for Certain Positions

1. RSA 41:9-B, OPTIONAL BACKGROUND CHECKS

The governing body or town manager may obtain background investigations and criminal history records checks on certain prospective employees, including volunteers, prior to a final offer of employment. A criminal history background check may be required for positions that require the employee “to work with or around children or elderly persons, enter the homes of citizens, or collect or manage money.” The town may request only a state records check or both a federal and state records check to be conducted through the division of state police. A release form is necessary for both types of records checks. For a federal records check, a set of fingerprints is also necessary to initiate the process.

The statute does not mandate background investigations and criminal history records checks on prospective employees or volunteers, nor does it prohibit such investigations through other means. It offers the option of the procedure that the federal law requires in order to use FBI records. It is up to municipalities to decide whether to conduct background investigations and record checks and, if so, whether to select a private service or the governmental service provided under the statute. Any concern that this procedure might be found to violate a constitutional right to privacy seems to be resolved, as the U.S. Supreme Court has found the process to pass constitutional review. *See National Aeronautics & Space Administration v. Nelson*, 562 U.S. 134 (2011).

2. RSA 170-E:56, MANDATORY BACKGROUND CHECKS FOR RECREATION CAMP OR YOUTH SKILL CAMP

No person or entity shall for profit or for charitable purposes operate any youth skill camp, as defined in RSA 170-E:55, II, without maintaining an appropriate policy regarding background checks for camp owners, employees and volunteers who may be left alone with any child or children. Certification of background checks shall be made to the Department of Health and Human Services demonstrating that no individual has a criminal conviction for any offense involving:

- (1).....Causing or threatening direct physical injury to any individual; or
- (2).....Causing or threatening harm of any nature to any child or children.

The full text of the statute should be reviewed to determine whether any camps in operation in the municipality are affected by these requirements.

3. RSA 41:9-C, LAW ENFORCEMENT CANDIDATE BACKGROUND CHECKS

Newly enacted RSA 41:9-c requires employers from whom law enforcement agencies are requesting employment information for candidates applying to become law enforcement officers to release that information upon written request endorsed by the candidate. The responding agency is released from civil liability for releasing the information, and imposes civil penalties for refusing to disclose requested information to a law enforcement agency.

4. DRUG AND ALCOHOL TESTING

Employers have many good reasons to require pre-employment drug and/or alcohol testing of employees. After all, these employees will, by definition, be serving the public. However, drug and alcohol testing has been found by the U.S. Supreme Court to be a form of “search and seizure” which is only permitted in a way that is not “unreasonable” under the Fourth Amendment to the U.S. Constitution. *See, e.g., Skinner v. Railway Lab. Execs. Ass’n*, 489 U.S. 602 (1989) (blood and urine testing for drug and alcohol use); *Nat’l Treas. Emp. Union v. Von Raab*, 489 U.S. 656 (1989) (urine testing for drug use); *Schmerber v. California*, 384 U.S. 757 (1966) (blood testing for alcohol); *California v. 617 Trombetta*, 467 U.S. 479 (1984) (breathalyzer tests).

However, although there are significant limitations on what a municipality may do, there are still certain categories of employees and specific situations for which drug and alcohol testing is acceptable and does not violate the Constitution. The key is that the testing program must adhere closely to the guidelines the courts have developed, must be geared toward protecting the public’s safety needs, and must be properly designed and administered.

There are three situations in which drug and/or alcohol testing is permitted under the Fourth Amendment. First, any employee holding a commercial driver’s license (“CDL”) is subject to federally regulated drug and alcohol testing as a condition of holding the license. Testing includes pre-employment, post-accident, testing on reasonable suspicion of drug or alcohol use, and return to duty testing after a violation. These requirements apply to municipal employees who are required to hold a CDL for their job; those employees can and must be tested through the Department of Safety. 49 U.S.C. 31301 et seq. It should be noted that the State of New Hampshire (acting under an option in the federal law) has chosen to exempt fire service personnel driving emergency vehicles assigned or registered to a department or fire service organization in pursuit of fire service purposes from the requirements of holding a CDL license. N.H. Admin Rule Saf-C 1801.02(a)(1). This means that the random testing otherwise applicable to CDL drivers does not apply to firefighters who operate emergency or fire service vehicles.

The second situation is “reasonable suspicion testing.” In this context, a municipality must have some individualized suspicion that drug or alcohol use is taking place. While there is no single national standard for what constitutes reasonable suspicion in this situation, generally speaking it may be said to exist when an employer has specific, objective facts, and reasonable inferences drawn from those facts, that suggest an employee is using drugs or is under the influence of alcohol while on the job. These facts might include things like observation of drug or alcohol use, apparent intoxication, abnormal or erratic behavior, and reports from reliable and credible sources that drug or alcohol use is happening on the job.

The third category is random testing, but only in limited circumstances. Federal courts have found that employees who serve in “safety-sensitive positions” may, in certain

situations, be required to undergo random drug and alcohol testing. Courts have recognized that, while these employees have a privacy right that will be invaded by such tests, the government has a stronger interest in protecting the safety of the public which justifies the use of random testing. Employees who participate in an occupation that is heavily regulated to ensure safety, or which is fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences are deemed to have a reduced expectation of privacy with respect to drug and alcohol testing. *Skinner*, 489 U.S. at 630; *Von Raab*, 489 U.S. at 668; *Keaveney v. Town of Brookline*, 937 F. Supp. 975, 987 (D. Mass. 1996). Employees who may fall under the category of “safety-sensitive personnel” include police officers and others who are required to carry firearms and/or are involved with drug crimes, emergency medical technicians, firefighters, transit employees, and bus drivers.

Testing of these employees must still be reasonable, however, and narrowly tailored to respect the individual’s dignity while providing an effective deterrent to drug and alcohol use. When considering a plan to test these employees, consult with your municipal attorney to be sure that the methods used are “reasonable” under federal law.

IV. PERSONNEL POLICIES AND BENEFITS ADMINISTRATION

A. Application and Adoption

Municipalities in New Hampshire should have personnel policies to set forth in writing the terms and conditions of employment for their employees. Personnel policies are established and adopted by the select board pursuant to its authority under RSA 41:8 to manage the prudential affairs of the town. Personnel policies apply only to employees. They do not apply to elected officials of the municipality, or those required by statute to be appointed. For example, a town personnel policy will not bind either an elected town clerk or a citizen appointed to a zoning board of adjustment. Special considerations are involved for policies affecting professionally licensed employees, such as attorneys or engineers and employees such as police officers or firefighters who must meet professional standards imposed by state regulatory boards.

Personnel policies can address virtually every aspect of the employment relationship. Policies generally include rules relating to hiring, compensation, use of benefits such as vacation time or sick time, training, discipline procedures, background checks, drug testing, use of town equipment (vehicles, computers, phones) and employee expectations of privacy, among others. A town personnel policy is not a collective bargaining agreement because it is not the result of negotiations with employees, but instead is adopted by the governing body.

B. Purposes

All proposed policies should be reviewed by legal counsel to assure compliance with federal and state law. Personnel policies may not be contrary to enacted laws and regulations. For example, a personnel policy could not allow the town to discriminate against a disabled employee in a manner that is prohibited by the Americans with Disabilities Act.

As a general guideline, the purposes of a personnel policy should include:

- creating a workplace that is fair;
- promoting consistency in treatment of all employees;

- promoting the reporting of negative behaviors and reducing claims of harassment, discrimination and whistleblowing; and
- educating employees about the employer’s policies and expectations, as well as the consequences of violating those policies and expectations.

C. Distribution

All employees should be given an updated copy of the municipality’s policy upon beginning work. They should sign an acknowledgment indicating that they have read the policy and understand that the policy, standing alone, does not represent an employment contract and that they are an at-will employee. So long as an employee signs an acknowledgment that the personnel policy does not create a contract, the municipality will probably be free to terminate at will for lawful purposes. *Butler v. Walker Power, Inc.*, 137 N.H. 432 (1993). Without such an acknowledgment, an employee who is terminated may be able to make a claim against the municipality that the termination constituted an unlawful breach of an employment contract.

D. Updates and Training

A policy manual is a document that requires maintenance. Policies should be updated on a regular basis to reflect changes in applicable laws, town policy, governmental structure or employee positions. When changes are made, all employees should receive the new information and acknowledge receipt in writing. Periodically, all employees should receive refresher training on the policies to reinforce the information and prevent violations. This is particularly true with respect to policies regarding sexual or other harassment or unlawful discrimination.

V. COMPENSATION OF EMPLOYEES

It is beyond the scope of this chapter to detail the differences between federal and state wage and hour requirements. Local officials should recognize that sometimes the two laws are different, and therefore they must know when each law applies in order to remain in compliance. There are helpful resources on the websites of both the state and federal labor departments, at <https://www.nh.gov/labor/inspection/wage-hour/index.htm> and <https://www.dol.gov/agencies/whd>. Local officials should not hesitate to ask for individualized assistance from town counsel, NHMA’s Legal Services attorneys or the Employment Law Hotline.

A. New Hampshire Minimum Wage Law

RSA chapter 279 is New Hampshire’s wage law, which the state Department of Labor (DOL) administers through its administrative rules, N.H. Admin. Code Lab 800. It is the duty of employers to keep records relative to the hours worked by each employee, the wages paid to each employee and the classification of employment of each employee. RSA 279:27.

RSA 279:21 establishes the minimum wage in New Hampshire as the federal minimum wage, as amended. As of this writing, the federal minimum wage for covered nonexempt employees is \$7.25 per hour, which has been in effect since July 24, 2009. The federal minimum wage provisions are contained in the Fair Labor Standards Act (FLSA). Posters designed to meet this requirement are available from the state DOL free of charge. <https://www.nh.gov/labor/forms/mandatory-posters.htm>. If an employee can demonstrate to the commissioner of labor that the actual amount

received at the end of a pay period did not equal the minimum wage for all hours worked, the employer must pay the difference in order to guarantee the applicable minimum wage.

Pursuant to RSA 275:43, I and RSA 275:43, II, and Rule Lab 803.01, every employer must pay all wages due to its employees within eight days, if the employee is paid weekly, or within 15 days if the employee is paid biweekly. RSA 275:43, IV.

It is unlawful for an employer to withhold a paycheck as part of a disciplinary program or after termination of employment in order to secure the return of employer property such as keys or other equipment.

RSA 275:48, I prohibits employers from withholding any portion of a person's wages for purposes other than required payroll taxes and various sorts of deductions specifically authorized by the employee in writing such as:

- health and medical insurance premiums,
- voluntary contributions to charities, and
- payments into savings funds and required clothing that is not a uniform. If uniforms are required by the employer, they must be provided to the employee at no cost, including costs of cleaning the items.
- However, amendments to RSA 275:48 set standards for certain permissible deductions and withholdings from wages:
 - *Employer loans to employees:* Loans may be repaid by payroll deduction if the employee voluntarily enters into a written agreement that specifies (1) when the payments will begin and end; (2) the amount to be deducted from each paycheck; and (3) a specific statement about whether the employer can deduct any remaining balance from final wages at the termination of employment.
 - *Recovery of accidental overpayment of wages:* Employers may recover overpayments by payroll deduction if (1) the repayments are voluntary and agreed to by the employee in writing; (2) the deductions begin in the pay period following the date of the written agreement; (3) the agreement specifies the date on which the payments will begin and end and the amount of the payments (which cannot be more than 20 percent of the employee's gross wages in any pay period); and (4) the agreement states specifically whether the employer can deduct any remaining balance from final wages at the termination of employment.
 - *Recovery of tuition:* Employers may recover tuition for non-required educational costs paid by the employer for the employee to an educational institution if (1) the employee requests such payment be made to the institution; (2) the employee agrees in writing to the repayment from wages; (3) the agreement states the time the payments will begin and end and the amount of the payments; and (4) the agreement specifies whether the employer will be allowed to deduct any out-standing amount from the employee's final wages.
 - *Repayment of vacation and other leave time:* Employers may recover advances of vacation and other leave time from an employee's final wages if a written agreement is entered into at the time the leave is advanced.
 - *Deductions for contributions to political action committees:* Employers may, upon written request from an employee, make deductions from wages for contributions to political action committees.
 - *Any mutually agreed purpose:* Withholding is authorized for any purpose on which the employer and employee mutually agree that does not grant financial advantage

to the employer, when the employee has given his or her written authorization and deductions are duly recorded. The withholding shall not be used to offset payments intended for purchasing items required in the performance of the employee's job in the ordinary course of the operation of the business.

If an employee holds a salaried as opposed to an hourly position, NH Admin Code Lab 803.02 assures that the salaried worker receives at least enough pay to equal the minimum wage, the amount received as salary is not reduced if the employee is absent due to illness, and the employee receives full salary even if suspended for disciplinary reasons unless the discipline relates to a breach of safety rules. Note that while the salary cannot be reduced when the employee is away from the worksite, the employer may reduce the employee's leave time benefit in a manner consistent with the employer's benefit plan or policy. *Grimard v. Rockingham County Dep't of Corrections*, 161 N.H. 69 (2010).

The state DOL website (<https://www.nh.gov/labor/>) is a good resource for information regarding state wage and hour protections for employees.

B. Federal Fair Labor Standards Act

The federal FLSA was initially enacted in 1938 to regulate the minimum wage, payment of wages for overtime work, record keeping and child labor protections. It was not until 1974 that the law was changed to extend coverage to local government as an employer. 29

U.S.C. §203(d)-(e). The statute protects employees only, and certain types of employees are exempt. It does not apply to independent contractors, trainees and students, volunteers, elected officials and their personal staff, appointees, legal advisors and certain employees working in the legislative branch of local government (such as a clerk of a city council). For example, the FLSA does not apply to select board members, town clerks, tax collectors, treasurers, or elected or appointed board members. The FLSA's relation to volunteers was discussed earlier in this chapter. Otherwise, municipalities should be prepared to consider the FLSA requirements when it comes to overtime compensation of employees, unless the employees are exempt under the categories discussed below.

1. THE GENERAL RULE

Unless an employee is exempt from the provisions of this rule, the employer must pay wages at the rate of at least time and one-half the regular wage rate if the employee worked more than 40 hours within a seven-day period. 29 U.S.C. §207(a)(1). It is important to calculate accurately how many hours an employee has worked.

2. HOURS WORKED

The FLSA does not define the term "hours worked." However, courts have addressed this issue many times over the years and, as a result, there are some general guidelines employers can use. In general, "hours worked" includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace and all other time during which an employee works or is permitted to work, whether or not required to do so. This means that "hours worked" might include some waiting time and other unproductive incidental time as well as productive labor time. See 29 C.F.R. §785.7. In each case, the determination of whether or not time was "hours worked" will depend on the particular facts and circumstances. A complete discussion of this topic is beyond the scope of these materials, but the following are some examples of issues employers may face when determining what constitutes "hours worked."

- a. **Time spent waiting.** If an employee is “engaged to wait” (that is, the employer has asked the employee to idly wait for something as part of the job), that time would generally be considered hours worked; on the other hand, time spent waiting for employment to begin (where the employee is “waiting to be engaged”) would generally not be considered hours worked. See *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).
- b. **On-call time.** On-call time is generally compensable if the employee has little ability to engage in personal activities while on call because of the frequency of the calls or the employer’s policies, even if the employee is never called during that time and never reports to work. On the other hand, if the employee is permitted to stay at home, sleep at home and go about his or her daily business while on call, with a pager, those hours would not constitute “hours worked” for purposes of overtime computation. In that case, the only portion of on-call time that would be considered “hours worked” would be the time when an employee is actually responding to a call. See 29 C.F.R. §553.221(d).
- c. **Travel time.** Normal travel between home and work is not work time, even if the employee works at a variety of job sites. 29 C.F.R. §785.35. However, if the employee is sent on a special one-day assignment to another worksite, such as another city, travel to and from the special site is performed for the employer’s benefit and at its special request, and therefore it counts as work time because it is “an integral part of the principal activity which the employee was hired to perform on the day in question.” See 29 C.F.R. §785.37. If an employee is required to travel overnight, that travel is work time when it cuts across the employee’s workday. Work time will even include travel on days that are not normally working days if the travel is required for the job (for instance, if normal workdays are 9 a.m. to 5 p.m. Monday through Friday; travel time between 9 a.m. and 5 p.m. is work time on Saturday and Sunday as well).

3. COMPENSATORY TIME OFF

Municipal employers may satisfy some of the obligation to pay overtime compensation by granting “compensatory time off” instead of paying overtime wages in money, but there are limits to this option. 29 C.F.R. §553.20. By agreement with the employee before the performance of the work, a municipal employer may award compensatory time off (often referred to as “comp time”) in lieu of cash at the rate of no less than one and one-half hours of comp time for every hour of overtime work. 29 C.F.R. §553.23. Municipal employees engaged in public safety work, emergency response work or seasonal work may “bank” or accrue up to 480 hours of comp time at any one time (earned for working 320 hours of overtime). All other municipal employees may bank up to 240 hours of comp time (160 hours of overtime worked). 29 U.S.C. §207(o)(3) (A). Employees must be permitted to use their comp time upon a reasonable request, and the employer may require the employee to use comp time before using other types of leave time. Upon termination of employment, the employee must be paid for any banked and unused comp time at a rate not less than (1) the average regular rate received by that employee during the last three years of employment, or (2) the final regular rate received by that employee, whichever is greater. 29 U.S.C. §207(o)(4).

4. EXEMPT EMPLOYEES

Certain categories of employees, such as those paid on a “salary basis,” are exempt from the overtime protections of the FLSA. In general, all other employees must be paid overtime if they work more than 40 hours in a workweek. An employee is only exempt if he or she is (a) paid on a salary basis at least \$684 per week, and (b) falls within one of the six categories of exempt workers.

An employee is paid on a “salary basis” if he or she regularly receives a predetermined amount each pay period that is not reduced due to quality or quantity of work actually performed during that period and that is equal to at least \$684 per week. Employers may wish to avoid having salaried employees because paying employees on an hourly basis is an easy way to reward those who work more and dock the pay of those who are late or do not work a full day. However, while hourly pay may encourage productivity, employees cannot be exempt from overtime pay unless they are paid on a salary basis, and salaried employees cannot have their compensation reduced because of variations in the quality or quantity of work performed.

The six exempt categories of employees are executive, administrative, professional (these three are commonly referred to as the “white collar” exemptions), outside salesperson, computer personnel, and highly compensated employees. 29 C.F.R. §§541.100-700. The rules require employers to look beyond an employee’s title and examine the employee’s “standard duties” to see whether they fall within the exempt categories. 29 C.F.R. §541.2.

- *Executive:* The employee must (a) manage the business of a recognized department, division or subdivision of the employer; (b) “customarily and regularly” supervise and direct the work of two or more full-time employees or their equivalent; and (c) have authority to hire and fire other employees, or the employee’s recommendations about hiring firing and promotion of other employees must be given “particular weight.” 29 C.F.R. §541.100.
- *Administrative:* The employee’s primary duties consist of office or nonmanual work “directly related to management or general business operations of the employer” rather than the production process or sales, and the employee exercises discretion and independent judgment with respect to “matters of significance.” 29 C.F.R. §541.202. For example, an administrative assistant who does not exercise discretion and judgment related to management decisions does not qualify even if he or she helps with the management of the municipality’s business. Those employees who do not exercise discretion or independent judgment directly related to the management policies or judgments and do not qualify as administrative employees.
- *Professional:* This refers to an employee whose primary duty consists of (a) work requiring “knowledge of an advanced type in a field of science or learning, customarily acquired by a prolonged course of specialized intellectual instruction” (“learned professional”) or (b) work requiring “invention, imagination, originality or talent” in a recognized field of artistic or creative endeavor (“creative professional”). 29 C.F.R. §541.300. Attorneys, doctors, accountants, actuaries, engineers and other similar professionals fall within this category. While professionals must generally be paid on a salary basis like all other exempt employees, there is an exception in the rules for lawyers, doctors and teachers, who can be paid on an hourly basis and still qualify for the professional exemption. 29 C.F.R. §541.304.
- *Outside salesperson:* While generally inapplicable to municipalities, this category exempts those whose primary duties are making sales away from the employer’s place of business. 29 C.F.R. §541.500(a)(2).
- *Computer personnel:* This category includes employees who deal with systems analysis or who design and develop computer programs or systems (that is, they design or analyze hardware or software). They must be highly skilled in computer systems, analysis, programming and software engineering; trainees and other entry-level employees do not qualify for this exemption. 29 C.F.R. §§541.400-402. Unlike other

exemptions, computer personnel can be paid on an hourly basis and still be exempt so long as they are paid at least \$27.63 per hour. 29 C.F.R. §541.400(b).

- *Highly-compensated employees:* This category exempts employees who earn at least \$107,432 per year and perform nonmanual labor as well as any of the duties of the executive, administrative or professional exemptions. Thus, a manager who supervises two employees (one of the executive requirements) and makes \$107,432 is exempt as a highly compensated employee even if he or she does not manage a department (the second executive requirement). 29 C.F.R. §541.601.

5. SPECIAL RULES FOR PUBLIC SAFETY EMPLOYEES

- Public safety employees usually not exempt.** Police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, firefighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees are not “executive,” “administrative,” or “professional” employees, even if they supervise coworkers, because “their primary duty is not management of the enterprise.” 29 C.F.R. §541.3(b). This means that only police officers, firefighters and similar personnel who head a department or division can qualify for the executive exemption.
- Overtime exception for public safety workers in small agencies.** “Any employee of a public agency who in any work week is employed in fire protection activities” or “is employed in law enforcement activities (including security personnel in correctional institutions)” is exempt from the FLSA overtime pay requirements “if the public agency employs during the workweek less than five employees in fire protection or law enforcement activities.” 29 U.S.C. §213(b)(20). Fire protection and law enforcement activities are considered separately in determining whether there are fewer than five employees for that particular agency. All relevant employees are counted, including full- and part-time, and those on active and leave status. If there are five or more employees, the agency is covered by overtime requirements and public safety employees are entitled to overtime regardless of their rank or pay if the employee performs “line work” as his or her “primary duty.”
- Special computation of overtime for public safety employees.** In recognition of the special scheduling challenges and budgetary pressures that burden virtually all municipal employers, FLSA rules permit public agencies to use a work period longer than one week and to pay public safety employees at non-overtime rates for a specified number of hours above 40 during that period. 29 U.S.C. §207(k). Employees engaged in fire protection or law enforcement may be paid overtime on a “work period” basis. A “work period” may be from seven consecutive days to 28 consecutive days long. For example, fire protection personnel (EMS, fire, EMT and ambulance employees) are due overtime under such a plan after 212 hours worked during a 28-day work period, while law enforcement personnel are due overtime after 171 hours worked in a 28-day period. This calculation is prorated for work periods of more than seven and less than 28 days. As explained by the First Circuit Court of Appeals, a municipality is not required to provide employees (in this case, covered by a collective bargaining agreement) advance notice of the adoption of an alternate “work period” under this rule. *Calvao v. Framingham, Massachusetts*, 599 F.3d 10 (1st. Cir. 2010).

6. LONGEVITY PAY

Some employers seek to reward employees for long service by making a special payment based upon their time in service. This should be done with caution, since if the employee has a right

under the employer's personnel policy to receive the payment, it changes the employee's hourly rate for the computation of overtime for the entire year. Thus, an annual "longevity pay" check issued in December can result in the employer being required to recompute the overtime wages paid to the employee for the entire fiscal year.

Note that this is not a full discussion of this complicated area. Since there can be significant penalties for failing to properly compute and pay overtime, each employee's situation should be separately examined on a regular basis under both state and federal requirements.

C. Unemployment Compensation

The purpose of the unemployment compensation program is to reduce the hardships of unemployment upon people who become unemployed through no fault of their own. There are two parallel unemployment tax systems at work. The federal system is designed to fund a variety of programs delivered through state employment offices. The state-based system collects taxes and pays them as benefits to workers who become unemployed in New Hampshire. The amount of the state tax is based upon the employer's experience, that is, the more benefits that are paid as a result of the employer's activities, the higher the tax to be paid by the employer.

Municipal employees are covered by these laws. The municipality has the option of reimbursing the state fund the amount paid to former employees or paying quarterly taxes on wages. Not all persons providing services to a municipality are covered by the law. See RSA 282-A:9, IV(o), which provides that elected officials and temporary emergency workers are not "employees" for purposes of unemployment compensation.

The governing body must assure that required state and federal returns are filed when a new full or part-time employee is hired and quarterly thereafter to show the amount of wages earned. Failure to file as required can result in financial penalties. This program responsibility is another example of why it is important to understand who is and is not a municipal employee.

More information about unemployment compensation is available at the New Hampshire Department of Employment Security website at <https://www.nhes.nh.gov/>. In particular, the Department's "Employer Handbook" may be of great assistance to employers.

VI. LEAVE TIME

In certain circumstances, an employee's right to leave time may be protected by both federal and state law.

A. Family Medical Leave Act

The federal Family Medical Leave Act (FMLA) was passed by Congress in 1993. It generally applies only to employers that employ 50 or more employees at the worksite or within 75 miles of the worksite. 29 C.F.R. §825.110. While the statute treats all public agencies as "employers" regardless of the number of employees, 29 U.S.C. §2611(4)(A)(3) and 29 C.F.R. §825.108(d), 29 C.F.R. §825.108(d) states as follows:

All public agencies are covered by the FMLA regardless of the number of employees; they are not subject to the coverage threshold of 50 employees carried on the payroll each day for 20 or more weeks in a year. However, employees of public agencies must meet all the requirements of eligibility, including the requirement that the employer (e.g., State) employ 50 employees at the worksite or within 75 miles.

There is debate over whether employees of public employers with fewer than 50 employees are eligible for FMLA leave. The United States Court of Appeals for the Seventh Circuit, in *Fain v. Wayne County Auditor's Office*, 388 F.3d 257 (7th Cir. 2004), dealt with the issue of whether an employee has the right to receive FMLA benefits if his or her public employer has fewer than 50 employees. The Court held that while the FMLA does, indeed, treat all public employers as “employers” regardless of how many employees the public employer has, the regulation (29 C.F.R. §825.108(d), above) requires that *employees* of public agencies must meet all of the requirements of eligibility, including a requirement that the employer employed 50 or more employees at the worksite or within 75 miles of the worksite. The Appellate Division of New York also agrees with this interpretation, *See McGovern v. Levittown Fire Dist.*, 813 N.Y.S. 2d 131, 132 (2006), as does the Court of Appeals for the Sixth Circuit, *see Tilley v. Kalamazoo Cty. Rd. Comm'n*, 777 F.3d 303, 310 (6th Cir. 2015) (concluding that there is no language in the FMLA “that excludes public employees from the FMLA 50/75– Employee Threshold.”).

These cases are not binding law in New Hampshire. The First Circuit Court of Appeals, which covers New Hampshire, has not yet decided this issue and may not adopt the same interpretation. Until it does, municipal employees in New Hampshire should be aware that they may not be covered by FMLA if the municipality employs fewer than 50 employees. Also, municipalities should understand that this point has not been settled in New Hampshire’s federal circuit and that they could be found to have FMLA responsibilities even if they employ fewer than 50 persons. This is a complicated employment issue, and municipal officials are advised to consult their town attorney or human resources professional.

When it applies, FMLA requires that a municipality provide at least 12 weeks of unpaid leave and the promise of job security and continued benefits to employees who request and qualify for FMLA leave. Employees generally qualify for FMLA leave if they are absent from work for: (1) the birth and care of a new child; (2) the placement and care of an adopted or foster child; (3) the care of the employee’s spouse, child or parent with a serious health condition; or (4) a serious health condition of the employee. The FMLA also includes special military leave entitlements:

Military Caregiver Leave: Permits eligible employees to take up to 26 weeks of unpaid leave to care for a covered service member. A covered service member is a current member of the Armed Forces, including the National Guard or Reserves, who has a serious illness or injury incurred in the line of duty.

Qualifying Exigency Leave: An eligible employee may take up to a total of 12 weeks of unpaid leave for qualifying exigencies arising out of the fact that the employee’s spouse, son, daughter or parent is on active duty in the National Guard or Reserves or has been notified of an impending call or order to active duty in support of a contingency operation. Examples of qualifying exigencies include, but are not limited to, short notice deployment, military events such as official ceremonies, making or updating financial and legal arrangements and attending certain post-deployment activities such as arrival ceremonies.

To be eligible for leave under the FMLA, employees must have worked for an employer for 12 (including non-consecutive) months and a minimum of 1,250 hours prior to beginning leave. Specific federal regulations address the combination of FMLA leave with vacation and sick time, workers’ compensation, or an employee who makes a claim after returning to work following military service.

More information is available from the U.S. Department of Labor at <https://www.dol.gov/agencies/whd/fmla> .

B. New Hampshire Maternity Leave Law

The FMLA dovetails with New Hampshire’s Maternity Leave Law. RSA 354-A:7, VI requires

municipal employers with six or more employees to provide unpaid leave with job security to any employee for the “period of temporary disability resulting from pregnancy, childbirth or related medical conditions.” Since leave is only required for the period of temporary physical incapacity, the leave begins when the employee becomes physically disabled and ends when the employee is physically able to return to work. The statute also requires that, for purposes of benefits, the employee be treated the same as any other “temporarily disabled” employee. Unlike the FMLA, the New Hampshire law requires that leave for the period of temporary physical disability be provided without regard to how long the employee has worked for the employer or for how many hours.

C. Which Applies?

Designated FMLA leave and leave under New Hampshire law will run concurrently. 29 C.F.R. §825.701. Thus, an employee cannot use New Hampshire leave for the period of disability and then claim entitlement to an additional 12 weeks of leave under FMLA. If an employee requests FMLA leave, the town must respond promptly as to whether the leave will be so designated. Towns may wish to adopt an FMLA policy with input from an attorney to address these issues before they arise.

VII. DISCIPLINE AND TERMINATION

A. General Considerations

As discussed previously, employees hired by a municipality are considered at-will employees unless there is an employment contract, a definite term of employment or a collective bargaining agreement in place. Under New Hampshire’s at-will doctrine, an employer may terminate an at-will employee at any time so long as the reason is not illegal. Likewise, an employee may quit at any time without owing any duty to the employer. *Cloutier v. Great Atlantic and Pacific Tea Co., Inc.*, 121 N.H. 915 (1981). Despite an employee’s at-will status, if an employer’s termination action is motivated by bad faith, malice, retaliation for reporting an unlawful act, or is otherwise contrary to public policy, then the employee may be able to sustain a claim of wrongful discharge. *Monge v. Beebe Rubber Co.*, 114 N.H. 130 (1974). Wrongful discharge is a type of tort (a civil wrong), and the wronged employee may be able to recover monetary damages against the municipality as well as against the supervisor or other employee who committed the wrong. *Porter v. Manchester*, 155 N.H. 149 (2007). It bears repeating that the value of the at-will doctrine in the public employment environment is limited at best and should not be relied on too heavily when deciding whether to terminate an employee.

B. Discipline

Discipline is far more than terminating a person’s employment. Only the most severe forms of misconduct, such as a physical fight with another employee, or stealing municipal property, generally result in immediate termination of employment. For this reason, most employers use a “progressive discipline system” that calls an employee to task for infractions at the earliest suggestion of misbehavior, warns the employee (verbally and/or in writing) of the consequences of future violations, and trains or retrains the employee in the applicable policies or work rules to prevent future problems. If infractions continue, the consequences become more severe, such as suspension with or without pay, demotion or change in duties. It may also provide for more frequent evaluations to monitor progress and prevent further problems.

A progressive discipline system represents a fair and consistent approach to discipline. It allows the penalty to fit the infraction and provides for corrective action prior to discharge. When a progressive discipline system is in place, if termination eventually is required, it is not a surprise

to either the supervisor or employee and legal action is often avoided. Municipal employers are strongly encouraged to consult with their attorneys to develop and implement a progressive disciplinary system.

C. Documentation

All elements of disciplinary action, including regular evaluations and all discussions with employees regarding discipline or counseling issues, must be documented. This documentation should be maintained in the employee's personnel record and in general should never be removed. Documentation is essential to demonstrate that actions taken were appropriate and justified and that the municipality as an employer has administered its employment policies consistently and fairly.

Evaluations of all employees should be regular and thorough. They should be announced well in advance and should always include a written record that is signed by both the supervisor and the employee. These written records should identify strengths as well as areas needing improvement.

Complaints about employee behavior and the investigation into those complaints should be well documented. This documentation should be created promptly while events and discussions are fresh in everyone's mind. It should include a written report about the receipt of concerns and facts that have been learned. It should not include speculation, generalizations, or prejudgments. The complaint should be shared with the employee, and the documentation should include a statement that the employee has been informed of the complaint and the consequences that may result, any response the employee has to the complaint and a record of any rehabilitative steps taken or to be taken.

It is critical to document all events or issues that may lead to disciplinary action or termination. This documentation should include, at a minimum: information about the problem (what it is, why it is a problem, how it was discovered, history of the problem up to the present); a statement about what is or will be done to correct the problem; any agreements or statements of action, including what is expected of the employee in the future; a statement of possible future action if the problem is not corrected and the employee's response. The employee should sign the document and should receive a copy. It is then important to follow up on these issues and to keep continuing records of all further problems, responses and disciplinary actions, up to and including dismissal.

When considering discipline (and indeed, whenever dealing with employees), it is important to bear in mind that employees generally have the right under RSA 275:56, I to review their own personnel file and to obtain copies of the information in the file. The employee may only be charged an amount for the copies reasonably related to the cost of supplying the requested documents. The only exceptions to the employee's right to review his or her own file are (a) if the employee is the subject of an investigation at the time of the request, information does not have to be disclosed if it would prejudice law enforcement, or (b) information related to a government security investigation. RSA 275:56, III. If, upon inspection of his or her personnel file, an employee disagrees with any of the information contained the file, and the employee and employer cannot agree upon removal or correction of such information, then the employee may submit a written statement explaining his version of the information together with evidence supporting that statement. That statement must then be maintained as part of the personnel file.

D. Making Decisions about Termination

Termination of an employee may be voluntary or involuntary. A voluntary termination (often the simpler of the two) may occur when the employee retires, relocates to a new area or finds a new position. It may also occur when the employee is dissatisfied with some aspect of the current employment, such as working conditions, pay or equipment. An involuntary termination might occur when the employee has engaged in conduct involving civil or criminal liability or is no longer qualified for the position (such as losing a driver's license); when the municipality does not appropriate enough money in the budget to continue funding the position and the employee is laid off; or for disciplinary reasons when the employee has committed a violation of the personnel policy serious enough to warrant termination instead of other disciplinary action.

Decisions regarding termination of a municipal employee should be made by majority vote at a meeting of the select board held pursuant to the requirements of the Right to Know Law. Pursuant to RSA 91-A:3, II (a) through RSA 91-A:3, II (c), the select board may meet in nonpublic session to consider or act upon employee dismissal, promotion, compensation, discipline, investigation, hiring or matters that would likely have an adverse effect on the employee's reputation.

There are two exceptions to this rule. First, if a nonpublic session is based upon protection of the reputation of an employee, and if the affected employee requests an open meeting, the session must be open. Second, certain employees are entitled by statute or by contract to request an open meeting. One example of this exception would be the dismissal of an employee of a public library for malfeasance, misfeasance, or inefficiency in office, or incapacity or unfitness to perform the employee's duties. Pursuant to RSA 202-A:17 the library employee is entitled to request a public hearing before the library trustees. Any employee with this sort of statutory or contractual right to a hearing or open meeting must be notified in advance that the meeting and the discussion will occur so that the employee has an opportunity to be present and request an open meeting. Note, however, that most employees have no right to a hearing before being terminated, except police officers who are entitled to a pretermination hearing before the select board. RSA 41:48.

The decision to terminate the services of any employee is rarely easy. Therefore, this action should not be undertaken lightly and should be done only after consultation with local counsel. The steps that are required will depend upon whether or not the employee is "at-will."

1. COLLECTIVE BARGAINING AGREEMENT:

When a collective bargaining agreement is in place, the process for involuntary termination of employees is usually explained in detail, because the method of termination of employees is a mandatory subject for negotiation and is a condition of employment under RSA 273-A:1, XI. This process must be followed in any involuntary termination proceeding.

In a recent case from Maine, a police employee was laid off. He was covered by a collective bargaining agreement that entitled him to be recalled to his position if any new hiring occurred in the ensuing 12-month period. The town hired a new person, and neither provided notice to the employee nor recalled him to his position. The town was sued alleging both a contractual violation, and a denial of the civil right of the employee to have both notice of the action and an opportunity to be heard. While the town initially won in the trial court, the decision was reversed on appeal, and remanded for a full trial. *Clukey v. Town of Camden*, 717 F. 3rd. 52 (1st Cir. 2013). Multiple appeals followed that initial remand with a final ruling in favor of Camden in 2018. *Clukey v. Town of Camden*, 894 F.3d 25 (1st Cir. 2018).

2. TERMINATION CONTROLLED BY CONTRACT:

Individual employment contracts may also address the way termination will be handled. The municipality must carefully follow all the steps in the individual employment contract in order for a termination action to be upheld.

3. TERMINATION CONTROLLED BY COMMON LAW PRINCIPLES.

When there is no collective bargaining agreement or employment contract in place, the rights of the public employee are less clear. If a public employee is not covered by any specific agreement or protective legislation such as that covering police officers (RSA 41:48, RSA 105:2-a), tenured teachers (RSA 189:14-a) or fire chief (RSA 154:5), that employee does not have the right to a termination hearing. However, while this may permit the municipality to avoid unnecessarily complicating termination procedures a termination hearing may provide a municipality with a record of the proceedings that could be valuable later if the employee files a wrongful termination or discrimination claim.

When an employee's job is protected by legislation or the common law, there are generally two procedural safeguards that are required: notice of the charges and a hearing. Until recently it was supposed that the procedure in such cases was controlled by RSA chapter 43, an old statute used primarily for highway layout proceedings but which also applies to proceedings "to decide any question affecting the conflicting rights or claims of different persons." That chapter requires notice of the time and place of the hearing be given 14 days in advance to the employee and that the notice be sufficiently specific that it enables the employee to prepare an explanation or defense to the charges. RSA 43:2. The hearing officer must hear all parties who desire to be heard at the hearing and must issue a decision in writing including sufficient findings of fact so that if it is appealed to court, the court can determine whether the decisions reached were proper. RSA 43:4. However, in *Correia v. Alton*, 157 N.H. 716 (2008), the Court ruled that RSA chapter 43 applies to removal proceedings of public officials under RSA chapter 41 only where a statute expressly requires it for a specific public office, such as town clerk, RSA 41:16-c, IV(a); treasurer, RSA 41:26-d, IV(a); tax collector, RSA 41:40, IV(a). *Correia* involved a police officer entitled to notice and hearing prior to removal under RSA 41:48, which does not mention RSA chapter 43 or any other specific procedures. In such cases, the responsible public officials must devise their own procedures that satisfy the requirements of due process of law. Model rules of practice and procedure for administrative proceedings have been promulgated by the Attorney General for state agencies and may be consulted for guidance at N.H. Admin Code Jus 800.

In a truly at-will employment relationship (likely a rare occurrence in municipal employment, as discussed earlier), either party is free to terminate the employment at any time for any legitimate reason or for no reason at all. However, it is important to distinguish between a legitimate reason and an improper reason. An employer may not terminate any employee for a reason that might constitute wrongful discharge. Whether a termination is voluntary or involuntary, an employee may claim that they were "wrongfully discharged." For example, an employee may be wrongfully discharged if he or she was terminated or forced to quit in violation of laws protecting their leave or compensation rights, in violation of laws prohibiting discrimination in retaliation for exercising a constitutionally protected right, or in retaliation for "whistle-blowing" or union activities.

The opinion in *Snelling v. Claremont*, 155 N.H. 674 (2007) illustrates the concept of wrongful termination and violation of a constitutionally protected right—the First Amendment right to free speech. The city employee in this case successfully argued that he was terminated in retaliation for exercising his constitutionally protected right to free

speech, and as such, the termination constituted a wrongful discharge. The employee, who served as the city assessor, gave several interviews with a local newspaper in which he offered his opinions on the city's tax system and also that he felt that some city officials were taking unfair, but not illegal, advantage of the city's tax abatement system. The lesson to be taken from this case is that, although speech on the part of employees may be in conflict with the positions of the employers (town and city officials), extreme care must be taken if disciplinary action against the employee is contemplated solely because of what the employee has said. This does not mean that an employer must ignore any and all remarks made by employees and that discipline is never appropriate in these instances, only that the employer must proceed with an abundance of caution when disciplining employees if constitutionally protected rights may be implicated.

The employee's right to criticize the municipal employer has been strengthened even more. In 2008 the legislature amended RSA 98-E:1, which formerly applied only to state employees, to apply to all public employees. It now provides:

Notwithstanding any other rule or order to the contrary, a person employed as a public employee in any capacity shall have a full right to publicly discuss and give opinions as an individual on all matters concerning any government entity and its policies. It is the intention of this chapter to balance the rights of expression of the employee with the need of the employer to protect legitimate confidential records, communications, and proceedings.

When an employment contract is involved or there is a collective bargaining agreement in place, the proper reasons for termination will be spelled out in the agreement. Even when there is no formal contract, however, employee handbooks and employment policies and procedures may create an implied set of obligations that the employer should be careful not to violate, for example, by failing to follow the policies and procedures that are in place, or by failing to notify the employee that certain conduct is prohibited and that discharge is a possible consequence.

VIII. SELECTED LAWS PROTECTING THE HEALTH AND SAFETY OF EMPLOYEES

A. Workers' Compensation

At common law, if a worker was injured in the performance of his or her duties at work, no compensation was available unless the worker could prove in court that the employer had either intentionally or negligently allowed conditions to exist that resulted in the harm. Often, employees could not meet this burden, and they and their families suffered great hardship. At the turn of the 20th century, new workers' compensation laws required employers to cover the cost of all injuries at work, regardless of who was at fault in causing the injury. This system remains in force today.

Municipalities are responsible for their employees and must provide workers' compensation insurance coverage for them as soon as their employment begins. There is no such responsibility for independent contractors to the municipality. Both employers and employees have duties under the law, which is administered by the state Department of Labor (DOL). These duties are set forth in administrative rules NH Admin Code Lab 500.

If an employee is injured, a report must be made to the state DOL within five days of the injury. All injuries should be reported, even if minor and even if the employee does not lose time from work

as a result of the injury. The injury might result from a single event, or might result from a longer-term exposure to a dangerous material, or environmental condition such as noise or stress. Effective July 17, 2019, for an emergency response/public safety worker, the definition of a work injury shall include acute stress disorder and post-traumatic stress disorder. Also, effective July 17, 2019, cancer disease in a firefighter, whether regular, call, volunteer, or retired member of a fire department, is deemed occupationally caused. Finally, effective January 1, 2021, it will be presumed that acute stress disorder and post-traumatic stress disorder in an emergency responder are occupationally cause. RSA 281-A:17-c. If an employee is injured in the future, these past events may have a bearing upon the injury or a bearing upon the recovery of the employee that could substantially change how the case is viewed by the DOL. Notwithstanding the compulsory obligation to file a First Report of Injury, where an employee received a first aid treatment only the generates a bill of less than \$2,000 the employer can at its option not send the First Report to its insurance carrier and instead pay the treatment cost within 30 days. N.H. Admin Code Lab 504.02 (g).

The employer continues to have duties to the injured employee so long as treatment is required, even if the employee can never return to the job. While an injury does not guarantee that a job will be maintained indefinitely for the employee, there are certain reinstatement rights if an employee is able to return to a meaningful portion of the duties once performed.

B. Worker Safety

An injury to an employee at work can be devastating to both the employee and to the ability of the employer to deliver necessary services. It is certainly best for all if steps are taken in the workplace to prevent the injury before it occurs. In the private sector, regulation of worker safety is a joint effort of the federal DOL, Occupational Safety and Health Administration (OSHA) and the state DOL. In the public sector, OSHA does not have jurisdiction, but state protective laws apply.

The general rule is that the employer must keep the workplace in good condition. Employees cannot be forced to use equipment or machines that are old and dangerous. There are many specific requirements that pertain to certain job functions contained in N.H. Admin Code Part Lab 1400.

In an effort to involve both labor and management in the joint effort to keep a safe workplace, the law requires any employer with more than fifteen employees, including part-time employees, to create and maintain a “joint loss management committee” that reviews and implements the employer’s safety program. RSA 281-A:64.

Safety programs must be documented. The state DOL has the statutory power to inspect worksites and assess penalties of up to \$250 per day if the required documentation is not present, or if the joint loss management committee has either not been formed or has not met regularly to discuss and implement improvements to the safety program.

C. Youth Employment Law

RSA 276-A governs the employment of persons less than 18 years of age in New Hampshire. The purpose of the statute is to “foster employment of young people . . . while providing necessary safeguards.” Municipalities often can hire persons covered by this act to work in a variety of positions, particularly in the summer months. It is important to understand the limitations on workers under the age of 18, because the state can assess the municipality a civil penalty of up to \$2,500 for each violation of the law. RSA 276-A:7-a.

1. HAZARDOUS WORK PROHIBITED

No person under 18 may be employed in a “hazardous occupation.” These occupations are defined by the U.S. Department of Labor and include, but are not limited to: logging; operating power-

driven metal and woodworking machinery; operating buffing machines; roofing, excavating, firefighting (except that 16 and 17 year-olds may participate in Youth Training and Employment in Firefighting as permitted by RSA 276-A:23, et seq.) or any job placing the individual more than 30 feet off the ground. Sixteen and seventeen-year-olds may obtain waivers in certain instances for some of these occupations.

2. YOUTHS 16 OR 17 YEARS OLD

Employers of this age group must have a signed note from the parents or guardian of the employee permitting the employment. They may work no more than six consecutive days and no more than 40 1/4 hours per week during the school year, and no more than 48 hours per week during school vacations. No youth who works more than 2 nights in a week past 8 o'clock p.m. or before 6 o'clock a.m. shall be permitted to work more than 8 hours in any shift during that particular week.

3. CERTIFICATE REQUIRED FOR YOUTHS UNDER 16 (“WORKING PAPERS”)

No person under 16 shall be permitted to work without a certificate from the student’s school indicating satisfactory academic performance unless: (1) the student is working for parents or grandparents; (2) the student is working in a casual (infrequent without significant compensation) job; or (3) as a farm laborer. No person under 16 is permitted to work in construction, mining, or logging.

4. HOURS FOR YOUTHS UNDER 16

Generally, with a written exception for agricultural work, youth under 16 may only work between 7 a.m. and 9 p.m. During the school week, they may only work three hours per day and up to 23 hours per week. During vacation or weekends, youths may work up to eight hours per day and up to 48 hours per week.

5. YOUTHS UNDER 12

Youths under 12 may not be employed by a municipality unless the work is “casual” as defined in RSA 276-A:3. Casual work is “employment which is infrequent or of brief duration or productive of little or sporadic income or not commonly held to establish an employer-employee relationship.”

6. OTHER LIMITS AND REQUIREMENTS

No youth may be employed in any manual labor for more than 10.25 hours per day or 54 hours per week. RSA 276-A:11. In addition, the employer is required to post in every room where youths are employed in a conspicuous place a printed notice stating the hours of work, the time allowed for dinner or other meals and the maximum hours any youth is permitted to work in one day. The employer is in violation of the law if it employs youths during hours other than those posted. RSA 276-A:20.

7. YOUTH TRAINING AND EMPLOYMENT IN FIREFIGHTING

In 2008 the legislature enacted a subdivision in RSA 276-A devoted to standards for training and employment of 16 and 17-year-old youths in firefighting. Youths under the age of 16 may participate in explorer programs subject to rules adopted by the department of labor. Youths 16 and 17 years of age may work in non-hazardous tasks following initial training, and more advanced training is also possible. RSA 276- A:23 – :26.

IX. SELECTED LAWS PROTECTING THE CIVIL RIGHTS OF EMPLOYEES

Even if an employee is an “at will” employee without a collective bargaining agreement or employment contract, employers must comply with the many provisions imposed by federal and state law for the protection of employees.

A. Residency Under the New Hampshire Constitution

A recurring issue under New Hampshire law is regulation of employee residency. Elected officials are, of course, required to be citizens of the United States and to reside within the municipality they serve. RSA 91:2; RSA 669:6. However, a municipality may not have a general requirement that all public employees live within the town or city that employs them. A municipality may have a residency requirement only where there is a compelling reason to justify a limitation on the employee’s right to live where he or she chooses. *Angwin v. Manchester*, 118 N.H. 336 (1978); *Donnelly v. Manchester*, 111 N.H. 50 (1971). The New Hampshire Supreme Court has upheld an employee residency requirement only in the case of police officers. In *Seabrook Police Ass’n v. Seabrook*, 138 N.H. 177 (1993), the Court held that, under the circumstances in Seabrook, the value of having police officers physically present and living in local neighborhoods justified the residency requirement.

B. Special Protections for Veterans

The Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §4301 et seq., is a federal law administered by the Veterans’ Employment and Training Service of the U.S. Department of Labor. This law, and its regulations, serves to protect the rights of men and women who serve in the uniformed services of the United States to return to the employment they enjoyed before being called into military service, together with the wages and benefits that would otherwise have been available to the service member. The federal DOL has adopted rules (effective January 18, 2006) to explain and clarify USERRA, which are written in a question-and-answer format and available online at <https://www.dol.gov/agencies/vets/programs/userra>.

The USERRA generally requires service members to provide advance written or verbal notice to their employers of military duty, unless providing advance notice is impossible, unreasonable or precluded by military necessity. 20 C.F.R. §1002.85. However, although the employer may address concerns over the employee’s military leave with the appropriate military authority, the employee does not need to obtain the employer’s permission to leave for military duty. 20 C.F.R. §1002.87.

While the employee is in military service, he or she is considered to be on leave from the civilian employer. 20 C.F.R. §1002.149. Although employers are not required to pay employees during military service (except those who actually perform work for the civilian employer during that time), municipal employers may, but are not required to, provide up to 15 days of paid military leave per year for employees who are members of any reserve component of the armed forces of the United States or the State of New Hampshire. See RSA 112:9 and RSA 112:10. Employees may, if they choose, use accrued vacation, annual or other leave time (other than sick leave, unless the employer allows employees to use sick leave in similar situations) while performing military duty. 20 C.F.R. §1002.53(b).

The USERRA generally requires that employers reinstate service members upon completion of military duty (except if they are dishonorably discharged during their leave), if the employee returns to the employer and seeks reemployment. Any service member who seeks to return to

civilian employment following up to five years of military service is guaranteed reemployment if such rights are requested within a reasonable time. The amount of time the service member has to request a return to work is based upon the length of service just completed. This five-year military service limit may be extended by initial enlistments lasting more than five years, periodic training duty, and involuntary active duty and recalls, especially during a time of national emergency. 20 C.F.R. §1002.103. A reinstated employee is entitled to the seniority and other rights and benefits determined by seniority that the employee had on the date military service began, plus the additional seniority, rights and benefits that the employee would have attained if he or she had remained continuously employed. 20 C.F.R. §1002.191. If reemployment is denied, the employer may be required to pay the service member for lost wages and benefits.

Employers are required to notify employees of their rights under USERRA. This requirement can be satisfied by posting notice of these rights where other employee notices are ordinarily posted. The federal DOL has developed a poster that can be used for this purpose, titled “Your Rights Under USERRA,” which may be downloaded from the DOL website at: https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Private.pdf.

RSA chapter 97 guarantees reemployment rights to public employees returning from military service. Employees must inform the treasurer or other fiscal agent of the municipality within 90 days after they are discharged or placed on inactive status that they wish to be reinstated. RSA 97:1. These employees must be reinstated to their former position and compensation or, if the former position has been discontinued, to a comparable position. RSA 97:2, :4. If the employee’s former position exists but has been filled by someone else, then the municipality must reinstate the veteran but continue to pay the person the veteran displaced for “such time as is reasonable under the circumstances.” RSA 97:3. If the municipality has not appropriated enough money to carry out these obligations, it may borrow the amount necessary from the state at 1 percent interest. RSA 97:6. The federal law does not preempt this state law, and the service member has the right to insist upon all of the rights guaranteed by both laws.

And, as discussed earlier, the FMLA contains special military leave entitlements for eligible employees to take leave related to a covered service member.

C. Legal and Illegal Aliens

One of the key sections of the federal Civil Rights Act of 1964 prohibits discrimination in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral and other aspects of employment on the basis of race, color or national origin. The Immigration and Nationality Act extends these protections to U.S. citizens, U.S. nationals and aliens with a legal work authorization, including refugees and those granted asylum.

Municipalities have a duty to comply with the provisions of the Immigration Reform and Control Act of 1986. This is the federal law that mandates all employers to ascertain the immigration status of all current and potential employees by use of the I-9 form. Aliens in the country legally are protected against discrimination in employment by this law, meaning that no municipal employer may adopt or use a policy that prefers a U.S. citizen over a qualified alien in all hiring decisions.

Aliens not in the country legally are not entitled to these protections. If an alien is not able to provide the type of documentation of status required by the I-9 form, the alien must not be employed.

D. Americans with Disabilities Act

The ADA is a federal law with two major goals:

1. EMPLOYMENT

A qualified employee with a mental or physical disability is protected from discrimination in the workplace based on that disability. If the person can perform the essential functions of the job, the employer must provide “reasonable accommodations” to enable the employee to be successful, so long as such accommodation can be provided without undue hardship to the employer. Some examples are special computer monitors for the vision impaired or special telephones for the hearing impaired. Employers, including municipalities, with 15 or more employees are required to comply with the employment related portions of the act. In determining whether an employee is considered “disabled” under the act, courts will look at whether he or she has a physical or mental impairment that substantially limits one or more major life activities (for example, standing, sitting, walking, seeing, breathing, hearing or lifting). This analysis is often the subject of litigation and is beyond the scope of this publication. Other similarly complicated analyses apply to consideration of what accommodation might or might not be required and what functions of the job are essential. It is vitally important to identify the essential functions of each job. An employee with a legitimate disability may not prevail in an ADA discrimination case if he or she cannot perform those functions with or without reasonable accommodation. In addition, when any employee requests a reasonable accommodation, the employer should be careful to avoid any retaliatory actions against that employee, even if the accommodation is denied. See *Colon-Fontanez v. San Juan*, 660 F.3d 17 (1st Cir. 2011).

2. PUBLIC ACCOMMODATIONS

A municipality must assure that property to which the public is invited is accessible to persons with disabilities. This means that new construction or renovations to existing facilities must be built in accordance with “barrier free” designs. There are numerous technical regulations in this area, which have become familiar to architects and construction managers.

The most important thing for municipal officials to be aware of is that the two provisions of this law exist, and they should consider its implications when making decisions as they manage individual employees, draft or modify personnel policies, or review proposed changes to town property open to the public. Any questions about how to handle these issues should be posed to the town’s attorney. The US Department of Justice has published an ADA Guide for Small Towns: <https://www.ada.gov/smtown.htm>.

E. Whistleblowers’ Protection Act

The New Hampshire Whistleblowers’ Protection Act is found at RSA 275-E. The law protects employees who, in good faith, report violations of the law or who, in good faith, participate in investigations concerning allegations that the employer has violated the law. The statute prohibits employers from discharging, threatening or otherwise discriminating against employees for reporting violations or cooperating in investigations. Before an employee will be protected by the law, he or she must first bring the violation to the attention to the employer and allow the employer a reasonable opportunity to correct it. The employee is not required to first report the violation to the employer if he or she has reason to believe that the employer would not promptly remedy the violation.

The Whistleblowers’ Protection Act further protects employees from discharge, threats or discrimination arising out of an employee’s refusal to execute a directive that violates the law. An employee who believes his or her rights have been violated under RSA 275-E may request a

hearing before the commissioner of labor who may order reinstatement, payment of back pay, fringe benefits and other remedies.

As amended in 2010, the law now specifically protects governmental employees from retaliation. It prohibits governmental employers from threatening, disciplining, demoting, firing, transferring, reassigning or discriminating against a governmental employee who files a complaint with the department of labor about activities constituting fraud, waste or abuse in the expenditure of public funds, or otherwise discloses or threatens to disclose activities or information that the employee reasonably believes violates any other part of the chapter. RSA 275-E:9. The chapter also expands the protection of RSA 275-E to any employee who objects to or refuses to participate in an activity that the employee, in good faith, believes is a violation of the law. RSA 275-E:2.

F. Crime Victim Employee Leave Act

RSA 275:61 – :65 provides for leave and other benefits for certain employees who are victims of crime, and protects those employees from discharge, threats or discrimination in their employment because the employee has exercised those rights. The law applies only to employers, including municipalities, which have 25 or more employees for each working day in each of 20 or more calendar weeks during any calendar year. RSA 275:61, III. Employees who may claim benefits under this statute are “victims,” defined as any person who suffers direct or threatened physical, emotional, psychological or financial harm as a result of the commission or the attempted commission of a crime. “Victims” also include the immediate family of any victim who is a minor or who is incompetent, or the immediate family of a homicide victim. RSA 275:61, V. Immediate family members include the parent, stepparent, child, stepchild, sibling, spouse, grandparent or legal guardian of the victim, or any person involved in an intimate relationship and residing in the same household with the victim. RSA 275:61, IV.

The law requires covered employers to allow covered employees to take unpaid leave time from work in order to attend court or other legal or investigative proceedings associated with the prosecution of the crime, provided that the employee first provides the employer with a copy of the official notice of the proceedings. An employee who exercises this leave option may choose to use, or an employer may require the employee to use, the employee’s accrued paid vacation time, personal leave time or sick leave time for these purposes. Employees shall not lose seniority while absent from employment under this statute. Employers must maintain the confidentiality of any written documents or records submitted by an employee related to the employee’s request to leave work. *See* RSA 275:62. The law does not limit the length of a leave of absence for this purpose; however, an employer may limit the leave if it creates an “undue hardship” to the employer’s business. For these purposes, an undue hardship is a significant difficulty and expense to a business and includes the consideration of the size of the employer’s business, the employee’s position and role within the business, and the employer’s need for the employee. RSA 275:63. Employers may not “discharge, threaten, or otherwise discriminate against any employee regarding such employee’s compensation, terms, conditions, location, or privileges of employment because the employee has exercised his or her right to leave work” under this statute. RSA 275:64; RSA 275:62, II. Employers who violate any provisions of this statute will be subject to civil penalties imposed by the state DOL. RSA 275:65.

G. Leave Authorized in a State of Emergency

When a state of emergency is declared by the governor or the general court under RSA 4:45, a member of a fire department, rescue squad or emergency medical services who is called into service of the state or town shall have the right to take leave without pay from his or her place of

employment to respond to the emergency. The employer cannot require that the employee use his or her vacation or other accrued leave for the period of emergency service, but the employee may choose to use this time instead of taking leave without pay. RSA 275:66. An employer may request an exemption from the director of emergency management services or local emergency management agency for an employee who is essential to the employer's own emergency disaster relief activities.

H. Speech of Public Employees

RSA 98-E protects the free speech rights of public employees. "Notwithstanding any other rule or order to the contrary, a person employed as a public employee in any capacity shall have a full right to publicly discuss and give opinions as an individual on all matters concerning any government entity and its policies." RSA 98-E:1. Thus, so long as employees are expressing their opinions in their personal capacities, rather than in the performance of their official duties for the municipality, those opinions are protected by the law. This means that public employees have broad rights to criticize governmental entities and their policies.

I. No Retaliation Against Employee Requesting Flexible Schedule.

RSA 275:37-a prohibits any employer from retaliating against an employee solely because the employee requests a flexible work schedule. The law does not require the employer to accommodate the request; it merely prohibits retaliation for the making of the request.

CHAPTER THIRTEEN

ETHICAL ISSUES, CONFLICTS OF INTEREST, AND INCOMPATIBILITY OF OFFICE

I. ETHICS

A. What Are 'Ethics'?

It may seem like a simple question but ask several people “what are ethics?” and you are likely to get several different answers. When the question involves the ethical behavior of local government officials and employees, the answers might include things such as:

- Avoiding conflicts of interest (separating public and personal interests)
- Disclosing financial interests and other relationships
- Avoiding criminal behavior, following state law, and abiding by local ordinances
- Keeping confidential information confidential
- Properly using authority and acting cooperatively
- Treating people fairly and equally
- Honesty, integrity, and trustworthiness

The ethical behavior of all public officials and employees is of significant concern to everyone. Not only is it critical for officials and employees to act ethically, it is also important to avoid even the *appearance* of unethical behavior. If citizens begin to doubt the ethics and good intentions of local officials, it is difficult to govern effectively and even more difficult to overcome the perception that “something is going on.”

Is this really a problem in local government? At the time this publication went to print, a Google search for “ethics and local government” yielded over 500,000,000 results. It is not a new problem, either. Adlai Stevenson, then Governor of Illinois, wrote in 1952 that “[p]ublic confidence in the integrity of the government is indispensable to faith in democracy. When we lose faith in the system, we lose faith in everything we fight and spend for.”

Although New Hampshire is quite different from most other states because our local government primarily consists of volunteers rather than career politicians, we are not immune from ethical dilemmas. It is easy for officials to get caught up in day-to-day issues and lose sight of the larger picture. Questions about “who is right” and “who is in charge” often take precedence over the reason people should be in local government: serving the community.

At its core, local government is about service. The most successful and effective governmental officials and employees are those who consider what they do as “service to the public.” Do people make mistakes? Of course. What matters is (a) actions were taken in good faith, (b) officials and employees take responsibility for those actions, and (c) lessons are learned so that the public can maintain confidence in its government.

It is understandable, given these concerns, that towns and cities want to take appropriate steps to maintain the highest level of ethical behavior. Society has been trying to legislate civility and morality for thousands of years. The questions for today’s local government is what can municipalities do, and how does the law already address issues of ethics?

B. Home Rule? Not Really

Contrary to popular belief, New Hampshire is not a home rule state. Despite our political tradition of local control, New Hampshire's Constitution does not grant any power directly to municipalities. Our municipalities have authority to act only if the state legislature gives it to them through a statute. "Towns only have such powers as are expressly granted to them by the legislature and such as are necessarily implied or incidental thereto." *Girard v. Allenstown*, 121 N.H. 268 (1981).

This means that when a town or a local board or official wants to take a certain action, they must find a law that grants them that authority. It is not enough to conclude that there is no law prohibiting the action; silence in the law is usually a prohibition against that particular municipal action.

Within this framework, what may a municipality legally do to enforce ethical behavior among its employees and officials? Perhaps surprisingly, no single statute authorizes a town or city to adopt a broad "ethics ordinance" addressing every aspect of ethics, binding both employees and officials, and authorizing a local ethics board to remove an official from office. Instead, there are several different statutes (discussed more fully below) that allow towns and cities to enact certain specific kinds of ordinances. There are also specific statutes prohibiting certain conflicts of interest, such as RSA 673:14, which prohibits land use board members from participating in matters when they have a direct personal or pecuniary interest in the outcome or when they would be disqualified from sitting as a juror at a trial upon the same matter. Several other statutes make certain behavior by officials and/or employees illegal, and there are various circumstances in which a municipal board or a court may remove an official from office for violations of those statutes.

Before enacting an "ethics ordinance," then, local officials should become familiar with the limits of municipal authority and the full range of options available for controlling, directing and suggesting ethical behavior for municipal officials and employees.

In the course of reviewing the various options open to municipalities regarding ethical behavior, it is also important to bear in mind the idea that *just because something is legal doesn't mean it is a good idea*.

C. Conflicts Distinguished from Incompatibility

Conflicts of interest and incompatibility create the most frequent ethical issues for municipal officials. It is important to understand the difference between the two issues. A conflict of interest issue involves whether an official is disqualified from making a particular decision. An incompatibility issue, on the other hand, asks whether a person is disqualified from holding office at all. For example, is it proper for a real estate broker to be on the planning board? If a real estate agent represents a developer, he or she obviously cannot vote on that developer's application before the planning board. But the real estate agent certainly is not ineligible to be a member of the planning board simply because he or she is a realtor. The conflict question focuses on specific decisions or matters, whereas the incompatibility question focuses on whether one person may hold two particular offices at the same time. Both topics are discussed separately below.

II. INCOMPATIBILITY OF OFFICES

A. Statutory Incompatibility

1. GENERAL STATUTE

RSA 669:7, I lists pairs of offices that cannot be held by a single person:

No person shall at the same time hold any two of the following offices: selectman, treasurer, moderator, trustee of trust funds, collector of taxes, auditor and highway agent. No person shall at the same time hold any two of the following offices: town treasurer, moderator, trustee of trust funds, selectman and head of the town's police department on full-time duty. No person shall at the same time hold the offices of town treasurer and town clerk. No full-time town employee shall at the same time hold the office of selectman. No official handling funds of a town shall at the same time hold the office of auditor. No selectman, moderator, town clerk or inspector of elections shall at the same time serve as a supervisor of the checklist. No selectman, town manager, school board member except a cooperative school board member, full-time town, village district, school district except a cooperative school district, or other associated agency employee or village district commissioner shall at the same time serve as a budget committee member-at-large under RSA chapter 32.

Furthermore, RSA 669:7, I-a states: "No person shall at the same time file a declaration of candidacy for any 2 or more elected offices that are incompatible under paragraph I." Therefore, if it would violate the incompatibility statute to hold two offices, it also violates the incompatibility statute to file candidacy for those two offices, even if the candidate will choose to hold only one of those positions if elected to both.

2. WHAT IS "FULL-TIME"?

Under RSA 669:7, no full-time employee can be a selectperson. Also, RSA 32:15 says no full-time employee of a municipality that has an official budget committee can be a member-at-large. The term "full-time" is not defined. It clearly does not apply to someone who just gets a small annual stipend. However, it is recommended that anyone whose decisions on budgets might be influenced by his or her personal or pecuniary interest should not serve in these positions.

3. WHO IS A TOWN EMPLOYEE?

In *Littleton v. Taylor*, 138 N.H. 419 (1994), the New Hampshire Supreme Court held that a full-time town librarian was not a full-time town employee and could therefore be legally elected a select board member. The Court said that under RSA 202-A, the library trustees have such independence from select boards that library employees are not town employees.

4. PLANNING BOARD MEMBERS

In addition to the general statute discussed above, RSA 673:7 limits the ability of elected or appointed planning board members to serve on other municipal boards or commissions. In a city or a town, only one appointed or elected member of the planning board member may serve on the conservation commission, the local governing body, the historic district commission, building code board of appeals, zoning board of adjustment, heritage commission, agricultural commission, and housing commission. Up to two planning board members may serve at the same time on any other city or town board or commission.

5. BUDGET COMMITTEE MEMBERS

RSA 32:15 provides: "No selectman, town manager, member of the school board, village district commissioner, full-time employee, or part-time department head of the town,

school district or village district or other associated agency shall serve as a member-at-large. Every member-at-large shall be domiciled in the town or district adopting this subdivision and shall cease to hold office immediately upon ceasing to be so domiciled.”

B. Common Law Incompatibility

Two positions might be incompatible even though they are not listed in RSA 669:7 or any other statute. Whenever two positions bear a special relationship to each other, one being subordinate to and interfering with the other, with inconsistent loyalties or responsibilities, then one person cannot legally hold both positions. See McQuillin, *Municipal Corporations*, §12.67. For example, in the case of *Cotton v. Phillips*, 56 N.H. 220 (1875), the Court said one person couldn’t be both school committee member and auditor because he would, in effect, be sitting in judgment over his own acts. That’s incompatibility, not a conflict of interest.

III. CONFLICTS OF INTEREST

A. Introduction

One of the most troubling situations to face as a municipal official is when an angry citizen claims that the official should not participate in a vote because of a conflict of interest. A charge of conflict of interest often implies unethical behavior, yet it is not always easy to distinguish an actual conflict of interest from an unsubstantiated allegation. It is a charge that goes to the heart of the people’s trust in their government and questions the personal motives of elected and appointed officials. After all, in this context, conflict of interest involves an official who has a conflict with the *public* interest. It is often easy for the angry citizen to claim conflict of interest. In fact, it is not unheard of for an applicant before a municipal board, or the applicant’s attorney, to charge conflict of interest as a way of intimidating municipal officials who may not look favorably on an application to step down. But it is often not easy for a local official to determine if he or she does, in fact, have a conflict that requires disqualifying oneself from a decision. There are several New Hampshire Supreme Court cases which offer guidance, but the determination of an actual conflict of interest relies heavily on the specific facts of the situation.

B. Conflict Defined

Conflict of interest has proven difficult for courts and legislatures to define in a way that applies in all situations. The particular circumstances and facts of each case must be factored into the determination of whether an official should be disqualified from acting on a matter. However, the general rule is that a conflict of interest requiring disqualification will be found when an official has a direct personal or pecuniary (financial) interest in the outcome. That interest must be “immediate, definite and capable of demonstration; not remote, uncertain, contingent or speculative.” *Atherton v. Concord*, 109 N.H. 164 (1968). As the Court in *Atherton* explained, “The reasons for this rule are obvious. A man cannot serve two masters at the same time, and the public interest must not be jeopardized by the acts of a public official who has a personal financial interest which is, or may be, in conflict with the public interest.”

C. Difference Between Legislative and Judicial Functions

A stricter standard of fairness is often applied by the courts in cases where a board is acting in a judicial, as opposed to a legislative, capacity. Consequently, it can be helpful to understand in which capacity the board is acting when deciding whether to disqualify oneself. It is not

always easy to tell the difference. It depends on the type of decision the board is making, not on which board is making the decision.

1. LEGISLATIVE CAPACITY

Legislative acts are those that set policy, establish or amend ordinances or procedural rules, set budgets, or involve other actions that do not directly affect the rights of a specific person. Generally speaking, a court will only invalidate the action of a board if the person with a disqualifying conflict of interest cast the deciding vote. *Michael v. Rochester*, 119 N.H. 734 (1979).

In a case involving a city council decision, the Court refused to invalidate the decision despite one member's conflict of interest because "no judicial function was involved." *Michael v. Rochester*, 119 N.H. 734 (1979). A city councilor paid the city to extend a water line to his property. The councilor then voted for an agreement that required future lot purchasers connecting to the line to pay the councilor so that he would recoup a portion of his investment. The council voted unanimously in favor of the agreement. The councilor clearly had a personal financial interest in the council's action and a conflict of interest, but the remedy was not invalidation of the council decision. The Court said, "Though a judicial or quasi-judicial act of a municipal body may be voided because of a conflict of interest ... an administrative or legislative act by such a body need not be invalidated if the conflicting interest did not determine the outcome." In *Appeal of Cheney*, 130 N.H. 589 (1988), the Court said a legislative action will not be voided because of a conflict of interest unless that vote was the deciding vote.

In *Merrimack v. McCray*, 150 N.H. 811 (2004), the select board (a five-member board) voted to terminate litigation against the defendant, Mr. McCray, a fellow selectperson. Three voted in favor of the settlement, including Mr. McCray, and two abstained. The Court concluded that Mr. McCray's participation did not determine the outcome of the vote. The Court reasoned that, even without his vote, there were two in favor and none against. The Court impliedly reasoned that an abstention is akin to an acquiescence to the will of the board. The Court stated: "So long as a majority of the board is present, only a majority of the votes actually cast is necessary to support an action."

In *Quinlan v. Dover*, 136 N.H. 226 (1992), the Court held that the mere fact that a city councilor had spoken out on one side of an issue (rezoning) in advance (prejudgment), in a legislative context, did not disqualify him from voting on the issue. The Court added that if the councilor had a financial interest and his vote determined the outcome, the council's decision would be invalidated.

2. JUDICIAL CAPACITY

"An act is judicial in nature if officials are bound to notify and hear the parties, and can only decide after weighing and considering such evidence and arguments as the parties chose to lay before them." *In re Bethlehem*, 154 N.H. 314 (2006); *Appeal of Keene*, 141 N.H. 797 (1997), quoting *Sanborn v. Fellows*, 22 N.H. 473 (1851). The Court has said that a municipal body is acting judicially when it decides matters that affect the rights of a specific petitioner with respect to a specific parcel of land. *Ehrenberg v. Concord*, 120 N.H. 656 (1980).

Part I, Article 35, of the New Hampshire Constitution says, "it is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit." This is the standard of impartiality that the courts apply to the judicial or quasi-judicial decisions made by board members.

The stakes are considerably higher when a judicial action is at issue. The New Hampshire Supreme has held more than once that "mere participation by one disqualified member was sufficient to invalidate the tribunal's decision because it was impossible to estimate

the influence one member might have on his associates.” *Winslow v. Holderness Planning Board*, 125 N.H. 262 (1984).

3. QUASI-JUDICIAL CAPACITY

Sometimes the courts refer to municipal boards as quasi-judicial, rather than judicial, because they are not required to provide all the same procedural safeguards required by a court of law. *Winslow v. Holderness Planning Board*, 125 N.H. 262 (1984).

D. Cases Involving Judicial Decisions

When considering the holdings in New Hampshire Supreme Court opinions below, it is important to bear in mind that, even when a court finds that no disqualifying conflict existed, the public perception of a conflict may have been an issue regardless of the outcome of the case. By avoiding the appearance of conflicts when it makes sense, local governments can reduce the risk of litigation over what might otherwise have been small matters with little public attention.

1. PREJUDGMENT

An official who had voted in favor of a project as a member of the planning board was *not disqualified* from voting on the same project as a member of the city council. His participation as a planning board member “does not prove that he had an interest in the project other than that of any other citizen.” *Atherton v. Concord*, 109 N.H. 164 (1968). However, a man who had spoken in favor of a project at a public hearing on a subdivision application before the planning board was *disqualified* from voting on the same project when he later became a board member because he had “prejudged the facts of the case before joining the board.” *Winslow v. Holderness Planning Board*, 125 N.H. 262 (1984).

2. ABUTTERS

Anyone who owns land abutting property that is the subject of an application before a municipal board is *disqualified* from acting on that application. *Totty v. Grantham Planning Board*, 120 N.H. 388 (1980).

3. FINANCIAL INTEREST IN THE OUTCOME

A public officer is *disqualified* if he has “a direct personal and pecuniary interest” in the decision. *Preston v. Gillam*, 104 N.H. 279 (1962). However, the interest must be “immediate, definite, and capable of demonstration; not remote, uncertain, contingent, and speculative, that is, such that men of ordinary capacity and intelligence would not be influenced by it.” *Atherton v. Concord*, 109 N.H. 164 (1968).

4. EMPLOYMENT

An employment relationship with an interested party *might* be grounds for disqualification. However, the following cases indicate that the rule has exceptions, and it is possible for an employment relationship to be so remote that the employee, in fact, has no interest different from that of the general public.

- A zoning board of adjustment member who was a former employee of a party was not disqualified from voting on a matter before the board because there was no evidence that she was “not indifferent” to the outcome of the case. *Taylor v. Wakefield*, 158 N.H. 35 (2008).
- An attorney who had formerly been employed by the Concord Housing Authority and who had been paid for those services stated, without any contradicting evidence, he had no bias. The Court held that he was not disqualified from voting

on an application submitted by the Housing Authority. *Atherton v. Concord*, 109 N.H. 164 (1968).

- An employee of a Rockingham County food surplus program was not disqualified from sitting on the zoning board of adjustment in a case in which the county was the applicant for a nursing home expansion. He had testified that he was free of bias, and the Court found he had no pecuniary interest in the outcome. If a private company instead of a governmental unit had employed the ZBA member, the result of the case may have been different. *Sherman v. Brentwood*, 112 N.H. 122 (1972).
- A county commissioner, deciding on the necessity of taking land for airport purposes (a quasi-judicial function), was disqualified when it was discovered that his law partner had represented a party to the dispute in question. *Appeal of Keene*, 141 N.H. 797 (1997). In this case, disqualification of the county commissioner voided the decision because of the inherent difficulty in estimating the influence one member of the tribunal may have had on the others.

5. FAMILY RELATIONSHIPS

There has yet to be a New Hampshire case that has considered in depth the extent to which a family relationship may constitute a conflict of interest on municipal boards. However, consider the following:

- In *Webster v. Candia*, 146 N.H. 430 (2001), the Court found no error by the trial court for failing to find bias on the part of a member of a planning board hearing a cluster housing application, even though the plaintiff alleged that the board member's wife was the leading proponent of an effort to repeal the cluster housing ordinance in an attempt to block the project. The Court said, "Administrative officials who serve in an adjudicatory capacity are presumed to be of conscience and capable of reaching a just and fair result. The burden is upon the party alleging bias to present sufficient evidence to rebut this presumption." In addition to claiming bias due to the activities of the board member's wife, the plaintiff also alleged that the board member came to the board meeting with a memorandum he had prepared detailing reasons to deny the application and that the board member had made the motion to deny the application. The Court said, "His motion was not evidence of 'prejudgment,' but of judgment exercised at the appropriate time and place. Nor was there evidence of 'bias.'"
- In a case involving a judge, *Rochester v. Blaisdell*, 135 N.H. 589 (1992), a taxpayer was in a dispute with the city. One of the partners in the law firm of the attorney representing the city, who hadn't actually participated in the case, was an uncle of the judge hearing the case, although they had not seen each other in 20 years. The Court held, based on the New Hampshire Code of Judicial Conduct, the judge at least had a duty to inform the parties of the family relationship so they could request him to step down.

6. OTHER RELATIONSHIPS

A member of a church that owned land abutting a project and who had previously been a member of the church building committee before taking public office was not disqualified to vote on the project. *Atherton v. Concord*, 109 N.H. 164 (1968).

IV. STATUTES GOVERNING CONFLICTS OF INTEREST

A. Municipal Charters

Former RSA 49-A:82, which formed the basis for many of the charters still in effect in cities, says that no city official shall take part in a decision in which he or she has a financial interest “greater than any other citizen or taxpayer.” This standard applies to legislative as well as judicial actions in cities in which this statute or charter provision is still in effect. RSA Chapter 49-C replaced RSA Chapter 49-A in 1991. RSA 49-C:33, I(c) simply permits cities the option of including a conflict of interest provision in their charters.

B. Local Conflicts of Interest Ordinances

One of the challenges with conflicts of interest is that the existence of a conflict is, to a great extent, a question of degree to be determined on a case-by-case basis. Towns and cities may wish to adopt a conflicts of interest ordinance to provide more certainty. However, as with any exercise of municipal authority, a municipality can only enact a valid, enforceable ordinance if a law grants it the authority to do so. In addition to the authority in RSA 49-C:33, I(c) for cities to include a conflict of interest provision in their charters, the legislative body of a city or town (town meeting, town council, city council or mayor and aldermen) may adopt a conflict of interest ordinance under RSA 31:39-a. An ordinance adopted under this statute may apply to both municipal officials and employees. A concise, carefully drafted ordinance can clarify what behavior is reasonably expected of people, whereas poor drafting can have the opposite effect.

RSA 21-G:21 – :27 contains a code of ethics for the executive branch of State government, which can be a source of ideas for local legislation. A simple example is RSA 21-G:22, which clarifies the limit of the “personal and pecuniary interest” that must be avoided: “Executive branch officials shall not participate in any matter in which *they, their spouse or dependents*, have a private interest which may directly or indirectly affect or influence the performance of their duties.” RSA 21-G:29 – :30 creates an Executive Branch Ethics Committee, which is authorized to issue written advisory opinions upon request of officials in specific situations. These opinions, edited to maintain confidentiality, may be found at <https://www.doj.nh.gov/ethics-committee/>.

Significantly, however, because municipalities may only take those actions authorized by statute, a conflicts of interest ordinance adopted under RSA 31:39-a may address only the issues listed in the statute and those that are necessarily implied or incidental to those issues. See *Girard v. Allentown*, 121 N.H. 268, 271 (1981). Those subjects which may be addressed are:

- definitions of conflicts of interest;
- regulations of conflicts of interest;
- provisions requiring disclosure of financial interests for specified officers and employees;
- establishment of incompatibility of office requirements stricter than those otherwise established by law; and
- establishment of conditions under which prohibited conflicts of interest will require removal from office.

Despite the clear limits of this statute, local ethics ordinances often include unauthorized provisions. For example, many ordinances authorize the creation of a local ethics board or committee with the authority to investigate complaints and to punish or remove employees and officials for violations. Legally, a local ethics committee could be established to offer non-binding advice to the select board or other officials regarding alleged ethics violations, but *not* to remove

municipal officials. Although a town or city may establish the conditions under which a prohibited conflict of interest will require removal from office, RSA 31:39-a is quite clear in providing that only the superior court can remove an official under these provisions.

The termination of an employee, in contrast, does not usually require action by a court, but this is a step that should be taken after careful consideration and only by the governing body or designated official, not by an ethics committee. There may be other significant factors to consider before removing an employee, such as any procedural or other rights that the employee may have under law (such as a police or fire chief) or under a collective bargaining agreement or individual employment contract.

Another unauthorized provision that has found its way into local ordinances is a declaration that certain operations of an ethics committee are exempt from disclosure under RSA Chapter 91-A, New Hampshire's Right to Know Law. Municipalities may not change the scope of RSA Chapter 91-A or declare that certain activities or records will not be available to the public. The ability to enter a nonpublic session during a public meeting must in each instance meet the specific conditions set forth in RSA 91-A:3. In addition, exemptions regarding the public availability of governmental records are construed narrowly and are often decided under RSA 91-A:5 on a case-by-case basis based on the facts and circumstances of each matter. The activities and records of an ethics committee must be considered individually under the same standards as all other municipal activities and records.

It is also common to find a local ethics committee charged with investigating ethical complaints about employees or officials. However, although a committee of this nature may be very helpful in addressing thorny conflicts of interest questions, the referral of certain matters to the committee could result in exposure to even greater liability for the municipality. For example, referral of an employment harassment claim to an ethics committee may result in a breach of confidentiality because the employer likely owes the employee certain confidentiality measures. Likewise, the referral of a matter regarding fraud or misappropriation of funds may result in a charge that the municipality has interfered with a criminal investigation. The key to the success of any such committee, therefore, will be the quality of its membership and an understanding of the legal limits of its authority. Members should be respected members of the community who are willing and able to meet on relatively short notice, to provide timely, thoughtful responses, and to refer matters to legal counsel as appropriate. One area in which an ethics committee could truly help is education. If an ethics committee organized training on ethics and conflicts of interest and helped make the information available to local officials and employees, it might help to reduce the number and severity of ethical issues.

To address issues outside the scope of an ordinance under RSA 31:39-a, any municipal board is free to adopt its own, non-binding set of guidelines to help members understand the ethical standards the board wishes to uphold. These policies are not binding, and no board (including the select board) has the authority to enact ethical guidelines to bind members of other boards. However, the exercise of creating a policy can be helpful, and educating new members about the standards to which all board members should aspire can provide much-needed guidance.

It is also important to distinguish between the regulation of municipal *officials* and the supervision of municipal *employees*. Since municipal employees are subject to the supervision of the department heads and/or the governing body, the governing body (like any other employer) may adopt personnel policies to govern employees. Personnel policies may address virtually every aspect of the employment relationship, including expectations regarding ethics and behavior, and the discipline and termination consequences of violating those expectations. Therefore, even if some of the provisions of a local "ethics" policy go beyond the permissible subjects in RSA 31:39-a and thus would not be enforceable against municipal officials, those requirements might be enforced against its employees if incorporated into the municipality's personnel policies.

C. Land Use Boards

All planning boards, zoning boards of adjustment, building code boards of appeals, heritage commissions, historic district commissions, agricultural commissions, and housing commissions are subject to RSA 673:14, which prevents a member from sitting on a case:

if that member has a direct personal or pecuniary interest in the out- come which differs from the interest of other citizens, or if that member would be disqualified for any cause to act as a juror upon the trial of the same matter in any action at law.

Equally important in RSA 673:14 is the procedure it authorizes. Any person on the board can ask for a vote on whether he or she, or any other member, is disqualified in a case. The vote must be taken prior to the public hearing in the case. The vote is non-binding, meaning the decision to step down or not belongs to the individual member. Although this statute requires a member of the land use board to ask the board to vote on his/her or another member's possible conflict of interest, the statute does not prevent an applicant or other interested party to the proceeding from raising issues of conflict of interest involving a board member. In *Bayson Properties, Inc. v. Lebanon*, 150 N.H. 167 (2003), the Court said an applicant was required to raise a claim of bias against a member of the planning board "at the earliest possible time in the proceedings before the board." *Fox v. Greenland*, 151 N.H. 600 (2004).

D. Other Officers

Other officials who are called upon to hear quasi-judicial matters in certain cases specified by statute are also subject to the "juror" standard by virtue of RSA 43:6, which says:

No selectman or other officer shall act, in the decision of any such case [a case "affecting the conflicting rights or claims of different persons" per RSA 43:1] who would be disqualified to sit as a juror for any cause, except exemption from service, in the trial of a civil action in which any of the parties interested in such case was a party.

E. The Juror Standard

RSA 673:14 and RSA 43:6 both require officials to be as impartial as a juror. This juror standard was also cited in the *Winslow* case (noted previously), even before RSA 673:14 applied to planning board members.

Some citizens' attorneys have cited this standard and succeeded in intimidating board members, by implying that the juror standard is more strict and absolute than the standard in the *Atherton* case—disqualification is required when a member has a "direct personal and pecuniary (financial) interest" in the outcome that is "immediate, definite and capable of demonstration; not remote, uncertain, contingent or speculative." But, it seems unlikely that the law would require "purer" jurors than judges. Case law involving jurors and judges suggests that the juror standard is no stricter than the "quasi-judicial" standard.

1. INDEPENDENT KNOWLEDGE

Knowledge of facts concerning an application independently learned by a land use board member, without more, does *not* disqualify him. *Dover v. Kimball*, 136 N.H. 441 (1992). The Court held that a planning board member's discovery of obvious inconsistencies in submitted documents and a subsequent statement to an applicant explaining why such inconsistencies would preclude approval of the application did not show that the application had been prejudged. "Municipal officials must be free to advise applicants of whether their applications conform to statutory requirements and make suggestions on how to bring the applications into compliance. If an application does not conform and will not be accepted, the officials should be able to communicate this information

without being accused of prejudging the application.” *Id.* at 447. This obligation to provide assistance to citizens, found in the New Hampshire Constitution, was reaffirmed in *The Richmond Company, Inc. v. Concord*, 149 N.H. 312 (2003), where the Court held that “it is their [the planning board’s] function to provide assistance to their citizens [which] includes informing applicants not only whether their applications are substantively acceptable but also whether they are technically in order.”

2. ORDINARY BUSINESS

A person who had regularly run an ad in the *Union Leader* was not disqualified from sitting as a juror on a case in which the newspaper was a party: “It is not any and every business relation that disqualifies a juror and if it did the newspaper subscriber, the telephone user, the electric and water consumer and those who engage in a host of other common everyday habits of ordinary commercial and domestic life would be eliminated from the average jury panel.” *McLaughlin v. Union Leader Corp.*, 99 N.H. 492 (1955).

A member of the zoning board of adjustment who was a former employee of a party to an appeal before the board was not disqualified from voting on the appeal. *Taylor v. Wakefield*, 158 N.H. 35 (2008). The Court explained that the juror standard “does not disqualify former employees *per se*, but only those who appear ‘not indifferent.’” There was no evidence in this case to indicate that the board member was “not indifferent” to the outcome of the appeal, so the board member was not disqualified.

3. IMPARTIALITY

In a case involving a slip and fall on a sidewalk, the Court refused to disqualify three people as jurors. One was employed by the company that had sanded the defendant’s parking lot and driveway, but which was not, however, a party to the case. A second was related to an employee of the defendant. A third had been a client of the defendant’s attorney at some prior time. The Court said the trial judge had the authority, using the *voir dire* questioning procedure, to take these factors into account and still find these people were impartial. In other words, none of these relationships was disqualifying *per se*. *Matthews v. Jean’s Pastry Shop, Inc.*, 113 N.H. 546 (1973).

4. PRIOR OPINION

A judge in a probation violation case was not necessarily disqualified merely because he had formed an opinion prior to trial, so long as he was able to “set aside” his opinions and “decide the case on the evidence[.]” The Court said that a pecuniary interest in the outcome or a family relationship to a party *would* constitute *per se* grounds for disqualification, but not a prior opinion. *State v. Aubert*, 118 N.H. 739 (1978).

F. Criminal Statutes

Many state laws prohibit certain unethical behavior by public officials and impose civil and/or criminal penalties.

- RSA chapter 640 (Corrupt Practices) prohibits all state and local public officers or employees from offering, accepting, or failing to report bribery, or engaging in improper influence (threatening harm to a person to influence someone’s actions). These offenses are Class B felonies. The same statute also prohibits the offer or acceptance of gifts in return for a particular action, improper payments for action, and the purchase of public office. These offenses are all misdemeanors (which are still crimes).
- RSA 643 (Abuse of Office) prohibits two actions which are both misdemeanors. The first is

“official oppression,” defined as knowingly committing an unauthorized act or failing to carry out a duty, while purporting to be acting officially, with the purpose of benefitting oneself or others. The second is the “misuse of information,” which is speculation, acquisition, or sale of property with inside knowledge obtained by virtue of public office (the governmental equivalent of “insider trading”).

V. OTHER STATUTES GOVERNING ‘ETHICAL’ BEHAVIOR

A. Libel and Slander

Another check on unethical or improper behavior of local officials and employees is the tort (or civil wrong) of defamation, which includes both oral (slander) and written (libel) defamation. A “defamatory” statement tends to lower a person in the esteem of any substantial and respectable group, even if that group is quite a small minority. *Touma v. St. Mary’s Bank*, 142 N.H. 762, 766 (1998). It occurs when a person fails to exercise reasonable care in publishing (in print or by speaking) a false and defamatory statement of fact about someone to a third party without any valid privilege. *Pierson v. Hubbard*, 147 N.H. 760, 763 (2002). A statement of opinion is generally not actionable as defamation unless it is reasonably understood that the opinion is based upon defamatory facts. *Duchesnaye v. Munro Enterprises, Inc.*, 125 N.H. 244, 249 (1984). In addition, the statement must be about a specific person rather than a generalized group.

Defamatory statements might be privileged in certain situations. For example, statements made in the legislative process (such as during town meeting) or during judicial proceedings are absolutely privileged. Other statements during quasi-judicial proceedings (such as planning board hearings) might be protected by a qualified privilege if they are published on a lawful occasion, in good faith, for a justifiable purpose, and with the belief, founded upon reasonable grounds, that the statement is true. *Voelbel v. Bridgewater*, 144 N.H. 599, 600 (1999); *Pickering v. Frink*, 123 N.H. 326, 329 (1983).

However, there is no specific privilege for municipal officials conducting town business, so they generally are *not* protected from liability for making any defamatory statements about other people during committee meetings. It is possible, therefore, for an official or employee to be sued by someone claiming that the official or employee has defamed them. [(See, however, *McCarthy v. Manchester Police Department*, 168 N.H. 202 (2015), in which the Court explained, in detail, the applicability of immunity statutes (RSA 507-B and RSA 541-B) in the context of a defamation suit and found that those statutes protected both the police department and an officer in that department)]. It is also possible for citizens to commit libel or slander against other members of the public during public meetings, or against a local official. The bar is a bit higher, however, because public officials are expected to deal with a certain amount of criticism when they take on the office.

Given the expansive and complicated law surrounding defamation claims, municipal counsel should be consulted regarding any specific instances of concern. However, municipal officials should note that defamation can serve as a check on unethical or improper behavior of both local officials and municipal employees.

B. RSA Chapter 91-A, New Hampshire’s Right to Know Law

Frequently, charges of “unethical behavior” involve the allegedly improper handling of sensitive information. Many of these issues are already governed by RSA chapter 91-A, which exists “to

ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.” RSA 91-A:1. Municipal boards, commissions, and other “public bodies” are subject to this law, as are almost all records pertaining to municipal business.

With limited exceptions, meetings of all public bodies must be open to the public, with proper notice at least 24 hours before the meeting and publicly available minutes within five business days afterward. RSA 91-A:2, II. A public body may only meet in a nonpublic session for the narrow list of reasons provided in RSA 91-A:3, II, and even minutes of a nonpublic session will become publicly available unless they are properly sealed. RSA 91-A:2-a clarifies the legal limits of communications among members of a public body outside a public meeting, whether in person, by electronic communication, or by any other method. It is now much clearer that e-mail, text messaging, and other forms of communication that occur outside of the public eye (or ear) legally cannot be used to circumvent the spirit and purpose of the law. RSA 91-A:2-a.

Governmental records are similarly regulated under this statute. All governmental records must be made available to the public upon request for inspection and copying during regular business hours. RSA 91-A:4. The only categories of records that do not have to be disclosed are those listed in RSA 91-A:5 or in another specific statute. The New Hampshire Supreme Court construes these exceptions “restrictively,” presuming that records should be disclosed to further the purpose of the law. *Goode v. N.H. Office of the Legislative Budget Ass’t*, 145 N.H. 451 (2000).

It is particularly important for all local officials and employees to understand the requirements and limitations of this law because there are serious consequences when it is violated. When someone’s access to public meetings or public records is wrongfully denied, the municipality may be required to pay that person’s attorney’s fees and costs. When a specific official or employee acts in bad faith in refusing to allow access, the court may require the individual official or employee to pay those attorney’s fees and costs. When an official or employee acts in bad faith, the court is required to assess a civil penalty against that individual between \$250 and \$2,000. In addition, a court may invalidate any action taken by a public body in a meeting that violates the open meeting requirements of the law. Finally, if any municipal official discloses confidential information that he or she knows or should know is protected from disclosure under RSA 91-A, that official may be removed from office by a court for violating his or her oath of office. RSA 42:1-a.

For a more detailed discussion of the Right to Know Law, see Chapter 5.

C. Noninterference

In towns with a charter and in cities, the elected body (select board, town council, city council, or mayor and aldermen) is also governed by a statute prohibiting interference with the actions of the chief executive officer:

The elected body shall act in all matters as a body, and shall not seek individually to influence the official acts of the chief administrative officer, or any other official, or to direct or request, except in writing, the appointment of any person to, or his removal from, office; or to interfere in any way with the performance by such officers of their duties. Any member [who does so], as determined through procedures established in the charter, shall forfeit his office.

RSA 49-C:19 (*city charters*); RSA 49-D:4 (*town charters*).

In other words, no single member of a governing body in a municipality with a charter has the authority to direct or interfere with the official activities of the chief executive officer of the municipality or other officials. Furthermore, it should be noted that even in towns without a

charter, the select board members are authorized to act only as a board by majority vote. RSA 41:8. Although there is no statute authorizing removal of a selectperson for improper interference, the old saying that “one selectperson cannot do anything” is still valid. Only the board may act.

VI. DISQUALIFICATION

A. Recommendations

Officials exercising judicial or quasi-judicial authority, such as planning and zoning board members, must be impartial. Yet, though the above cases provide some guidance, there are few clear rules. What should you do when the answer is unclear?

1. DISCLOSE

Reveal the potential conflict to the parties. It gets the issue out in the open and no one can claim surprise. If nobody objects at that time, they have waived their right to object later. *Taylor v. Wakefield*, 158 N.H. 35 (2008); *Fox v. Greenland*, 151 N.H. 600 (2004); *Bayson Properties, Inc. v. Lebanon*, 150 N.H. 167 (2003). Under RSA 673:14, citizens don't have a right to insist on a board vote on whether a member is disqualified, but the board should listen to their concerns if they attempt to raise them.

2. DOUBT

When in doubt, step down. Under the rule of the *Winslow* and *Keene* cases, a court will overturn a board's decision if a disqualified person participated, whether or not he or she influenced the outcome. See *Appeal of Keene*, 141 N.H. 797 (1997); *Winslow v. Holderness Planning Board*, 125 N.H. 262 (1984). Usually, is not worth risking having a decision overturned because of a conflict of interest. Conflicts usually have nothing to do with the merits of a decision, and the board's hard work should not be put to waste. A board member can always step down if he or she does not feel right about sitting on the case, even if the potential conflict does not fit any of the court-created rules. On the other hand, however, there may be times when accusations of a conflict of interest are clearly an attempt to take advantage of a difficult situation and force an official to recuse himself or herself rather than risk a lawsuit. In such a situation, a board member may prefer to participate rather than recuse himself or herself to help prevent further abuse of the concept of conflicts of interest.

3. ORDINANCE OR POLICY

Consider a conflict of interest ordinance under RSA 31:39-a. As discussed previously, this type of ordinance may address only the specific subject matters listed in that statute and must be voted upon by the legislative body. However, it can be binding upon all officials and employees of the municipality. Such an ordinance can be particularly helpful in establishing some procedural rules regarding conflicts. For example, it often frustrates everyone when someone with a blatant conflict refuses to step down.

If an ordinance is difficult to pass, it may be worth considering a non-binding ethics code or policy. A non-binding policy can be adopted by the governing body and can bind municipal employees as part of a personnel policy, but it does not bind officials (even the governing body that enacts it). It can be worthwhile, however, because such a policy can provide clear guidance to all board members about what the board expects.

B. Replacing a Disqualified Member

1. LAND USE BOARDS

The law allows alternate members of a land use board to fill the shoes of a disqualified regular member. RSA 673:11 says that whenever a member is disqualified, the chair shall designate an alternate. It is in everyone's interest to identify conflicts as early as possible so that alternates can be notified before the meeting. A planning board does not lose any jurisdiction if the full membership is not present, as when a disqualified person steps down, so long as a quorum is still present. A simple majority of that quorum is sufficient to pass any vote over which the board has authority. In the case of a zoning board of adjustment, RSA 674:33, III, the concurring vote of any 3 members of the board shall be necessary to take any action on any matter on which it is required to pass.

2. SELECTPERSONS AND OTHER OFFICERS

Unlike land use boards, there are no alternates for selectpersons. However, in RSA Chapter 43, which covers hearings held by the select board and other officials for highway layouts and certain other proceedings specified by statute “for the purpose of deciding any question affecting the conflicting rights or claims of different persons” — meaning quasi-judicial matters as discussed above — there is a provision for appointing an alternate on a case-by-case basis. RSA 43:7 says that if any of the select board members or other officials is disqualified from participating in a specific matter, the remaining members of the board should appoint a replacement for the limited purpose of hearing that matter. The replacement should be “a qualified person who has theretofore holden the same office in the town, or, in the case of committees, by a new appointment.” The word “committees” refers to committees appointed by the select board. The replacement for a disqualified select board member must be a person who has previously held the position of select board member.

VII. REMOVAL FROM OFFICE

A. Appointing Authority

It should be emphasized that the power to appoint an official does not necessarily include the power to remove that official. In certain instances, such as in a town with a town manager, the power to appoint municipal employees under RSA 37:6, II carries with it the power of removal of such employees. *Marsh v. Hanover*, 113 N.H. 667 (1973). In other instances, the removal of appointed or elected officials is governed by statute. Such statutes include RSA 105:2-a (police chief); RSA 154:5 (fire chief); and RSA 41:16-c, RSA 41:26-d, and RSA 41:40 (removal of town clerk, treasurer, and tax collector, respectively, by the governing body), among several others.

B. Land Use Boards

Appointed land use board members can be removed under RSA 673:13 by the board that appointed them for “inefficiency, neglect of duty, or malfeasance in office.” Elected land use board members may be removed by the governing body, using the same legal standard. Any member of a Conservation Commission may be removed for cause by the appointing authority after a public hearing if requested. RSA 36-A:3. In *Williams v. Dover*, 130 N.H. 527 (1988), a member of the

Dover Planning Board allegedly violated city land use ordinances in his private capacity as his employer's representative. The city council removed him. The New Hampshire Supreme Court held that the removal was improper, noting that he had not, at any time, referred to or attempted to take advantage of his position on the planning board. The Court said:

Malfeasance sufficient under our law to warrant removal from office must have direct relation to and be connected with the performance of official duties. It does not include acts and conduct which, though amounting to a violation of the criminal laws of the state, have no connection with the discharge of official duties.

C. Select persons

There is no law specifically involving the removal of a select board member. However, any official can be removed for violation of the oath of office, under RSA 42:1-a. A violation of the oath of office includes a breach of confidentiality. The proper procedure for removal is by a petition to superior court. RSA 42:1-a.

D. Any Official

Under RSA 95:1, public officials are prohibited from making a contract with the municipality they serve to buy real estate or to sell or buy goods, commodities or other personal property if the value of the contract is more than \$200, unless the contract was subject to open competitive bidding. Violation is a misdemeanor, and upon conviction the official is removed from office pursuant to RSA 95:2.

VIII. SOCIAL MEDIA

Ethics and conflicts of interest have always been issues for local government. In the modern age, however, a whole new set of land mines have been created: social media. Never in history has it been so easy to make so many ethical mistakes, with such speed, in such a public way. New social media technologies provide dynamic, accessible ways for municipalities to communicate with the public. However, as with all communication, social media presents a number of legal issues municipalities need to recognize. It may be dressed up as something new, but most social media technologies present similar challenges for local officials as their more traditional counterparts.

A. Draw a Parallel

Compare new technologies to older, more familiar methods of communication. Blogs are informal online journals, similar to a municipal newsletter or a letter to the editor or column in a newspaper. Some authors permit the public to post comments on a blog as well, which is a bit like an electronic listserv or e-mail messaging board. Twitter is, essentially, a microblog limited to 280 characters. Social networking sites such as Facebook and LinkedIn are like a combination of many traditional communication methods: direct messaging (like e-mail), online chatting (like instant messaging), and posting comments on others' pages (like a message board). YouTube, Instagram, TikTok, and Flickr are places to post videos (like a cable channel) and photos (like a website or bulletin board).

Most municipalities have some experience with the legal issues involving traditional media. New communication methods are really no different, with one exception: speed. Therefore, it is

important to consider potential pitfalls of these exciting new tools *before* jumping into the quick-moving stream of social media.

B. Public v. Personal

No matter what the medium, municipal communication should be limited to official municipal business, such as notices, minutes, forms, information, alerts, contact information and ordinances. For example, a tweet might alert citizens that a snow emergency has been declared, that the polls have opened for elections, or that the town meeting warrant has been posted. Video of select board meetings might be posted or livestreamed on YouTube. The public works department's Facebook page might keep the public informed of the progress on a bridge reconstruction.

However, when officials and employees begin using these technologies for personal commentary, the unintended consequences can be significant. If an official discloses confidential information on a website, social media page, or any other way, he or she may face removal from office (RSA 42:1-a) and may expose the municipality to liability as well. If comments are defamatory (described in Section VII above), they may also result in liability for the municipality. Even comments that are merely inaccurate or misleading can tend to erode public confidence in municipal government and compromise a board's ability to govern effectively.

In addition, personal comments by any official can affect the legality of a board's decisions. The planning board and ZBA, for instance, are each required to hear testimony and to gather information at a public hearing on all applications before them. Each board member is supposed to remain impartial, and the board is not supposed to decide the case before it reaches the deliberation stage after the hearing has closed. This impartiality is required by statute and, in fact, any board member who has prejudged the case or who is unable to set aside personal bias is disqualified from participating in the hearing or decision for that matter. *See* RSA 673:14, I. If a disqualified member participated in a case, a court could vacate that decision and the board would have to start all over again. *See Appeal of Keene*, 141 N.H. 797 (1997). Even if the decision is upheld, the town or city may have to defend a costly legal challenge in court. Statements made by any official on a chat, social media page, e-mail, website, or other forum about individual applications or even general matters of interpretation of the zoning ordinance or local regulations can lead to real or perceived problems with prejudgment and bias. This can result in the unnecessary waste of the municipality's money, time and resources to defend and sort out those problems. Comments by a single member of a municipal board or committee could also create confusion about whether those comments belong to the member or to the entire board. Boards and committees act only by majority vote. *See, e.g.*, RSA 41:8 (a majority of select board is required to act). A single member should be very careful in expressing opinions, answering questions or providing explanations for official matters when he or she purports to do so on behalf of the entire board. Unless great care is taken to clarify when a person is speaking for a board and when that person is speaking solely for him or herself as an individual, these comments can create confusion among the public and be very misleading. On the other hand, as noted by the N.H. Supreme Court in an unpublished opinion *W. Robert Foley, Trustee of the W. Robert Foley Trust v. Town of Enfield*, No. 2017-0294 (decided February 2, 2018), an inquiry posted by a ZBA member on an electronic list serv that asked about whether a ZBA ruling might create a binding precedent for future cases was not found to be prejudicial to the interests of an applicant whose case was under consideration at the time of the list serve posting.

In a recent N.H. Superior Court decision, *Z-1 Express, LLC v. City of Manchester*, Hillsborough Superior Court – Northern District, Docket Number 216-2018-CV-00275 (October 29, 2019), an application was pending before the planning board for a conditional use permit for a gas station/convenience store. After the final evidentiary hearing, but before the board deliberated and made

a final decision, two members voiced opposition to the project on a social media site established by residents opposing the project. At the meeting when the board voted, one of the members who voiced opposition on social media was asked to recuse himself; he refused, and he voted at a later meeting to deny the application.

The Superior Court ruled that the member's failure to enter into and participate in deliberations with an open mind threaten the integrity of the deliberative process, and also undermined the public trust in the overall function of the planning board. The Court applied the *Winslow v. Holderness* rule and vacated the decision and remanded the matter back to the planning board for a new decision.

C. Is It Defamatory?

In New Hampshire, the tort of false light or defamation includes both oral (slander) and written (libel) defamation. Libel and slander are defined and discussed in Section V above. For purposes of social media, it is critical to note that *there is no specific privilege for local officials conducting town business*, so they generally are not protected from liability for making any defamatory statements during meetings or over the internet. However, it is important to note that a defamatory statement must be *about* the plaintiff, rather than just a generally insulting or politically incorrect statement. Comments of a more general nature, referring to broad groups of people rather than any person in particular, are probably not "defamatory" although they may tend to harm the credibility of the person making them.

Furthermore, when the public is permitted to comment or post on a blog, website or other medium, those comments might also be defamatory. The citizen who makes the comment may be liable, but the municipality might, too! By "publishing" these statements (that is, posting them on YouTube, Facebook, a blog, or a website) or, possibly, by failing to remove them, the municipality may also become liable for the defamatory statement in the same way it could be liable for rebroadcasting the video on the municipal cable channel.

D. Free Speech?

Some forms of social media involve exchanges of information between municipalities and citizens. A blog might be set up to accept public comments on an issue, or officials might have email or chat exchanges with citizens. These exchanges may need to be edited to avoid publishing defamatory statements, to keep the posts on the topic at hand, or to avoid obscenity or vulgarity.

However, editing and deleting posts by the public may inadvertently violate the First Amendment rights of free speech. When the federal First Amendment right to free speech applies, the inclusion of one viewpoint without equal opportunity for all other viewpoints, or the editing or rejecting of citizen articles based on content, might expose a town or city to liability. *See, e.g., State v. Hodgkiss*, 132 N.H. 376 (1989) (municipalities may regulate protected speech only in a content-neutral manner); *see also Bonner-Lyons v. School Committee of City of Boston*, 480 F.2d 442 (1973) (city distribution system may not be used to support and promote views of only one group, must provide equal opportunity for all groups to avoid violating free speech rights). A blanket prohibition of the views of any private citizens on a municipal blog or website is not likely to violate any citizen's First Amendment right to free speech. The First Amendment to the U.S. Constitution protects the rights of citizens to express their views in a "public forum" such as a commercial newspaper, a personal blog or website, a parade, or a sign. However, a town website, blog, or Facebook page is not ordinarily a public forum.

"[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Service v. Council of Greenburgh Civic Ass'ns*,

453 U.S. 114, 129 (1981). “The crucial question is whether the manner of expression is basically compatible with the normal activity of a particular place at a particular time.” *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

This means that some government sites are simply not open for expression the way that others are. See, e.g., *Adderley v. Florida*, 385 U.S. 39 (1966) (jails); *United States Postal Service v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114 (1981) (private mailboxes); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983) (interschool mail system).

A website or social media page is not a physical “location,” but if the same logic is applied, it seems unlikely it would be considered a public forum unless public expression were “basically compatible with the normal activity” of that medium. A municipal website or blog is a tool of the municipal government that should be intended to facilitate municipal business and would be limited generally to public purposes. When a town sets up and controls a website and refuses to allow hyperlinks to an opposing point of view, this constitutes government speech, and has been ruled exempt from First Amendment scrutiny under the government speech doctrine. *Sutcliffe v. Epping Sch. Dist.*, 584 F.3d 314 (1st Cir. 2009)

On the other hand, once a municipality intentionally opens the forum up for public expression, it may be a “designated” or “limited” public forum for First Amendment purposes. See, e.g., *Del Gallo v. Parent*, 557 F.3d 58 (1st Cir. 2009). A Facebook page might ask for public suggestions about saving energy in municipal buildings or feedback about the efficiency of a municipal service. It would be appropriate in that case to limit the public comments only to the stated subject. However, if comments opposing the governing body’s preferred plan were always edited out or if negative feedback were always rejected, a court might find that the municipality had discriminated based on the content of the speech, which is not permissible. See, e.g., *State v. Hodgkiss*, 132 N.H. 376 (1989) (municipalities may regulate speech only in a content-neutral manner). The municipality could, of course, still limit comments to a certain length, to a certain number per day or by any other content-neutral method. Permitting comments from the public on government social media outlets is something that should be considered carefully to balance the benefits with the possible ethical conundrums it may create.

E. Advocacy and Electioneering

One potential use of social media is to distribute information regarding local government initiatives, suggestions, proposals, and plans. Background information regarding warrant articles and other issues is likely to be of interest to voters, of course, and may be communicated in a variety of ways. However, the direct advocacy for or against a particular warrant article, candidate, or other measure should be avoided, regardless of the media through which it is communicated.

The extent to which local governments may use public funds and resources to advocate on behalf of a specific proposal or action is not entirely clear. The U.S. Supreme Court has determined that, under the U.S. Constitution, the government may use tax dollars to endorse its own policy measures without violating the First Amendment. *Johanns v. Livestock Marketing Ass’n*, 544 U.S. 550 (2005). A September 2009 decision of the U.S. District Court for the District of New Hampshire found that, in certain circumstances, it is permissible for a municipality to use its communication channels to express its own views through “government speech” which is exempt from the First Amendment. It may even be possible for the government to “speak” by selecting only certain speech of third parties to present and communicate through its website or other channel. See *Sutcliffe v. Epping*, 584 F.3d 314 (1st. Cir. 2009).

However, this area of the law is not yet fully settled in New Hampshire. A significant body of case law suggests that some government advocacy may go too far. When local officials spend tax dollars

to persuade the legislative body (that is, town meeting voters) to establish a policy in the first place, the answer from *Johanns* is much less clear. In addition, a variety of state and federal courts have long held that government officials may not spend public funds advocating or opposing a ballot measure unless they offer an opportunity for opposing views to be heard. See, e.g., *Bonner-Lyons v. School Committee of City of Boston*, 480 F.2d 442 (1st Cir. 1973); *Greenberg v. Bolger*, 496 F. Supp. 756 (E.D.N.Y. 1980); *Citizens to Protect Public Funds v. Board of Ed. Parsippany-Troy Hills TP*, 98 A.2d 673 (N.J. 1953). Even the Court in *Sutcliffe* observed “there may be cases in which a government entity might open its website to private speech in such a way that its decisions on which links to allow would be more aptly analyzed as government regulation of private speech.”

It is also important to note that RSA 659:44-a prohibits any town employee from electioneering while in the performance of his or her official duties, or to use government property, including but not limited to, telephones, facsimile machines, vehicles and computers, for electioneering. “Electioneering” is defined in RSA 652:16-h as:

. . . visibly displaying or audibly disseminating information that a reasonable person would believe explicitly advocates for or against any candidate, political party, or measure being voted. Electioneering includes, but is not limited to:

I. Wearing clothing or paraphernalia that displays a candidate’s name, likeness, or logo, a ballot measure’s number, title, subject, or logo, a political party’s name or logo, or any communication that a reasonable person would believe explicitly advocates for or against any candidate, political party, or measure, provided that a person eligible to vote or register to vote in the voting district who is unable to remove or cover clothing that explicitly advocates for or against any candidate, political party, or measure, may wear such clothing in the polling place while actively engaged in the process of registering to vote or while actively engaged in the process of voting.

II. Distributing or posting a card, handbill, poster, placard, picture, pin, sticker, circular, or any other form of communication that a reasonable person would believe explicitly advocates for or against any candidate, political party, or measure.

Violation of RSA 659:44-a is a misdemeanor. Therefore, no municipal employee should take part in publishing anything with municipal funds, property, or equipment that would be considered electioneering under this statute. RSA 659:44 also prohibits an election officer, defined in RSA 652:14, from electioneering while in performance of his official duties. RSA 659:43, I prohibits the wearing at a polling place of any pin, sticker, or article of clothing that is intended to influence the action of any voter within the building where the election is being held. Although RSA 659:43, I has not been addressed by the New Hampshire Supreme Court, in light of *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), NHMA recommends that RSA 659:43, I be narrowly interpreted to only prohibit the wearing of an item of political paraphernalia in a polling place that advocates for or against any candidate or measure on the ballot for that election. For instance, although a person could not wear a shirt that said “Vote for Bob Jones for State Representative” where Bob Jones was on the ballot, a voter could wear a shirt that says, “I support Good Education for Our Children.”

F. Administrative Burdens

One additional concern that should not be overlooked is the administrative burden that the use of social media can create. For example, if the select board creates a page to correspond with the public, that correspondence should be limited to municipal business. Someone would have to review every posting in advance to determine whether and to what extent the comments included personal or off-topic matter that should not be posted. This might be time-consuming and would almost inevitably raise legal questions requiring consultation with an attorney.

Furthermore, to the extent the First Amendment right to free speech applied, the editing or rejecting of postings based on content might expose the municipality to liability under the First Amendment. *See, e.g., State v. Hodgkiss*, 132 N.H. 376 (1989) (municipalities may regulate speech only in a content-neutral manner).

G. Suggestions:

Maintain Control. Unless the legislative body votes to vest control of social media in another board or official, the select board has ultimate responsibility for the use of social media. This responsibility includes decisions regarding which technologies to use, policies that will apply, and how to spend the money appropriated for this purpose. Municipal employees or officials who are delegated responsibility or permitted to use such technologies should be required to follow all policies established by the governing body.

Develop a Policy. While no law requires the governing body to create policies regarding the use of social media, it is highly advisable to do so. Websites, blogs, and all other social media can expose a municipality to liability. The best way to avoid these pitfalls is to have a carefully written policy for everyone to follow. Any such policy should be reviewed by the municipal attorney before it is formally adopted by the governing body, and then periodically reviewed with the attorney to see if adjustments need to be made. Don't be afraid to adjust the policies as appropriate.

Disclaimers Aren't a Silver Bullet. While a disclaimer may be informative, it is generally ineffective in reducing or eliminating a municipality's risk of liability. A website, blog, Facebook account, or other networking tool will be run or endorsed by the municipality and funded with municipal money. Since all these communication channels will be under the control of the governing body, and they will remain ultimately responsible for content and distribution, it is hard to see how a municipality could disclaim responsibility for that content. If a municipality wishes to include disclaimers, those disclaimers should be reviewed by the municipal attorney before they are posted to determine whether they will, in fact, be helpful.

CHAPTER FOURTEEN

TRUSTS, RESERVE FUNDS AND THE ROLE OF TRUSTEES

I. MUNICIPAL TRUSTS

A “trust” is defined as “a fiduciary relationship with respect to property in which one person is the holder of the title to the property, subject to an equitable obligation to use the property for the benefit of another.” *Restatement (Second) of Trusts, sec. 2* (1959). Stated another way, a trust is a relationship among three parties: (1) the donor, or person who initially owns the property and grants it subject to certain conditions; (2) the trustee, who receives the grant of property from the donor with the obligation to manage the property in accordance with the donor’s terms; and (3) the beneficiary, who receives the benefits of the property. The property may be money, real property or personal property of any kind.

A. Authority

1. RSA 31:19

RSA 31:19 provides:

Towns may take and hold in trust gifts, legacies, and devises made to them for the establishment, maintenance and care of libraries, reading rooms, schools, and other educational facilities, parks, cemeteries and burial lots, the planting and care of shade and ornamental trees upon their highways and other public places, and for any other public purpose that is not foreign to their institution or incompatible with the objects of their organization.

“Legacies” (money and other personal property) and “devises” (real property) are dispositions of property by means of a will.

RSA 31:20 – :21 are additional authorities for acceptance of cemetery and burial lot trusts.

Cities have the same rights and responsibilities as towns with respect to municipal trusts. There are procedural differences in the way cities accept trusts and choose trustees of trust funds.

2. LIMITATION ON PURPOSES

Under RSA 31:19, a town may hold a trust for any listed purpose or any other purpose for which a town may expend money. A town may not administer a trust for a private purpose, nor for a public purpose outside the scope of town authority. *Keene v. School District*, 89 N.H. 477 (1938) (when statute did not refer to “schools or other educational facilities” city could not hold trust to promote higher education).

3. CHARITABLE TRUSTS; OVERSIGHT BY OFFICE OF ATTORNEY GENERAL

All authorized municipal trusts are deemed to be “charitable trusts.” *Sargent v. Cornish*, 54 N.H. 18 (1873); *State v. Federal Square Corp.*, 89 N.H. 538 (1938). “Charitable trust” is defined broadly in RSA 7:21, II:

[A]ny fiduciary relationship with respect to property arising under the law of this state or of another jurisdiction as a result of a manifestation of intention to create it, and subjecting the person by whom the property is held to fiduciary duties to deal with the property within this state for any charitable, nonprofit, educational, or community purpose...[.]

Charitable trusts are subject to supervision, investigation and enforcement by the New Hampshire Attorney General, acting through the Director of Charitable Trusts. RSA 7:19 et seq. This office has dedicated a section of its website to these issues. Included are the forms which must be filed, as well as helpful information for local officials on the management of charitable trusts. <https://www.doj.nh.gov/charitable-trusts/municipalities.htm>

4. WHO CAN ACCEPT OR REJECT A DONATION?

This power resides with the legislative body unless the voters, through a warrant article, delegate their authority to specific public officials. RSA 31:19, I. The town meeting may authorize the select board, or town council, to accept trust funds without further action by the town meeting. RSA 31:19, II. The voters have the option to decide whether to grant this authority for a period of one year or indefinitely.

The town meeting may also delegate its authority to accept unanticipated funds to the select board. Unanticipated revenue is money applied for, accepted, and expended from the state, federal, or other governmental unit or a private source which becomes available during the fiscal year. In this case, the authority to accept is delegated unless and until it is rescinded by the voters through a subsequent warrant article. RSA 31:95-b.

Towns may also delegate their authority to accept private donations and gifts to the library trustees pursuant to RSA 202-A:4-c. In this case the authority is delegated unless and until it is rescinded by the voters through a subsequent warrant article. If the select board, town council, or library trustees are granted the authority to accept trust funds and/or unanticipated private funds, there are specific requirements which must be followed: money can only be accepted for the legal purposes for which a town may appropriate money, a public hearing may be required, and acceptance of the donation may not require the expenditure of other town funds except those funds lawfully appropriated for the same purpose. Once private trusts or donations are accepted, the administration of these funds is under the jurisdiction of either the trustees of trust funds or the library trustees depending upon the stated intent of the donor.

B. Creation of Municipal Trusts

1. OFFER OF PROPERTY BY DONOR SUBJECT TO CERTAIN CONDITIONS

The first step in the creation of a municipal trust, of course, is an offer of property to the town for a specified purpose, either by a living donor or through a will. The offer of the gift need not be in writing (except by will), but every effort should be made to have the terms of the trust reduced to writing to facilitate proper administration. An adequate written document will include:

- The name of the donor, date of the document and description of the property.
- A clear statement of the purpose for which the funds are to be spent.
- Any restrictions placed on the way the funds are to be invested.
- A statement of whether the principal, as well as the income, may be expended (important because only income can be expended unless the trust expressly allows expenditure of principal).

2. ACCEPTANCE BY MUNICIPALITY

RSA 31:19 refers to the power of “towns” to accept trusts, so the town meeting must exercise the authority. This can be done in any of three ways:

- a. **Specific warrant article.** Trusts can be accepted individually by votes on warrant articles identifying the trusts.
- b. **Annual delegation of authority to select board.** It used to be common for towns to annually include a warrant article to empower the select board to accept trusts under RSA 31:19 without further action of the town during the ensuing year.
- c. **Delegation indefinitely until rescinded.** Towns have the authority to adopt warrant articles granting the select board power to accept trusts without further action of the town indefinitely, until rescinded by another warrant article. RSA 31:19, II and RSA 31:19, III.
- d. **Cities.** Cities may accept trusts by the votes of their city councils or boards of aldermen, which are both the legislative bodies and governing bodies of cities. RSA 21:47-48

3. REFUSAL BY MUNICIPALITY

The city or town has the discretion to reject an offer of property in trust, where, for example, the difficulty of administering the trust would outweigh its benefits.

C. Change of Purpose of Municipal Trusts: The *Cy Pres* Doctrine

Where a trust is created for a charitable purpose, but for some reason it becomes impossible or impracticable to carry it out in accordance with its literal terms, the Superior Court or Probate Court (either of which has jurisdiction), using equitable powers, may modify the trust in order to carry out the intent of the donor as nearly as possible under the changed circumstances. RSA 498:4-a et seq.; RSA 547:3-d et seq. This is known as the doctrine of “*cy pres*,” an old French term meaning “as near as may be.” In *cy pres* cases, the state’s Director of Charitable Trusts is a necessary party who represents the public interest in the trust. Towns seeking to modify trusts by *cy pres* are well-advised to work closely with the Director of Charitable Trusts to achieve an appropriate result.

The standard for *cy pres* can be difficult to meet. For example, in *Boscawen v. Attorney General*, 93 N.H. 444 (1945), the town had a surplus of income from trusts to maintain individual cemetery lots and a shortage of funds for general cemetery care. The Court denied permission to use the excess income for general cemetery care because the town had not shown that the original intent of the single-lot trusts was impossible or impracticable to carry out, only that there was a shortage of funds for another purpose. In 1957, the legislature considered a bill to allow trustees of trust funds to divert excess perpetual care trust income to general cemetery care without court permission. In *Opinion of the Justices*, 101 N.H. 531 (1957), the Supreme Court ruled that the bill would unconstitutionally violate the separation of powers by invading the courts’ authority over trusts. Finally, the legislature enacted RSA 31:22-a in 1977, which permits the trustees of trust funds to *petition* the court for *cy pres* on the issue. The statute requires proof that the excess income will not be needed in the future for each lot and that diversion of the income for general maintenance is in the public interest. This statute has not been tested in the Supreme Court.

RSA 498:4-a requires a municipality to hold a public hearing prior to filing a petition in court for *cy pres* with respect to the proposed sale or change of use of land or buildings held under a charitable trust. RSA 498:4-a, II.

II. ADMINISTRATION OF MUNICIPAL TRUSTS

After a trust is accepted by the municipality, the property passes to the control of the trustees of trust funds.

A. Trustees of Trust Funds

1. COMPOSITION AND ELECTION

Municipal trusts are administered by a board of three (or, if the municipality votes to do so, five) elected trustees. RSA 31:22. The trustees hold three-year, staggered terms. Vacancies are filled by appointment by the select board for the remainder of the term. In cities the method of selection and length of term is controlled by ordinance.

2. SINGLE-TRUSTEE OPTION

If the total amount of trust funds is less than \$15,000, the town may vote to have a single trustee of trust funds. RSA 31:23.

3. BOOKKEEPER

The trustees elect one of their number as bookkeeper, whose duties are to keep the records and books for the trustees and require vouchers before making disbursements of funds. RSA 31:22. The town meeting determines compensation of the bookkeeper. RSA 31:35.

4. BOND REQUIRED

A bond is required of all trustees of trust funds, paid for by the town. RSA 41:6. The Department of Revenue Administration regulates such bonds.

B. Custody of Trust Funds

1. GENERAL RULE

The trustees of trust funds have custody of municipal trust funds, RSA 31:25; RSA 31:37 (including those of school districts and village districts). In *Drury v. Sleeper*, 84 N.H. 98 (1929), the New Hampshire Supreme Court ruled that the trustees had custody of a cemetery trust fund even though the will expressly appointed the select board, reasoning that the testator must have intended that the proper officers of the town hold and administer the trust.

2. EXCEPTIONS

There are limited exceptions, which entrust custody of trust funds to other boards:

- Library trustees are permitted to have custody of library trusts when the donor so specifies. RSA 202-A:22 – :23. (See also section V(C) of this chapter.)
- Where a school or village district includes parts of two or more towns, the district voters choose which town's trustees will hold the district's trust funds. RSA 31:31.

C. Trustees' Duty to Administer Trust Funds

1. MEANING OF 'ADMINISTER'

The term "administer" means to manage, direct or superintend the affairs of the trust. Synonyms are "manage," "conduct," "give out," "distribute" and "furnish." *Opinion of the*

Attorney General (Op. A.G.) 65-16 (1965).

2. FIDUCIARY DUTY

Trustees of the trust funds must act in the best interest of the trusts. They have a duty to exercise due care to manage the trusts in accordance with directives of the donor and the controlling statutes.

3. PROFESSIONAL ASSISTANCE

The trustees are authorized to engage banks and brokerage firms to assist in management and investment of trust fund resources and bookkeeping. RSA 31:38-a.

4. EXPENSES

The ordinary expenses of the trustees are incidental town charges. RSA 31:24. This means that an appropriation for these amounts, plus any amount to be paid to the bookkeeper per RSA 31:35 should be sought in the annual operating budget. An exception to this is any expense for professional assistance sought from banks and brokerage houses. These expenses are charged against the funds of the trusts involved. RSA 31:38-a, IV.

D. Investment of Trust Funds

1. INVESTMENT POLICY REQUIRED

The trustees of trust funds must formally adopt an investment policy to guide all investments made by them (or their agents) with any trust funds in their custody. The investment policy must be reviewed and confirmed at least annually. RSA 31:25.

2. LEGAL INVESTMENTS

RSA 31:25 lists the types of investments of municipal trust funds that are deemed prudent for trustees of trust funds to make. This list is somewhat broader than the municipal treasurer's options for investments. RSA 41:29.

a. **Types of legal investments.** Permissible investments include:

- Deposits in any federally or state-chartered bank or credit union authorized to do business in this state.
- Bonds or notes of the State of New Hampshire or a political subdivision.
- Bonds, notes or other obligations fully insured by the U.S. Government.
- Stocks and bonds that are legal for investment by a state-chartered bank. Municipalities may invest its funds in any federally insured bank, even one out of state, as long as it meets the statutory requirements.
- Participation units in the Public Deposit Investment Pool (PDIP) established under RSA 383:22.
- Shares of certain mutual funds whose prospectuses contain investment policies consistent with the investment policy of the trustees of trust funds.

b. **Single trustee.** If the town has a single trustee under RSA 31:23, the list of investment options is the same with two exceptions: stocks and bonds legal for investment by a bank are not permitted. However, the single trustee may invest in a common trust fund established by the New Hampshire Charitable Foundation. RSA 31:26.

c. **Security of funds.** Any bank or other entity receiving funds for investment must offer the trustees the option of having the funds secured by collateral to reduce the risk of

loss of the funds. RSA 31:25.

3. NONLEGAL INVESTMENTS

In two opinions issued in the mid-1960s, the Attorney General advised that trustees of trust funds are obliged to sell securities promptly and prudently when they are removed from the legal list. *Op. A.G. 65-40* (1965); *Op. A.G. 66-2* (1966). RSA 31:25-a, RSA 31:25-b and RSA 31:25-c now govern the treatment of securities that are removed from the legal list after purchase. Such securities may be retained on certain conditions:

- The security was legal when purchased.
- The security remains a “prudent” investment under RSA 32:25-b (“one which a prudent man would purchase for his own investment having primarily in view the preservation of the principal and the amount and regularity of the income to be derived therefrom”).
- The total market value of the retained nonlegal securities does not exceed 20 percent of the total market value of all the investments held by the trustees.
- An annual report of such retained securities is made as an addendum to the annual report of the trustees to the Attorney General under RSA 31:38.

In *Op. A.G. 66-2* (1966), the Attorney General specified that investment in growth stocks with a systematic withdrawal plan is prohibited because such income includes capital gains, which is deemed to be an invasion of principal.

4. COLLECTIVE INVESTMENTS

Under RSA 31:27, trustees of trust funds may combine property of various trusts in their care into one or more common trust funds for efficiency, unless specifically prohibited by a trust instrument or court order. RSA 31:28. The interests of each trust must be accounted for separately, and profits and income must be allocated at least annually based on the trust’s proportionate share of the market value of the entire investment at the time of contribution or withdrawal. RSA 31:29.

5. COMPOSITION OF PORTFOLIO

The statutes do not require any particular balance of stocks and “safer” investments in the portfolio of a town’s trust funds, *Op. A.G. 66-2* (1966), except that, under RSA 31:27, no more than ten percent of a common trust fund or \$10,000, whichever is greater, may be invested in any one organization (excluding bank deposits, government bonds, Public Deposit Investment Pool units and certain mutual funds).

6. PRUDENT INVESTOR RULE

RSA 31:25-d authorizes the trustees of trust funds to invest under the provisions of the “prudent investor rule” applicable to private trustees. To invest under this standard, trustees must notify the Attorney General in writing and must employ the services of the trust department of a bank or a brokerage firm to provide investment advice and assistance under RSA 31:38-a, III.

E. Expenditure of Trust Funds

Under RSA 31:32, the trustees of trust funds pay out trust funds to the agents designated in the trust or the officers designated by statute for the purpose (for example, cemetery trustees) to be expended for the object of the trust. If no such agents or officers are designated, the trustees of the

trust funds, themselves, make the expenditures. Under RSA 31:31, the governing bodies of school and village districts fulfill this role. Payments require proper vouchers from the bookkeeper. RSA 31:22. Where the trustees have reason to believe that the funds will be used for an improper purpose by the designated officer, they are justified in withholding payment. *Op. A.G. 65-16* (1965). This does not mean that the trustees may substitute their judgment on the use of the funds for that of the officer designated to expend the funds. For example, if the select board is designated to select the recipient of a scholarship award, the trustees may not withhold payment if they disagree with the recipient selected.

F. Reports and Audits

The trustees of trust funds have the following duties to compile and make available information concerning the trust funds in their custody:

- A copy of the investment policy must be filed annually with the Attorney General. RSA 31:25.
- Nonlegal securities retained under RSA 31:25-a must be reported to the Attorney General annually as an addendum to the annual report. RSA 31:38.
- An annual audit must be performed based on the trustees' report of the securities held, and the receipts and expenditures with proper vouchers. RSA 31:33, I.
- The annual reports of the trustees and the auditor shall be printed in the town report, which may be in summary form if so voted by the legislative body. RSA 31:33, II.
- In the year in which a town accepts property in trust, the donors and values of the gifts, legacies and devises shall be printed in the annual report. RSA 31:33, III.
- The trustees shall keep a record of all trusts, open to inspection by all persons in the town. RSA 31:34.
- A copy of the trustees' and auditor's reports shall be filed annually with the Attorney General. RSA 31:38.
- The DRA Form MS-9, detailing the identity of the trusts, investment vehicles, principal and income, shall be filed annually with the town, the DRA and Attorney General. N.H. Admin Code Rev 1707.11. Trust Fund reporting has now been automated through the Trustee of Trust Funds Portal (NHTTF). Login access and Support information can be found at <https://www.doj.nh.gov/charitable-trusts/municipalities.htm>.

III. RESERVE FUNDS

Trustees of trust funds are also charged with custody, investment and expenditure of reserve funds created by action of the local legislative body and funded with appropriations; that is, capital reserve funds under RSA chapter 34 (cities) and RSA chapter 35 (towns), and expendable trust funds under RSA 31:19-a. It is beyond the scope of this chapter to discuss these budgetary devices at length.

They are discussed in more detail in the chapters discussing budgeting and town meeting procedure as well as other NHMA publications related to those topics.

A. Capital Reserve Funds

Capital reserve funds, as the name suggests, were originally intended as a means for municipalities to appropriate and save money in anticipation of certain capital acquisitions. Under RSA 34:5, :6

(cities) and RSA 35:9, :10 (towns), the trustees of trust funds have custody and investment responsibility for these funds. The permissible scope of investment is somewhat narrower than for municipal trusts under RSA 31:25. This does not mean that the trustees may substitute their judgment on the use of the funds for that of the officer designated to expend the funds. For example, if the select board is named as agents to expend a capital reserve fund for purchase of a fire truck, the trustees could withhold the disbursement if the select board sought to purchase a computer but could not withhold payment because they disagree with the timing of the fire truck purchase or disagree with the specifications of the truck.

B. ‘Expendable’ Trust Funds

In 1983 RSA 31:19-a was enacted to allow municipalities to appropriate money into non-lapsing accounts designated as trust funds for operation and maintenance functions. These accounts became known as “expendable trust funds” (ETFs) because the statute allows both the original appropriations and accrued interest to be expended by the appointed agents. RSA 31:19-a, I. Expendable trust funds are subject to the same provisions concerning custody, investment and expenditure as capital reserve funds. RSA 31:19-a, III. Appropriations into ETFs are not to be commingled with privately donated trust funds for the same purpose. RSA 31:19-a, IV.

C. Reserve Funds, Generally

The distinction between “operation and maintenance” and “capital” expenditures created problems for several years, until 1995 when the legislature amended RSA 31:19-a, III and enacted RSA 34:1-a and RSA 35:1-c to provide that the legality of such a fund shall not be affected by its designation as “trust,” “reserve,” “capital reserve” or any other designation. The scope of RSA 31:19-a was widened to include any valid purpose for which a municipality may spend money. Now it does not matter which statute is used to create a nonlapsing reserve fund.

IV. CEMETERY TRUSTEES

Cemetery trustees do not serve as trustees of the municipality’s cemetery trust funds. Rather, they operate and maintain the cemeteries, expending a combination of municipal appropriations and income from the cemetery trust funds held by the trustees of trust funds.

A. Composition of Cemetery Trustees

1. CITIES

In cities the method of selection and term of office are set by ordinance. RSA 289:6.

2. TOWNS, GENERALLY

RSA 289:6 calls for an elected board of cemetery trustees of three members unless the town opts to have five members. Terms are staggered and are for three years. Vacancies are filled by appointment by the select board for the remainder of the term. The governing body can also appoint up to two alternate members of a cemetery board of trustees upon recommendation of the board for one-year terms. RSA 289:6, I.

3. SELECT BOARD

Town meeting may vote to delegate the powers and duties of the cemetery trustees to the select board. RSA 289:6, II-a.

4. TOWN MANAGER

Towns with town manager form of government may vote to delegate the powers and duties of the cemetery trustees to the town manager. RSA 37:6, VII(i).

5. CHARTER PROVISIONS

Towns with a municipal charter form of government may specify in the charter the procedure for election or appointment of cemetery trustees. RSA 289:6, IV.

B. Powers and Duties of Cemetery Trustees

1. OPERATION AND MAINTENANCE

Every municipality must provide one or more suitable cemeteries, whether by providing a cemetery itself or by entering into agreements with adjacent municipalities or nonprofit entities to provide, one or more suitable cemeteries. RSA 289:2. The operation and maintenance of all cemeteries owned and maintained by the municipality shall be in the charge of the cemetery trustees.

2. REGULATIONS

In the absence of regulations established through town meeting action, the cemetery trustees shall adopt regulations for the management of the cemeteries. RSA 289:2; RSA 289:7.

3. FINANCIAL AUTHORITY

The cemetery trustees prepare annual budget requests, expend the money appropriated for cemetery purposes and expend the income from cemetery trusts. Appropriations and trust income may not be commingled. RSA 289:7, I.

4. PREPARATION OF LOT DEEDS

The cemetery trustees prepare deeds for the governing body to sign. RSA 289:7, I(e).

5. APPOINTMENT OF CEMETERY CUSTODIAN

The cemetery trustees may appoint a custodian or sexton to supervise the work done in the cemeteries. RSA 289:7, II.

6. OTHER PROVISIONS BY SPECIAL LEGISLATION

Variations in the powers and duties of cemetery trustees may occur by special legislation. RSA 289:7, I. For example, RSA 289:14-b, passed in 2018, authorizes cemetery trustees to provide information about the location of historical burial grounds and cemeteries to non-governmental organizations for inclusion in their online and other databases.

C. Role of Trustees of Trust Funds

The trustees of trust funds administer the cemetery trust funds under RSA 31:19 et seq. When available, trust fund income is transferred to the cemetery trustees in response to vouchers presented by the cemetery trustees showing the proper purpose for which the money is to be spent. RSA 289:7, I(d).

V. LIBRARY TRUSTEES

With certain exceptions, the library trustees do not administer the municipality's library trust funds. Like the cemetery trustees, the library trustees' primary function is operation and maintenance of public library services and property.

A. Composition of Library Trustees

1. CITIES

In cities, the trustees of a public library are elected as provided in the city charter. RSA 202-A:8. Vacancies shall be filled by the appointing authority, and the appointing authority may appoint up to three alternates. The library trustees may recommend names for vacancies and alternates. RSA 202-A:10. Where a condition of the trust creating the library calls for private trustees, the city council shall, nevertheless, select a public trustee for a three-year term. RSA 202-A:8.

2. TOWNS

In towns, the board of library trustees shall consist of any odd number of members that the town may decide to elect. Terms are staggered and are for three years. Vacancies are filled by appointment by the select board unless the town meeting provides otherwise. RSA 202-A:6; RSA 669:75.

B. Powers and Duties of Library Trustees

1. OPERATION AND MAINTENANCE

The library trustees are the governing board of the library. RSA 202-A:2, II. The library trustees have the entire custody and maintenance of the library and all related property except trust funds held by the town. RSA 202-A:6.

2. REGULATIONS

The library trustees shall adopt rules and regulations to transact its business and govern the library. RSA 202-A:11.

3. FINANCIAL AUTHORITY

The library trustees expend annual appropriations, unanticipated funds from government and private sources, money from income-generating equipment, and income from library trust funds. RSA 202-A:11, III; :4-c; :6; :11-a; :22.

4. PERSONNEL AUTHORITY

The library trustees hire and remove the public librarian and other employees of the library. RSA 202-A:15 – :17.

5. BUDGET PREPARATION

The library trustees shall prepare an annual budget indicating what support and maintenance of the free public library will be required out of public funds. The budget is submitted to the "appropriate public agency" of the municipality. In a town with an official budget committee, that means to the budget committee. A separate budget request shall be submitted for new construction or capital improvements to an existing library property. RSA 202-A:11, II.

C. Role of Trustees of Trust Funds

The trustees of the trust funds have custody and control of the library trust funds, RSA 202-A:22, except when the donor specifies that the library trustees themselves should administer and invest.

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