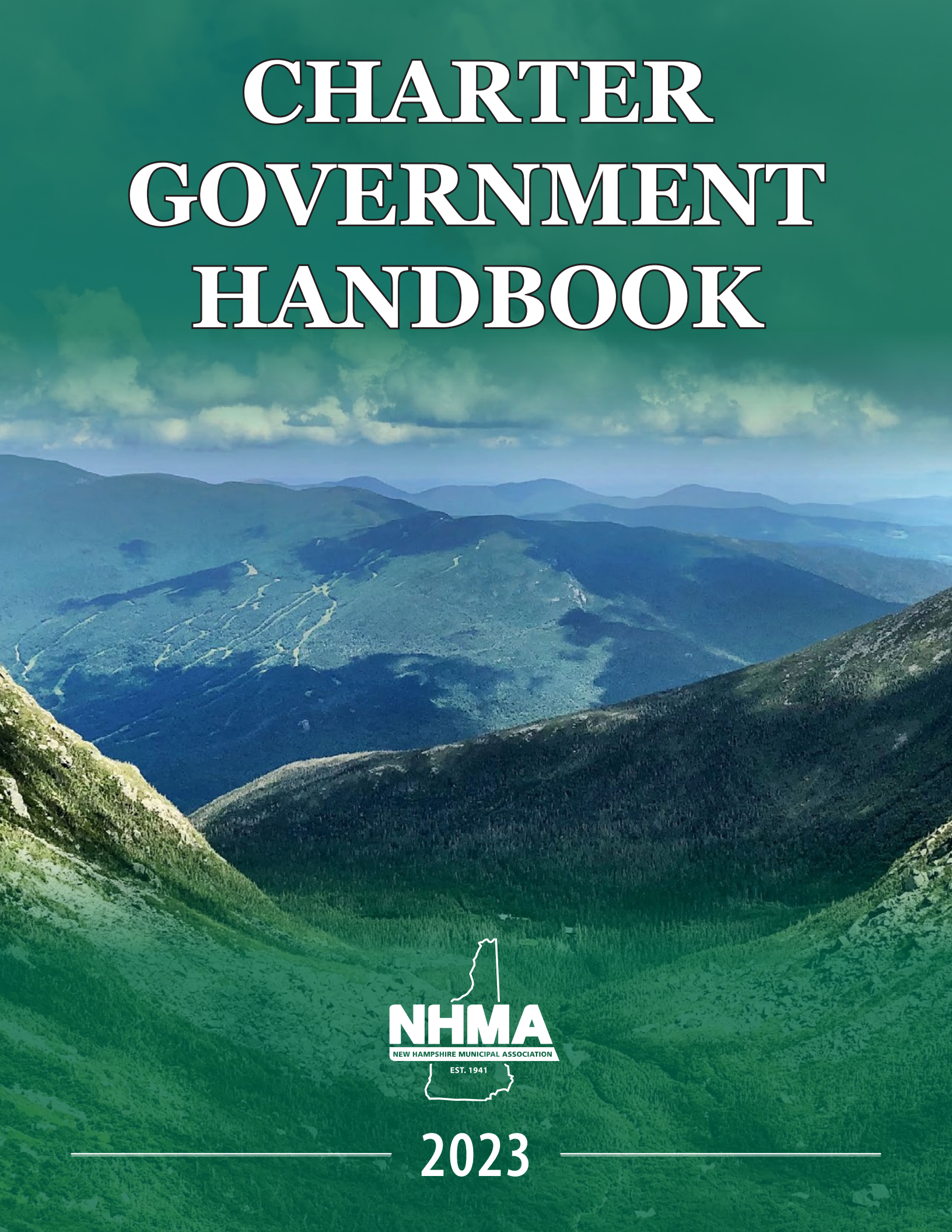
CHARTER GOVERNMENT HANDBOOK



NHMA
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INTRODUCTION

CHARTER GOVERNMENT HANDBOOK 2023 EDITION

The information presented here is only a brief overview of selected topics important to effective municipal governance and is not intended as legal advice on a particular issue. While the topics in this guidebook offer an introduction to New Hampshire municipal government, they do not include the details of individual charter provisions, which are vital to much of what officials do in their cities and towns with charters. Therefore, the guidebook is not a substitute for consulting with your municipal attorney or calling on NHMA's Legal Services Attorneys or Government Affairs Counsel. Other NHMA publications are available to provide you with more in-depth information on specific areas of municipal law, such as *A Hard Road to Travel* and *New Hampshire's Right-to-Know Law*. Other training opportunities on a wide range of topics are also available throughout the year.

NHMA Legal Services attorneys provide general legal advice to municipal officials. Attorneys are available to answer your legal inquiries by telephone, email, or mail. The attorneys also provide a variety of educational workshops and training materials for local officials; these resources are advertised on our website, in *New Hampshire Town and City* magazine, and in *Newslink*, our bi-weekly electronic newsletter. We're also available to bring individualized programs to your area and welcome your invitation to do so.

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 and through their participation in NHMA's legislative policy process. In addition, NHMA publishes materials related to legislative issues, including the *Legislative Bulletin*.

We hope you find these reference materials helpful as you carry out your duties as an elected town or city official. We hope serving your municipality brings its rewards, 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 case law) is just as legal and binding on the municipality and its officials as are statutes. This chapter addresses only New Hampshire state law, but keep in mind that municipalities are also subject to applicable federal statutes, administrative regulations, and case law.

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 of 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.

The federal statutes are codified in the United States Code (U.S.C., or U.S.C.A. for the annotated code).

B. Legislation

The state legislature has its own system for identifying bills that are being deliberated 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 find out where to locate 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, eff. July 9, 2005.

2008, 229:2, eff. Aug. 19, 2008. 2009, 31:2, 3, eff. July 14, 2009. 2010, 39:1, 2, eff. July 17,

2010. 2011, 164:1, 2, eff. Aug. 13, 2011. 2013, 270:2, eff. Sept. 22, 2013.

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. 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 your municipality 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/nhtoc.htm**, 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 municipality 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. Town of Salem, 173 N.H. 345 (2020)

- "*Union Leader Corp. v Town of Salem*" is the title of the case;
- "Union Leader Corporation" is the name of the plaintiff (the person or entity who originally brought the lawsuit);
- "Town of Salem" is the defendant (the one who was sued), in this case, the Town of Salem;
- "173" 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.);
- "345" is the page number in volume 173 on which the opinion begins; and
- "(2020)" 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 remanded") or losing ("affirmed").

Throughout the year, NHMA publishes summaries of cases that are of importance to municipalities. Theses case summaries are included in *Newslink*, NHMA's biweekly electronic newsletter to members, and are published on the "Court Updates" page of the NHMA website. Orders and Opinions can also be accessed at the Court's website: **https://www.courts.nh.gov/our-courts/supreme-court/orders-and-opinions**.

F. Administrative Rules

Administrative rules, also referred to as regulations, are also binding on the municipality 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 **http://www.gencourt.state.nh.us/rules/about_rules/listagencies.aspx**. 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 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. From the homepage, select the dropdown menu for "Government" and then 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, select the same dropdown menu for "Government" and then choose "NH State Legislature." The state website also provides information on all aspects of state government. In addition to state agencies such as the Office of Planning and Development, Department of Business and Economic Affairs , links on the state website 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.

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. These sites include those sponsored by Cornell University (**https://www.law.cornell.edu/lii/about/about_lii**) and Emory University (**http://library.law.emory.edu/electronic-resources/electronic-resources-free.html**), which can be located with a general search engine. You will also locate valuable resources for general legal research (**https://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.

III. 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, U.S. Supreme Court,* 569 U.S. 251 (2013)**

  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 New Hampshire Consumer Protection Act (RSA 358-A:2) for failing to comply with the requirements of RSA 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 262 was preempted by federal law, and therefore it could not be the basis of a Consumer Protection Act claim. New Hampshire Courts 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 New Hampshire 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)**

  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. 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 New Hampshire 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 interstate 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 sevenor 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 strictly under state and federal constitutional guidelines, and invalidated as contrary to the general welfare of all citizens.

- ***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 Department of Environmental Services 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 or not several provisions of the town's zoning ordinance are implicitly preempted by RSA chapter 149-M and administrative rules of the Department of

  Environmental Services. 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 as long as 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 RSA155:64 – :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 city 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.

- ***Seacoast Motorcycles, Inc. v. North Hampton,* No. 218-2010-CV-626 (December 14, 2011)**

  Although this Rockingham County Superior Court opinion is only binding on the parties involved, it is instructive regarding preemption of local regulation of motorcycle noise. Here, the judge examined a town ordinance prohibiting the operation of motorcycles 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 judge 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 judge applied the concept of "implied preemption" and permanently enjoined the town from enforcing the ordinance. The town did not appeal.

CHAPTER TWO

MUNICIPAL CHARTERS

I. HISTORY OF THE CHARTER FORM OF GOVERNMENT IN NEW HAMPSHIRE

The history of city charters in New Hampshire is worth knowing because it helps with analysis and understanding of current charters, many of which are a combination of special acts of the legislature and locally enacted revisions and amendments adopted from time-to-time under various enabling statutes.

Early charters were special acts of the legislature, each tailored for the particular needs of the city. Charter amendments were made periodically by additional special legislation.

RSA Chapter 49-A, enacted in 1963, created a local option to enable cities to draft and amend their own charters by a procedure that ultimately required local voter approval by referendum. RSA Chapter 49-A provided a choice of a mayor-aldermen plan or a councilmanager plan and specified many required features of the city government, leaving the details in some instances to local choice.

The adoption of Part 1, Article 39 of the New Hampshire Constitution in 1966 ensured that the legislature could not thereafter change a city's form of government without approval of the voters. (The legislature still can pass special legislation affecting the form of government, provided the measure is subject to approval by the voters of the city at a referendum.)

In 1979, RSA 49-A was repealed and replaced with RSA Chapter 49-B. RSA 49-B gave cities choices of mayor-board of aldermen, mayor-council and city council-manager forms, but without a detailed framework. Originally, RSA 49-B:11 provided that the statute should be liberally construed, and RSA 49-B:8 provided that any municipality by ordinance could exercise any power or function that the "legislature has power to confer upon it." At that point, it appeared that the cities had been granted a considerable measure of home rule and latitude in structuring their own forms of government.

In 1988, RSA Chapter 49-B was tightened. Section 8 was amended to limit municipal power to what had been "granted by general law." Section 11 was repealed and Section 1 amended to provide that the Chapter would be "strictly interpreted."

Then, in 1991, RSA Chapter 49-C was enacted to reimpose a framework for city government with a limited menu of choices for local variation (quite similar to former RSA Chapter 49 A). RSA Chapter 49-B was limited to controlling charter adoption, revision and amendment procedures.

In summary, the legal authority for charters has evolved as follows:

- Before 1963—Special acts of the legislature
- 1963 to 1979—Local option with detailed framework (RSA 49-A)
- 1979 to 1988—Local option with apparent wide latitude (RSA 49-B)
- 1988 to 1991—Local option with reduced latitude (RSA 49-B amended)
- 1991 - Local option with detailed framework (RSA 49-C)
- 2011 - Authorizing Tax Cap adoption by Charter Towns & Cities (2011 NH Laws Chapter 234)

- 2014 - Defining the manner of adoption, revision & amendment of Charters
- (2014 NH Laws Chapter 292)
- 2016 - Modifying the procedure for Charter amendment (2016 NH Laws Chapter 224)

In analyzing a charter provision, it can be helpful to know when and under what power it was adopted. In recent years the New Hampshire Supreme Court has narrowly construed the scope of power that may be exercised through municipal charter amendment.

II. NEW HAMPSHIRE SUPREME COURT DECISIONS RELATED TO MUNICIPAL CHARTERS

A. Limit of Charter Amendment Authority

***Town of Hooksett v. Baines,* 148 N.H. 625 (2002): A Town Charter may not impose term limits on elected municipal officials contrary to state election laws.**

- The purpose of RSA Chapter 49–B is to implement the home rule powers recognized in Part I, Article 39 of the State Constitution by authorizing a municipality to adopt a form of government that best addresses its local needs.
- RSA Chapter 49–B provides the statutory framework through which cities and towns may amend their actual forms of government, and grants them the power necessary to carry out such changes.
- RSA Chapter 49–B in no way provides or suggests that the towns, cities or other subdivisions of this State should have the right to exercise supreme legislative authority.
- RSA 49-B:1 expressly provides that its provisions shall be strictly interpreted to allow towns and cities to adopt, amend, or revise a municipal charter so long as the resulting charter is neither in conflict with nor inconsistent with the general laws of the State or the NH Constitution.
- Hooksett could not therefore adopt term limits for elected officials.

***Girard v. Allenstown*, 121 N.H. 268 (1981): Towns do not have the authority derived from RSA Chapter 49-B to adopt a rent control ordinance.**

- The expressed legislative purpose of RSA Chapter 49-B was to implement the home rule powers granted to municipalities by Art.39, Pt. 1 of the Constitution of the State of New Hampshire.
- Neither RSA 31:39 nor RSA Chapter 49-B gives towns the authority to adopt and enforce a rent control ordinance; therefore Allenstown could not adopt a rent control ordinance.

***Moriarity v. City of Nashua; Teeboom v. City of Nashua*, 172 N.H. 301 (2019): Spending cap in charter must have override provision, in accordance with RSA 49-C:33, I(d).**

- Nashua's city charter includes a spending cap, which requires annual city expenditures not to exceed a yearly percentage increase.
- In 2011, the legislature amended RSA Chapter 49-C to require a charter with a tax cap to include an override provision: a supermajority of the elected body can vote to "override" the tax cap. RSA 49-C:33, I(d). In addition, the legislature specifically authorized spending caps on a prospective basis and sought to ratify and declare valid other spending caps adopted prior to 2011, like Nashua's.
- The superior court ruled that any spending cap that does not contain an override provision impermissibly restricts the elected body's authority to adopt a budget. Because Nashua's charter did not include an override provision, the superior court judge ruled that Nashua's spending cap violated state law and was therefore unenforceable.
- The NH Supreme Court affirmed the trial court's opinion that the City's spending cap was unenforceable because it did not contain an override provision.

B. Limitation on Actions by Legislature to Modify Local Form of Government

***Opinion of the Justices (Weirs Beach)* 134 N.H. 711 (1991): A legislative proposal to permit the creation of a new town out of the existing boundaries of the City of Laconia was not a change to the local form of government. The alteration of city boundaries proposed by legislation did not fall within the constitutional provisions of NH Const. Pt. 1, Art. 39 and therefore a referendum on the proposed boundary change was not necessary.**

- NH Const. Pt. 1, Art. 39 provides that no law changing the charter or form of government of a particular city or town shall be enacted by the legislature except to become effective upon the approval of the voters of such city or town by referendum.
- This constitutional provision also provides that the legislature may authorize cities and towns to adopt or amend their charters or forms of government in any way which is not in conflict with general law, provided that such charters or amendments shall become effective only upon the approval of the voters of each such city or town on a referendum.

***Sedgewick v. City of Dover*, 122 N.H. 193 (1982): Legislative action to remove City of Dover's authority to own and operate a hospital did not change the form of government and did not require approval by Dover's voters.**

- Dover was granted authority by the legislature in 1905 to accept a legacy and erect and operate a hospital.
- The Dover City Charter was amended by the Legislature 1929 to include the authority granted by general legislation in 1905 to operate the hospital.
- In 1981 the Legislature enacted a general law that changed the hospital's status from a quasi-municipal entity to a non-profit and that legislative act did not provide for a referendum vote by the Dover electorate.

- The removal of the City's power to operate the hospital did not confer additional powers on the City of Dover, hence the 1981 enactment was not a change in the City's form of government, and therefore did not fall within the restrictions of NH Const. Pt. 1 Art. 39 requiring approval of the change of ownership of the hospital by the city's voters.

C. Charter Amendment vs. Charter Revision

***Albert v. City of Laconia*, 134 NH 355 (1991): Changing the number of councilors and providing for the election of a mayor at-large was properly done through the amendment process rather than the charter revision.**

- Laconia received a referendum petition seeking an amendment to the city charter that reduced the number of city councilors by eliminating at-large seats, limiting the number of councilors to the number of city wards, and providing for the election of a mayor to be selected at large by popular vote.
- Aggrieved citizen challenged the charter changes as being so fundamental that it should have been brought forth using the procedure for a charter revision as opposed to a charter amendment.
- Under RSA Chapter 49-B the amendment process is directed toward specific changes to a city charter, whereas the revision process is less specific and contemplates the possible need for a general, more fundamental, change in a city's governmental structure.
- Amendment implies continuance of the general plan and meaning of the law, with corrections to better accomplish its purpose. Basically, revision suggests fundamental change, while amendment is a correction of detail.
- Since the change in number of councilors and providing for the election of a mayor at-large was not such a fundamental reexamination of Laconia's form of government, even though the changes were significant, use of the amendment process was proper.
- A question was also raised as to whether the amendment violated the single subject limitation found in RSA 49-B:5.
- The NH Supreme Court relied upon a ruling by the Supreme Court of Wisconsin that concluded that in order to constitute more than one amendment, the propositions submitted must relate to more than one subject, and have at least two distinct and separate purposes not dependent upon or connected with each other.
- The amendment proposed for the Laconia Charter was deemed to address a single concern: reduction in the number and voting power of the at-large elected councilor seats, which, in turn, would vest greater voting power in the city's ward councilors. Even though more than one section of the charter was amended, they were all necessary for accomplishing the amendment's single and clearly stated goal.

D. What Are Permissible Charter Amendments?

***Harriman v. City of Lebanon*, 122 N.H. 477 (1982): It is permissible for a municipal charter to include an initiative and referendum process.**

- Petitioners sought to amend Lebanon's City Charter to add initiative and referendum.
- NH Supreme Court concluded that binding initiative does not run afoul of RSA Chapter 47 or RSA 44:3. A charter providing for citizen initiative or referendum can exist in a municipality with a city council-city manager form of government as long as the initiative petition neither intrudes into matters reserved for the city council under RSA Chapter 47, nor contravenes the general laws or constitution.
- However, once adopted, an initiative and referendum process in a local charter could not be used to amend or alter the city charter. Rather, all charter alterations and amendments must be adopted in accordance with RSA Chapter 49-B.

***Appeal of Kevin Barry*, 143 N.H. 161 (1998): City could not adopt a charter amendment that modified state law with regard to the operation of its retirement system.**

- City of Manchester adopted a charter amendment that purportedly amended the provisions of the City's retirement system that authorized the offset of workers' compensation settlements from city disability pensions.
- However, the City's retirement system was enacted as a general law by the Legislature.
- Aggrieved City employees who had their disability pensions offset by received workers' compensation lump sum settlements argued that the charter amendment approved by a city referendum was unlawfully adopted without legislative authority. The petitioners asserted that the City exceeded its authority when it offset their disability pensions by received workers' compensation benefits.
- NH Supreme Court ruled that since the city retirement system was enacted by the Legislature it could not be amended by charter amendment, and thus the change to the charter mandating offset of city disability pensions was void.

***City of Manchester School District v. City of Manchester*, 150 N.H. 664 (2004): City could not use the charter amendment process to absorb the Manchester School District as a city department.**

- The City adopted a charter amendment that merged the Manchester School District with the municipal corporation, thus making the school district a city department.
- RSA Chapter 49-B authorizes municipalities to amend their actual forms of government.
- However, RSA Chapter 49–B does not provide municipalities with the authority to enact rent control ordinances, amend their retirement systems or impose term limits on elected officials because, in doing so, municipalities impermissibly intrude into the legislative authority of the general court.
- By enacting a charter amendment that absorbed the Manchester School District as a city department, the City of Manchester did not amend its actual form of government and, therefore, it acted outside of the scope of authority granted to it by RSA Chapter 49–B.

III. AMENDMENT OR REVISION?

The definitions become particularly important in determining the process to be used to change a charter. For example, if a municipality wishes to adopt or revise its charter, the municipality must adopt a charter commission whose members will create an original charter or propose changes to an existing charter. Amending the charter does not require a charter commission process.

A. Charter Revisions

The municipal officers, defined in RSA 49-B:2, IV(e) as "the mayor and board of aldermen, mayor and council, and city council in a city, and board of selectmen and town council in a town," may decide that a revision of the charter is necessary and submit the question of establishing a commission to revise the charter to the voters. See RSA 49-B:4-e, I. Alternatively, voters may petition municipal officers to establish a commission to revise a municipal charter. This can be accomplished on the written petition of the number of voters equal to 20 percent of the number of ballots cast in the municipality at the last regular municipal election, but in no event fewer than 10 registered voters, RSA 49-B:4-e, II. The language of the petition must read substantially as follows: "Each of the undersigned voters requests the municipal officers to submit to the voters, at the next municipal election, the question of establishment of a charter commission to draft a revision to the municipal charter." Petitioners then circulate petition forms that request establishment of a charter commission. RSA 49-B:3, II, III.

The circulated and signed petitions must be submitted to the municipality as follows:

(a) For a town with its annual meeting in March, on or before December 15 of the preceding year.

(b) For a town with its annual meeting in April, on or before January 15 of the same year.

(c) For a town with its annual meeting in May, on or before February 15 of the same year.

(d) For any other municipality, at least 90 days before the regular municipal election on which the question is proposed to be submitted. In the case of a municipality with biennial elections, if the petition is submitted during a year in which there are no municipal elections, a special election shall be held at least 90 days after submission. RSA 49-B:4-e, II, RSA 49-B:3, II.

Upon receipt of a valid petition the municipal officers must submit the question for establishment of a charter commission to draft a revision to the municipal charter to the voters at the next regular municipal election. In the case of an order adopted by the municipal officials under RSA 49-B:4-e, I, the question would be submitted to the voters at the next regular municipal election that is held not less than 60 days after the date of the order. In the case of municipalities with biennial elections, the question shall be submitted at either the next regular municipal election or at a special municipal election that is held not less than 60 days after the date of the order. The question to be submitted to the voters shall be in substance as follows: "Shall a charter commission be established for the purpose of revising or amending the municipal charter?" RSA 49-B:4-e, III.

The vote on the proposed creation of a charter commission is separate from the vote to elect charter commission members. Within five (5) days of the running of the recount period after the vote in favor of establishing a charter commission the municipal officers must meet to order a special election. That special election to select the nine (9) charter commission members must be held on a Tuesday not less than 35 days or more than 60 days after the municipal officer meet to

order the special election. In a municipality with biennial elections, the special election shall be held on a Tuesday not less than 25 days or more than 133 days after such meeting. RSA 49-A:4, I (a). Members are elected in the same way that municipal officers are elected, except that they must be elected at-large on a non-partisan basis with candidate names arranged on the ballot in an order determined by lot publicly selected by the municipal clerk. RSA 49-B:4, I (b).

Once elected the charter commission members hold their organizational meeting at a date, time, and place set by the municipal clerk. The charter commission shall organize by electing from its members a chairperson, a vice chairperson and a secretary and shall file notice thereof with the municipal clerk. Vacancies occurring on the commission shall be filled by vote of the commission from the voters of the municipality. The charter commission may adopt rules and regulations governing the conduct of its meetings and proceedings and may employ such legal, research, clerical, or other employees and consultants as are deemed necessary within the limits of its budget. RSA 49-B:4, II.

The commission must file a preliminary report on a date that varies according to municipal elections dates, within approximately 215 days of its organizational meeting. See RSA 49-B:4, VI (b). Before issuing its preliminary report the commission must hold at least two (2) public hearings scheduled at its discretion. The preliminary report must include the text of any charter revisions and any explanatory information the commission deems desirable. The commission shall also file the preliminary report with the secretary of state, the attorney general, and the commissioner of the department of revenue administration as provided in RSA 49-B:4-a, I. RSA 49-B:4, VI.

The commission may recommend, in either its preliminary or its final report, that no revised charter be adopted. If the commission makes such a recommendation in its preliminary report, the preliminary report shall be deemed a final report and shall not be submitted to the state officials for review under RSA 49-B:4-a. If the commission makes such a recommendation in either the preliminary or final report, no charter question shall be placed on the municipal ballot, and the commission shall take no further action except to wind up its affairs within 60 days after the submission of its report. RSA 49-B:4, VII.

The chairman of the charter commission shall file a copy of the preliminary report relative to any charter revision with the secretary of state, attorney general, and commissioner of the department of revenue administration at the same time the preliminary report is filed with the municipal clerk pursuant to RSA 49-B:4, VI. Within 10 days after the filing of the report relative to any charter revisions, if initiated by the municipal officers, the municipal clerk shall file a certified copy of the report with the same state officials. Within 14 days of receipt of the preliminary report, the secretary of state, the attorney general, and the commissioner of the department of revenue administration shall notify in writing the municipal clerk and the chairman of the charter commission, if any, of their receipt. Within 45 days after the receipt of the report the secretary of state, attorney general, and commissioner of the department of revenue administration shall review the charter revision to insure that it is consistent with the general laws of this state, and shall give notice to the municipal clerk approving or disapproving the proposed charter. RSA 49-B:4-a.

If the secretary of state, the attorney general, or the commissioner of the department of revenue administration does not approve, the proposed charter question shall not be placed on the municipal ballot unless the objections to the proposed charter are resolved as provided in RSA 49-B:4-a, II. The secretary of state, attorney general, and commissioner of the department of revenue administration shall specify their objections in writing to the municipal clerk. Failure to specify objections to a proposed charter within 45 days shall constitute approval by the secretary of state, attorney general, or the commissioner of the department of revenue administration. RSA 49-B:4-a, II.

Upon approval from the secretary of state, attorney general, and commissioner of the department of revenue administration under RSA 49-B:4-a, the charter commission shall submit to the

municipal officers its final report, which shall include the full text and explanation of the proposed charter revisions, such comments as the commission deems desirable, an indication of the major differences between the current form of government and the proposed charter revisions, and a written opinion by an admitted New Hampshire attorney that the proposed charter is not in conflict with the NH Constitution or the general laws. Minority reports, if filed, shall not exceed 1,000 words. The submission of the final report and minority reports, if any, shall be accomplished by the following dates:

(a) If the charter commission was elected in a town with its annual meeting in March, on or before January 15 of the following year.

(b) If the charter commission was elected in a town with its annual meeting in April, on or before February 15 of the following year.

(c) If the charter commission was elected in a town with its annual meeting in May, on or before March 15 of the following year.

(d) If the charter commission was elected at a biennial municipal election, on or before September 15 of the following year.

(e) If the charter commission was elected in a municipality not described in subparagraph (a), (b), (c), or (d), within 245 days after its election. RSA 49-B:4-b, I.

Upon the submission of the final report, the municipal officers shall order the proposed new charter to be submitted to the voters at the next municipal election after the filing of the final report, unless the final report recommends that no charter be adopted, as provided in RSA 49-B:4, VII. In the case of municipalities with biennial elections, the charter shall be submitted to the voters at the next regular municipal election or at a special municipal election so long as such election is held at least 45 days after the filing of the final report. If the next regular election is less than 45 days after the filing of the report, the charter shall be submitted at the following regular election. RSA 49-B:4-b, II.

B. Charter Amendments

The municipal officers may determine that one or more amendments to the municipal charter are necessary and shall, by order, provide for notice and hearing on them. The notice of the hearing shall be published in a newspaper having general circulation in the municipality at least seven days prior to the hearing and shall contain the text of the proposed amendment and a brief explanation. If substantive changes are made to the proposed amendment, a hearing on the modified amendment shall be held.

Within 7 days after the last public hearing, the municipal officers shall file with the municipal clerk a report containing the proposed amendment and seek the necessary opinion from the state officials required by RSA 49-B:4-a. Within seven days after receiving approval from the secretary of state, the attorney general, and the commissioner of the department of revenue administration under RSA 49-B:4-a, the municipal officers may order the proposed amendment to be placed on a ballot at the next regular municipal election. In the case of municipalities with biennial elections, the municipal officers may order amendments to be placed on the ballot at either the next regular municipal election or at a special municipal election that occurs not less than 60 days after the order. RSA 49-B:5, I.

In the alternative, on the written petition of a number of voters equal to at least 15 percent of the number of ballots cast in a municipality at the last regular municipal election, but in no case fewer than 10 voters, the municipal officers shall, by order, provide that proposed amendments to the municipal charter be placed on a ballot in accordance with the procedures set out in RSA 49-B:5,

II or II-a. Each amendment shall be limited to a single subject but more than one section of the charter may be amended as long as it is germane to that subject; however, alternative statements of a single amendment are prohibited.

Upon filing completed petitions with signatures, the municipal clerk must determine if the signatures are sufficient and provide written notice of sufficiency or insufficiency to the petitioners. Within 10 days of receipt of a report from the municipal clerk that the petition is sufficient, the municipal officers shall provide for a public hearing on the proposed amendment, who shall conduct the hearing and cannot make substantive changes to the amendment. Within seven days after the public hearing, the municipal officers shall file with the municipal clerk a report containing the proposed petitioned amendment and shall order the proposed amendment to be placed on the ballot at the next regular municipal election. In the case of municipalities with biennial elections, the municipal officers shall order the amendments to be placed on the ballot at either the next regular municipal election or at a special municipal election that occurs not less than 60 days after the date of the order. RSA 49-B:5, V.

IV. VOTING ON CHARTER REVISIONS AND AMENDMENTS

The method of voting on a charter revision or a charter amendment must follow the same procedures for municipal elections. In a town, the question shall appear on the ballot before any other questions except the election of officers. In a city, the question shall appear in the order determined by the city clerk.

In the case of a charter revision the question to be submitted to the voters shall include a summary prepared by the charter revision commission which explains both the current form of government used by the municipality and the changes in that form of government which will occur if the charter revision is approved by the voters. The question to be submitted to the voters shall be in substance as follows:

> "Shall the municipality approve the charter revision recommended by the charter commission?"
>
> In the case of one or more charter amendments, each amendment shall be voted upon separately and the question to be submitted to the voters on each amendment shall be in substance as follows:
>
> "Shall the municipality approve the charter amendment reprinted (summarized) below?" Each such question shall be followed by the text or a summary of the amendment.

In the alternative, at the discretion of the charter revision commission, two or more amendments may be listed and voted upon together. In such case, the question shall be in substance as follows:

> "Shall the municipality approve the charter amendments reprinted (summarized) below?" The question shall be followed by the text or summary of each of the amendments that are being voted upon together.

In the case of a charter revision, at least two weeks prior to the date of the election the municipal officers shall cause the final report of the charter revision commission to be printed, shall make copies available to the voters in the clerk's office, and shall post the report in the same manner that proposed ordinances are posted.

In the case of one or more charter amendments, at least two weeks prior to the date of the election, the municipal officers shall cause the proposed amendment and any summary thereof to be printed, shall make copies available to the voters in the clerk's office, and shall post the amendment and any summary thereof in the same manner that proposed ordinances are posted.

Charter revision proposals must have at least 3/5 of the ballots cast in favor in order to be adopted. Charter amendments must be approved by a simple majority. Charter revisions become effective

immediately for the purpose of conducting necessary elections; otherwise charter revisions become effective on the first day of the next succeeding municipal year or as specified in any transition provisions of the charter. Charter amendments become effective on the first day of the next succeeding municipal year or on a date determined by the municipal officers, whichever occurs first. RSA 49-B:6 (IV).

V. SPECIFIC PROVISIONS FOR CHARTERS IN CITIES

RSA Chapter 49-C governs city charters, specifically allowing cities to draft charters within that statutory framework. There is no longer a need for the creation of special charters by the legislature. The statute provides a general background and frame of reference for cities adopting a charter; addresses elections, as well as development of administrative and financial procedures for the city; and provides a method for transitioning to a new charter.

The provisions regarding elections essentially provide that a city conducts municipal elections consistent with state election law. City charters may provide for polling hours that are consistent with statute, filing periods for each local office, the selection of the mayor and deputy or assistant mayor, terms of elected officials, compensation of elected officials, timing of meetings, removal of elected officials and filling of vacancies. RSA 49-C:3 through RSA 49-C:11.

In addition to options that may be included in the charters, the statute provides general requirements for city procedural operations, ordinances and general powers, as well as specifics that may not be altered by a charter. For example, all candidates for municipal office must be residents of the city, the mayor presides over all meetings of the elected body and the city clerk serves as clerk of the body. In a mayor-aldermen form of government, the mayor must be full-time and salaried. In a council-manager form of government, the mayor may not be full-time and authority for administrative operations is vested in the city manager. City-elected bodies are imbued with the authority provided in RSA Chapters 44 through 48 and with all the powers provided to town selectmen, so long as those powers are not inconsistent with the city charter.

A. Administrative Duties

With regard to administrative duties, the charter must specify whether it is a mayor or manager who acts as the chief administrative officer of the city. That person must enforce provisions of the charter and local ordinances and perform the duties required by charter and applicable law. City managers have the right to participate in discussions regarding matters before the city council, but not the right to vote. RSA 49-C:16.

It is the city council's responsibility to appoint a city manager and fix the manager's salary. The manager shall be chosen based solely on executive and administrative qualifications and is not required to be a resident either of the state or the city at the time of appointment. The charter must include a detailed procedure for a manager's removal, including notice and hearing. The council's decision on removal is final and when there is a manager vacancy, the council may appoint an acting manager for a period not to exceed 180 days. RSA 49-C:17.

The chief administrative officer (mayor or manager) shall have the authority to appoint and remove all administrative officers and employees. RSA 49-C:18. The elected officials must always act as a body and do not have individual authority to perform any administrative function or to interfere with those functions. They cannot attempt to influence official acts of the chief administrative officer or other officials, or to direct or request the appointment or removal of a person from office, except in writing. If an elected official violates the noninterference restrictions, the official is subject to forfeiture of office. RSA 49-C:19.

There are certain appointed officers that a city must have, such as a clerk, treasurer, at least one assessor, fire chief, police chief, health officer, city solicitor and a general assistance (local welfare) administrator. Other officers may be appointed as necessary. RSA 49-C:20.

City departments may be established by charter or by act of the elected officials by ordinance. Ordinances must include the functions and duties of departments and a merit plan to assure that appointments and promotions within the city are based on merit. The elected officials have the authority, upon the chief administrative officer's recommendation, to create, consolidate or abolish departments and define functions by ordinance. The ordinances compiled are referred to as the "administrative code." RSA 49-C:21.

B. Finance

A city's fiscal and budget year can be any date fixed by the charter or ordinance, but typically begins on January 1 or July 1. RSA 49-C:22.

The charter must contain a date for submission of the budget to the elected body and a date by which the body must act. If the budget is not adopted by the deadline, the chief administrative officer's budget becomes final unless the charter provides for another alternative. The charter must also provide for public hearings on the budget; procedures for fund transfers among departments; an annual audit by a certified public accountant (CPA) experienced in municipal accounting; bonding of officials, officers and employees; procedures for appropriations after the budget process; designation of fund depositories, periodic deposits and the security of funds; periodic reporting of the status of the city's finances; and creation of a fiscal control function. RSA 49-C:23. Cities are expressly authorized to include in their charters tax or spending caps that limit annual spending increases, subject to an override by a supermajority as determined in the charter. RSA 49C:12, III; 49-C:33, I(d).

The elected officials may authorize borrowing; however, borrowing for a term exceeding one year can be authorized only after a duly noticed public hearing. RSA 49-C:24.

Elected officials have the authority to specifically assess costs against owners of property that is especially benefited by a public improvement, RSA 49-C:25, and shall prescribe by ordinance complete special assessment procedures. RSA 49-C:26.

There are a variety of transition provisions, including the requirement to take an oath of office, the notice of election to a position and the penalties for violating the charter or an ordinance that has no specific penalty provision. City charters may contain provisions for referendum and initiative procedures and conflict of interest regulations. RSA 49-C:33.

Since all cities are governed by charters, it is critical for elected and appointed officials to pay careful attention to the details of that document. It is the most important document the city has that governs the process of city operations. It can be amended or revised whenever the need arises and should be reviewed regularly to determine whether changes are warranted.

When charter changes are considered, officials should focus closely on the provisions of RSA Chapters 49-B and 49-C and should consult their city attorney to assure that the process is followed correctly. Although the statutes are detailed and specific, they are navigable and can be used to assist cities in serving their residents in the most appropriate way.

VI. SPECIFIC PROVISIONS FOR CHARTERS IN TOWNS

RSA Chapter 49-D implements the home rule powers enumerated in NH Constitution, Pt. I, Art. 39 for towns. A town may adopt a charter pursuant to RSA Chapter 49-B which abolishes the open town meeting and vests all legislative authority in a town council, or, in the alternative, vests authority to make appropriations in a budgetary town meeting. A town charter may reserve voting on land use ordinances and approval of bond issues under RSA Chapter 33 to the voters. A town charter must create a legislative body, provide for the election or selection of a chair of the elected body, and provide for the appointment of a chief administrative officer. RSA 49-D:3.

RSA Chapter 49-D:3 provides for five (5) legislative body governmental structures that may be adopted:

1. Town Council. RSA 49-D:3, I
2. Official Ballot Town Council. RSA 49-D:3, I-a
3. Budgetary Town Meeting. RSA 49-D:3, II
4. Official Ballot Town Meeting. RSA 49-D:3, II-a
5. Representative Town Meeting. RSA 49-D:3, III

Interference with the official acts of the administrative officer by the elected body is prohibited. RSA 49-D:4. Any adopted town charter may provide for provisions governing the efficient and timely transition to a new form of government. RSA 49-D:5.

CHAPTER THREE

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.*, 151N.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. 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." A*TV 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.

6. 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. 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 nondisclosure." 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). The decision in Provenza was appealed to the Supreme Court on several grounds both challenging the applicability of the privacy/public balancing test to this particular document and arguing for an exemption as part of the officer's "personnel file". The court declined to address the personnel file argument as the document wasn't physically kept in the officer's personnel file and concluded that the privacy/public balancing test remained applicable.

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 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.

In 2022, HB 481 created the office of the Right-to-Know Ombudsman and modified the Right-to-Know Law to allow a complaint to be filed with the ombudsman rather than superior court. The position of the Right-to-Know Ombudsman sunsets on July 1, 2025, unless reenacted.

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-person, 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 FOUR

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 507B: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, 2015 N.H. LEXIS 174 (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 employee, 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. 72 (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 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 :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 is no charge for use of the property. As of August 16, 2022 a contribution or other voluntary payment not required to be made to use such land shall not be considered a "charge." In addition, a lease for a nominal fee of such land for said purposes to the state or any political subdivision thereof, or to any nonprofit corporation, trust, or association, shall not be considered a charge. 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*, 2013 DNH 52 (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 statues" 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. Except, however, it would not be deemed to be charging for the use of land for recreational purposes where the payment or charge is a contribution or other voluntary payment not required to be made to use the land.

- 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 highway); *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. H*ope 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 FIVE

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 city or town manager or town administrator, 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 firefighters. 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 city or town or the use of city or 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 city or 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 city or town or the use of city or 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, town 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 354A: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-295PB (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 city 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 municipality 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. In cities, under RSA 49-C:21, department heads and the chief administrative officer may prescribe rules or regulations governing city employees. 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 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 outstanding 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 city council members, city 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 $107,4320 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

a. 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.

b. 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 fulland 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."

c. **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 town or city council held pursuant to the requirements of the Right to Know Law. A decision to terminate employment may also be made by a city or town manager, and in that instance no public meeting or nonpublic session would be necessary. Pursuant to RSA 91-A:3, II (a) through (c), the town or city council 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 35 hours per week when school is in session for 5 days, and no more than 48 hours per week during school vacations.

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 276A: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 SIX

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 may exist). In this chapter the term "assessors" will be used to refer to the officials performing the assessing function. Even when there is a municipality-wide revaluation by professionals, the assessors have 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. In addition, RSA 75:8, I was recently amended to provide appraisals can also be adjusted to correct any errors in existing appraisals. This amendment, effective August 6, 2022 is intended to address the N.H. Supreme Court's decision in *Merrimack Premium Outlet v. Merrimack*, 174 N.H. 481 (2021). 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 . 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 '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 municipality.

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 municipality 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. Therefore, 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. S*ignal 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 municipality to determine whether an exemption will be granted. 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.

3. 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 "nonprofit" and not all entities qualifying as nonprofits for federal tax purposes are exempt from local property tax. See RSA 72:23-l. 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).

4. 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. *Wolfeboro Camp School Inc. v. Wolfeboro*, 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. A*ppeal 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).

5. Financial Filings

Charitable organizations claiming exemption under RSA 72:23, V must file certain financial forms with the each year to retain exempt status. RSA 72:23, VI.

6. 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).

7. Information Requests

Municipalities 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 apply if the municipality 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 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. 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 :39-b, allows each municipality 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 municipality 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 assessors must provide a written decision on the forms provided by the DRA no later than July 1. The municipality can request that the taxpayer provide a self-addressed envelope with sufficient postage to mail the decision. Failure of the municipality 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). When an appeal is submitted to the BTLA the taxpayer must sign and certify the application for appeal. *Appeal of Keith R. Mador Revocable Trust*, 173 N.H. 362 (2020).

6. Periodic Investigation

The 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 municipality annually reports to the DRA, on forms provided by the DRA, the total value of taxable property in the municipality and the total amount appropriated by the municipality. 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 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 municipality'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. Effective July 26, 2022 those who are currently serving in the armed services are eligible for the Standard and Optional Veterans' Tax Credits.

V. BILLING

A. Posting

After the tax rate has been set, the town council, assessor, or board of assessors prepares an alphabetical list of all the taxable property in the municipality, 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 :7-a. If the municipal office is not open five days a week, then this list must be posted in a public place.

B. Warrant

In a town council town, the list of taxable property, along with a warrant, is sent by the town council to the tax collector. In a city, the tax list, or warrant is delivered by the Board of Assessors to the tax collector. In both instances the tax list or 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 municipality 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 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). However, RSA 75:8, I was amended effective August 6, 2022 to now permit assessments to be adjusted to correct any errors in existing appraisals.

B. Abatements

1. Authority to Grant

Pursuant to RSA 76:16, I(a), the 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 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 assessors. Notice of the tax means the date the BTLA determines is the last date tax bills were mailed in the municipality. In municipalities 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 I (b), the 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 four 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 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 municipality is trying to attract?

RSA chapter 79-E, Community Revitalization Tax Incentives, enables municipalities 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 municipality 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, municipal 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 allow 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 municipalities 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 :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 assessors have 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 assessors select board do 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 assessors have 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 assessors 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 municipality 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 municipality 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 municipalities 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 municipality meeting can authorize the select board to sell liens to outside buyers. RSA 80:80, II-a. If the municipality 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 town council/city council 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 municipality has the authority to conduct an environmental investigation of the property. RSA 80:19-a. If the property is contaminated, the municipality can refuse to accept a tax deed. RSA 80:76. The governing body can also refuse a tax deed whenever ownership might expose the municipality 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 municipality'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 municipality 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 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 municipal 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 municipality's legal fees; plus all the municipality'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 municipality 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 municipality 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 municipality 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 municipality 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 municipality 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 municipality 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 municipality can keep out of the proceeds.

3. Municipality as Owner

The law makes clear that the right of repurchase, or to "excess" proceeds, is the only right retained by former owners. A municipality 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 Municipality had correctly tax-deeded the property in favor of the Municipality 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. P*olonsky 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 municipality'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 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 municipality to submit reports to the DRA for purposes of setting tax rate.

October 2022: Within 30 days after the DRA sets the tax rate, the board of assessors/city or town council 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 municipality, 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, **https://nhtaxcollectors.org** contains many helpful checklists and much more detail than our overview discussion.

CHAPTER SEVEN

BUDGETING AND FINANCE

I. APPLICABLE LAW

RSA 32:1 through :13 and sections :25 and :26 of the Municipal Budget Law apply to all towns, village districts, and school districts. Sections :14 through :24 apply to those with official budget committees only. This includes town council-budgetary town meeting towns. However, RSA Chapter 32 does not govern cities or towns with town councils and no budgetary town meeting. The budget is governed by provisions of the municipal charter, as well as various other statutes, some of which will be discussed below. All municipalities are also subject to DRA rules and reporting requirements.

II. BUDGET PROCESS AND FISCAL CONTROL IN CITIES

As provided in RSA 49-C:23,I, the annual budget of a city is prepared by the chief operating officer, who is either the mayor or city manager. The fiscal and budget year of the city begins on January 1, or July 1, unless a different date is fixed by the charter or by ordinance. RSA 49-C:22.

RSA 49-C:23 requires every city charter to include the following provisions relative to budget and finance:

I. A budget submission date and a date by which an annual budget shall be finally adopted by the elected body. Failing final adoption by the established date, the budget shall be determined as provided in the city charter, or as originally submitted by the chief administrative officer if no such provision is made in the city charter.

II. One or more public hearings on the budget before its final adoption. A copy of the proposed budget and notice of the public hearing shall be published at least one week in advance of any public hearing.

III. Procedures for the transfer of funds among various budgeted departments, funds, accounts, and agencies as may be necessary during the year.

IV. An annual independent audit conducted by certified public accountants experienced in municipal accounting. Copies or abstracts of such audits shall be made public along with an annual report of the city's business. Nothing in this paragraph shall prevent the elected body from requiring such other audits as it deems necessary. Audit services shall be put out to bid on a periodic basis as specified in the charter.

V. Bonding of officials, officers and employees, the cost of which shall be paid by the city.

VI. Procedures for appropriation of funds, after notice and public hearing and by a 2/3 vote, for purposes not included in the annual budget as adopted.

VII. Designation of one or more depositories of city funds by the elected body, the periodic deposit of funds, and the security required for such funds. Personal surety bonds shall not be deemed proper security.

VIII. Periodic, but at least quarterly, reporting of the state of the city's finances to the public and the elected body by the chief administrative officer. The chief administrative officer, with approval of the elected body, may reduce appropriations for any item or items, except amounts required for debt and interest charges or other legally-required expenditures, to such a degree as may be necessary to keep total expenditures within total anticipated revenues.

IX. Establishment of a fiscal control function, including pre-audit of all authorized claims against the city before payment. The head of such function need not be a resident of the city or the state at the time of selection, shall not be treasurer, and shall be chosen solely on the basis of executive and administrative qualifications and actual experience in and knowledge of accepted practices in respect to the duties of municipal fiscal management.

In addition, 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).

Effective August 20, 2021, in order to exclude certain budget items from a tax cap will now require a supermajority vote. 2021 N.H Laws Chapter 88. A city or town council town tax cap provision may specifically exclude certain dedicated, enterprise, or self-supporting funds or accounts, capital reserve funds, grants, or revenue from sources other than local taxes, or interest and principal payments on municipal bonded debt, or capital expenditures which shall be by a supermajority vote as determined in the charter. An ordinance or accounting practice that redistributes excludable budget items from within the limits of the capped budget to outside the limits of the capped budget shall be by a supermajority vote as determined in the charter. Statutes amended: RSA 49-B:13, II-a; 49-C:33, I(d); 49-D:3, I(e).

The elected officials may also authorize borrowing; however, borrowing for a term exceeding one year can be authorized only after a duly noticed public hearing. RSA 49-C:24. Elected officials have the authority to specifically assess costs against owners of property that is especially benefited by a public improvement, RSA 49-C:25, and shall prescribe by ordinance complete special assessment procedures. RSA 49-C:26. City councils must, at least once a year, publish a particular account of the receipts and expenditures of the city and a schedule of its debts and property. RSA 47:10.

City councils must take proper care that no money be paid from the city treasury unless previously granted and appropriated and shall secure a just and prompt accountability from all persons entrusted with the receipt, custody or disbursement of the money or funds of the city, or the care of its property. At least yearly, the city council or board of aldermen shall review and adopt an investment policy for the investment of public funds in conformance with the provisions of applicable statutes and shall advise the treasurer of such policies. RSA 47:6.

There are a variety of transition provisions, including the requirement to take an oath of office, the notice of election to a position and the penalties for violating the charter or an ordinance that has no specific penalty provision. City charters may contain provisions for referendum and initiative procedures and conflict of interest regulations.

III. SELECTED BUDGET AND FINANCE OPTIONS

Cities have the same powers as towns. RSA 47:1; RSA 44:1. Therefore, like towns, cities can create special revenue funds and capital reserve funds (see also RSA 47:1-b), and may create trusts, per RSA 31:19 and 31:19-a, and revolving funds, per RSA 31:95-h or RSA 35-B:2, II. Cities may also finance long-term

projects under RSA Chapter 33. RSA 33:1, I. This section will provide an overview of the law relative to these budget and finance tools.

A. Special Revenue Funds

Cities may, pursuant to RSA 47:1-c, vote to restrict revenues from a specific source to expenditures for specific purposes. Such revenues and expenditures shall be accounted for in a special revenue fund separate from the general fund. Any surplus in such fund shall not be deemed part of the general fund accumulated surplus nor shall any surplus be expended for any purpose or transferred to any appropriation until such time as the legislative body shall have voted to appropriate a specific amount from said fund for a specific purpose related to the purpose or source of the revenue. Therefore, special revenue funds cannot be created with agents to expend. The power to create special revenue funds is limited to those municipal activities funded primarily through user fees including, but not limited to, municipal airports and solid waste facilities. RSA 47:1-b; RSA 31:95-c.

RSA 47:1-c sets forth the procedure for adopting a special revenue fund as follows:

1. The legislative body may consider and act upon the question in accordance with their normal procedures for passage of resolutions, ordinances, and other legislation. The question shall not be placed on the official ballot.
2. The city council shall hold a public hearing on the question at least 15 days but not more than 30 days before the question is to be voted on. Notice of the hearing shall be posted in at least 2 public places in the municipality and published in a newspaper of general circulation at least 7 days before the hearing.
3. The wording of the question shall be: "Shall we adopt the provisions of RSA 47:1-b to restrict revenues from (here insert source) to expenditures for the purpose of (here insert purpose)? Such revenues and expenditures shall be accounted for in a special revenue fund to be known as the ( ) fund, separate from the general fund. Any surplus in said fund shall not be deemed part of the general fund accumulated surplus and shall be expended only after a vote by the legislative body to appropriate a specific amount from said fund for a specific purpose related to the purpose of the fund or source of the revenue."
4. If a majority of those voting on the question vote "Yes," RSA 47:1-b shall apply within the city on a date set by the city council.
5. If the question is not approved, the question may later be voted upon according to the provisions of RSA 47:1-c, I.

Such funds may also be rescinded, by following the same procedure outlined above, but the wording of the question shall be the same as set out in RSA 47:1-c, I(c), except the word "adopt" shall be changed to "rescind." If a majority of those voting on the question vote "Yes," RSA 47:1-b shall not apply within the city following the date of the vote.

B. Trust Funds

RSA 47:1-b provides says that "[t]his section shall not be construed to prohibit the establishment of capital reserve funds pursuant to RSA 34 or city created trust funds pursuant to RSA 31:19-a."

1. Capital Reserve Funds

Capital reserve funds for towns is governed by RSA Chapter 35. Capital reserve funds for cities is governed by RSA Chapter 34. Appropriating money to a capital reserve fund is like putting

it into a savings account. In fact, the money is held and invested by someone other than the treasurer, namely the trustees of trust funds. Capital reserve funds may be established and funded for:

I. The construction, reconstruction, or acquisition of a specific capital improvement, or the acquisition of a specific item or of specific items of equipment;

II. The construction, reconstruction, or acquisition of a type of capital improvement or the acquisition of a type of equipment;

III. A reappraisal by appraisers of the department of revenue administration or such other appraisers, appraisal firms or corporations approved by the commissioner of revenue administration, of the real estate in such city for tax assessment purposes;

IV. The acquisition of land;

V. The acquisition of a tax map of such city;

VI. Municipal and regional transportation improvement projects including engineering, right-of-way acquisition and construction costs of transportation facilities, and for operating and capital costs for public transportation; or

VII. The repayment of bonded debt issued for the purpose specified in the fund, in conformance with existing Internal Revenue Service rules.

Reserve funds may be created for non-capital items but note that each still must be for a specific purpose. RSA 35:1-c and RSA 34:1-a. This is no authority to create unspecified purpose reserves.

It takes two elements of action by the legislative body to create a capital reserve fund: action to create the capital reserve fund, "distinctly stating the purposes" for which the fund is being established, and an appropriation of a specific dollar amount into that fund. RSA 35:3; RSA 35:5; RSA 34:2; RSA 34:3. RSA 34:1, :3 and RSA 35:5 permit funding of capital reserve funds with monies "from any source other than money given to the town [or] district … for charitable purposes." Thus, any source for the funds is usually valid.

The authority granted by RSA 34:1 shall be exercised by the city council only after a public hearing on the annual budget as required by RSA 44:10, and by the adoption of a capital improvement budget and program. The public notice of said hearing shall include a statement distinctly stating the purposes for which such reserve is to be established. RSA 34:2.

RSA 34:10 and RSA 35:15 provides that capital reserve funds remain with the trustees of trust funds until the legislative body votes to expend money from that fund for the purpose for which the fund was established, or in the case of cities until the city council names agents to carry out the objects of the particular fund. .

In 2007, the legislature amended RSA chapter 35 and RSA chapter 34 to allow money in a capital reserve fund to be used for periodic debt payments in addition to payments under a lease/purchase agreement. "Capital reserve funds may be used for multiple payments under a financing agreement for the purpose for which the capital reserve was established." RSA 34:10, III; RSA 35:15, III. If the financing agreement is a lease purchase agreement, the lease purchase agreement may not contain an "escape clause" or a "non-appropriation clause." If agents have been named to expend the fund according to RSA 35:15, then no further vote of the legislative body is required to disburse funds for debt payments or lease/purchase payments after the initial two-thirds vote to ratify the bond issue or the lease/purchase agreement.

2. 'Expendable' Trust Funds

In 1983, RSA 31:19-a was enacted to allow municipalities to appropriate money into nonlapsing 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. Revolving Funds

Revolving funds may be established under RSA 31:95-h for the following purposes:

- Facilitating, maintaining, or encouraging recycling as defined in RSA 149-M:4;
- Providing ambulance services, or fire services, or both;
- Providing public safety services by municipal employees or volunteers outside of the ordinary detail of such persons, including but not limited to public safety services in connection with special events, highway construction, and other construction projects, or for any other public safety purpose deemed appropriate by the municipality;
- Creating affordable housing and facilitating transactions relative thereto;
- Providing cable access for public, educational, or governmental use;
- Financing of energy conservation and efficiency and clean energy improvements by participating property owners in an energy efficiency and clean energy district established pursuant to RSA 53-F; or
- Facilitating transactions relative to municipal group net metering.

A revolving fund for the purposes provided for in RSA 31:95-h must be established by a vote of the legislative body, which at the time of establishment or at a later time may restrict expenditures from the fund by limiting the types of items or services that may be purchased, limiting the amount of any single expenditure, or limiting the total amount of expenditures to be made in a year. No money may be spent from the revolving fund for any item or service for which an appropriation has been specifically rejected by the legislative body during the same year.

All or any part of the income derived from the services listed above may be deposited into the revolving fund, as may other revenue approved by the legislative body for deposit into the fund. The revolving fund is nonlapsing and is not considered part of the municipality's fund balance. The treasurer has custody of the monies in the revolving fund and shall pay out monies only upon order of the governing body or other board designated by the legislative body at the time the fund is created. Revolving fund money may be spent only for the purposes for which the fund was created.

Recreation revolving funds may also be established under RSA 35-B:2, II, into which all fees and charges for recreation services and facilities may be deposited. Money in the recreation revolving fund does not lapse and can be spent on the order of the recreation commission for recreation purposes under RSA Chapter 35-B. However, if the recreation revolving fund is rescinded by vote of the legislative body, remaining amounts in the fund automatically become part of the general fund accumulated surplus. RSA 35-B:2, II.

D. 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.

1. Authority

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 authority for acceptance of cemetery and burial lot trusts.

Cities have the same rights and responsibilities as towns with respect to municipal trusts. However, 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 municipality may hold a trust for any listed purpose or any other purpose for which a municipality may expend money. A municipality may not administer a trust for a private purpose, nor for a public purpose outside the scope of municipal 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.

4. Creation of Municipal Trusts

a. 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 municipality 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).

b. Acceptance by Municipality
RSA 31:19 refers to the power of "towns" to accept trusts. 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. Charters and ordinances may prescribe other methods. After a trust is accepted by the municipality, the property passes to the control of the trustees of trust funds.

c. Refusal by Municipality
The municipality has the discretion to reject an offer of property in trust, where, for example, the difficulty of administering the trust would outweigh its benefits.

5. 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. Municipalities 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.

In 2007 the legislature amended RSA 498:4-a to require 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, III.

E. Borrowing

1. Municipal Finance Act, RSA Chapter 33

Some projects are too large to accomplish with the resources available in an annual budget. If the muncipality has not accumulated money in a capital reserve or other nonlapsing account, money may have to be borrowed. While the range of allowable purposes listed in RSA Chapter 33 is broad, RSA 33:3 explicitly prohibits borrowing 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.

Cities shall not incur net indebtedness, except for school purposes, to an amount, at any one time outstanding, exceeding 3 percent of their valuation determined as provided. RSA 33:4-a, I. For school purposes, cities cannot incur net indebtedness to an amount at any one time outstanding, determined as provided, exceeding 7 percent of said valuation. Any debt incurred for school purposes by a city under this or any special statute shall be excluded in determining the borrowing capacity of a city for other than school purposes under the 3 percent limitation in paragraph I. RSA 33:4-a, II. There are some exclusions from the debt limit, which are described in RSA Chapter 33. The debt limitation computation is explained in RSA 33:4-b. DRA annually computes, and publishes on their website, the valuation upon which the debt limits for each municipality are based.

2. 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. Cities and towns may incur debt in anticipation of the taxes of the financial year in which the debt is incurred, in order to pay current maintenance and operation expenses, and may issue notes therefor to an aggregate principal amount not exceeding the total tax levy during the preceding financial year, provided that after the tax levy of the current year has been determined any city or town may borrow an amount not exceeding in the aggregate the total tax levy of the city or town for the current financial year. In order to meet necessary expenses which may arise during the period from the beginning of the financial year to the date of the annual town meeting, the treasurer of any town, with the approval of the governing body, may issue notes to an aggregate principal amount not exceeding 30 percent of the total receipts from taxes during the preceding financial year. RSA 33:7, I. 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 municipality 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.

3. Capital Improvement Program (CIP) to Reduce Long-Term Debt

The use of long-term debt instruments may be reduced if the municipality engages in longterm 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 replaced, 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. IMPACT FEES

Impact fees are worth mentioning in this chapter because municipalities can use them to pay for changes and upgrades necessitated by new development. The following is a very brief overview of impact fees. For a comprehensive document on impact fees, refer to the 2014 NHMA Law Lecture Series publication, Impact Fees in New Hampshire.

A. Impact Fees Defined

"Impact fee" means a fee or assessment imposed upon development, including subdivision, building construction, or other land use change, in order to help meet the needs occasioned by that development for the construction or improvement of capital facilities owned or operated by the municipality. RSA 674:21, V. In order to collect an impact fee, the purpose of the impact fee payment must be to construct or improve capital facilities owned or operated by the municipality.

The Capital Facility must be one of the following:

1. water treatment and distribution facilities;
2. wastewater treatment and disposal facilities;
3. sanitary sewers;
4. storm water, drainage and flood control facilities;
5. municipal road systems and rights-of-way;
6. municipal office facilities; public school facilities;
7. the municipality's proportional share of capital facilities of a cooperative or regional school district of which the municipality is a member;
8. public safety facilities;
9. solid waste collection, transfer, recycling, processing, and disposal facilities;
10. public library facilities;
11. public recreational facilities not including public open space.

B. Adopting Impact Fees

Before an impact fee ordinance can be adopted, the municipality must have enacted a capital improvements program as provided in RSA 674:5-7. Once that is done, the legislative body must adopt an impact fee ordinance pursuant to RSA 674:21, V, the innovative land use control statute. The planning board can administer an adopted impact fee ordinance, and that administration can include setting the amount of the assessed impact fees. Under RSA 674:21, V(i), "Neither the adoption of an impact fee ordinance, nor the failure to adopt such an ordinance, shall be deemed to affect existing authority of a planning board over subdivision or site plan review, except to the extent expressly stated in such an ordinance." RSA 674:21, V(e) requires the ordinance to establish a reasonable time after which any portion of an impact fee, which has not become encumbered or otherwise legally bound to be spent for the purpose for which it was collected, to be refunded, with any accrued interest. Whenever the calculation of an impact fee has been predicated upon some portion of capital improvement costs being borne by the municipality, a refund must be made upon the failure of the legislative body to appropriate the municipality's share of the capital improvement costs within a reasonable time. The maximum time that is considered reasonable is 6 years. See *Clare v. Town of Hudson*, 160 N.H. 378 (2010).

C. Implementation of Impact Fees

Impact fees must meet the rational nexus test, which requires the portion of the municipal capital infrastructure cost imposed on a development must bear a rational nexus to the needs created by, and special benefits conferred upon, the development. There must be a reasonable relationship between the fee being charged and the demands placed on the particular capital facility by the new development being assessed the fee. *Land Vest Properties, Inc. v. Town of Plainfield*, 117 N.H. 817 (1977).

In addition, impact fees must also meet the federal constitutional standards under *Nollan v. California Coastal Commission*, 483 US 25 (1987) (substantial nexus test) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (rough proportionality test).

Under RSA 674:21, V(a), if a municipality has existing deficiencies in its capital facilities, an impact fee cannot be used to correct those deficiencies. However, if a municipality had in the past made a capital investment that created excess capacity that would accommodate future growth, that past capital investment can be recouped through the impact fee system. If an existing capital facility was built or improved so that it had provided for additional capacity to serve new development, payment of an impact fee would be appropriate to recapture that investment on a proportional share basis. RSA 674:21, V(c).

Impact fees must be used solely for the capital improvements for which it was collected, or to recoup the cost of capital improvements made in anticipation of the needs which the fee was collected to meet. RSA 674:21,V(c); See *Clare v. Town of Hudson*, 160 NH 378 (2010).

Impact fees must be accounted for separately, segregated from the municipality's general fund, spent upon order of the municipal governing body, and are exempt from all provisions of RSA 32 relative to limitation and expenditure of town monies. RSA 674:21, V(c).

V. MULTI-YEAR CONTRACTS

Municipalities are set up to handle business one year at a time. So it's not surprising that 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 most common examples are extended equipment leases and multi-year collective bargaining agreements (CBAs). For leases, typically the issue is whether or not the agreement constitutes longterm debt under RSA chapter 33. For CBAs, the problem is adequate disclosure of the financial terms of the agreement, the "cost items" under RSA 273-A. The term for such disclosure is "sanbornizing" the agreement, after the leading case, *Appeal of the Sanborn Regional School Board*, 133 N.H. 513 (1990).

A. Collective Bargaining Agreements

In the *Sanborn* case, the Supreme Court upheld the validity of multi-year collective bargaining agreements under RSA Chapter 273-A, which comprehensively governs the public employee collective bargaining process. The statute provides that once an agreement is reached between the employer board and union, the "cost items" of the agreement, defined as "any benefit acquired through collective bargaining whose implementation requires an appropriation by the legislative body of the public employer with whom negotiations are being conducted," must be submitted to the legislative body for approval. Although multi-year agreements are authorized by RSA 273-A, the Court in *Sanborn* held that the school district was not bound to fund the second and third-year terms of the CBA because the voters at district meeting who were supposed to ratify the cost items had not been adequately informed of the financial terms by the language of the warrant article or by other means. In *Appeal of Alton School District*, 140 N.H. 303, 309 (1995), a section of the CBA provided that a pay plan with periodic step increases based on experience would continue in effect after expiration of the agreement (an "evergreen clause"). The Supreme Court held that the provision was unenforceable against the school district because, under *Sanborn*, the cost of the evergreen clause had not been adequately disclosed to the voters. Under the new statute, such pay plans would typically continue to operate automatically after expiration for all CBAs, and it would seem that the cost of the built-in "evergreen clause" would need to be disclosed to the voters. Consult your municipal attorney on the important and complex issue of what is adequate "sanbornizing" of the cost items of your CBA.

B. Equipment Leases

RSA 33:3 authorizes municipalities to issue notes and bonds to finance, among other things, "the purchase of departmental equipment of a lasting character." Issuance of debt requires a two-thirds vote, by ballot, of the legislative body. RSA 33:8. Multi-year leasepurchase agreements for equipment are regarded as long-term debt (like a bond, they require a stream of payments to pay principal and interest over time) and thus also require a 2/3 (or 3/5) ballot vote. However, lease-purchase agreements with so-called "escape" or "nonappropriation" clauses, which terminate the agreement automatically if the requisite annual appropriation is not made, are not long-term debt and thus may be approved by majority vote. RSA 33:7-e.

C. Other Multi-Year Agreements

There are other types of multi-year expenditures a city or town council may want to enter into that do not fall within the specific statutes governing CBAs or lease agreements. Naturally, these are the types of agreements that create the most questions, but there is case law that helps us determine how and when municipalities can enter into such contracts.

As a general principle, one legislative body cannot bind a successor legislative body on procedural matters. *Exeter v. Kenick*, 104 N.H. 168, 171 (1968). In addition, the general rule of lapse means that appropriations are usually adopted on an annual basis. However, there is significant case law to support a city or town council's authority to enter into a multi-year contract. First, in *Blood v. Manchester Electric Light Co.*, 68 N.H. 340 (1895), the New Hampshire Supreme Court held that towns and cities are authorized to make multi-year contracts (in that case, a ten-year street lighting contract) under the basic statutory power to "make any contracts which may be necessary and convenient for the transaction of the public business of the town," quoting what is now RSA 31:3. The Court rejected the argument that a multi-year contract "would impermissibly disable the town from performing its legislative functions to their full extent for the time being." In making a contract, a municipality acts in its business or proprietary capacity, not its legislative capacity.

However, in the case of *Bedford Chapter-Citizens for a Sound Economy v. School Administrative Unit #25-Bedford School District*, 151 N.H. 612 (2005), a proposed 20 year high school tuition agreement with the Manchester School District was presented for approval at a special school district meeting. The article did not call for a current appropriation of money. RSA 197:3 (very similar to RSA 31:5, applicable to towns) provides that "no school district at any special meeting shall raise or appropriate money … unless the ballots cast at such meeting shall be equal in number to at least one half of the number of voters of such district entitled to vote at the regular meeting next preceding such special meeting. " The issue was whether it was necessary for one-half of eligible voters to vote even though no actual appropriation of money was called for. The Court held that the article did involve a vote to raise or appropriate money within the meaning of RSA 197:3. The Court relied on the precedent of *Childs v. Hillsboro Electric Light and Power Co.*, 70 N.H. 318 (1900) (another street lighting contract), which had decided the same issue under the predecessor statute to RSA 31:5. The Court quoted from *Childs*:

> "To 'raise' money, as the word is ordinarily understood, is to collect or procure a supply of money for use, as, in the case of a municipal corporation, by taxation or perhaps loan. Money cannot be actually given or appropriated before it is raised. A promise to give or appropriate money may be made before the money is actually procured; but in such case the promise binds the promisor to have the money on hand when it comes due, and so, in a sense, the money is raised by the promise…. The town must seasonably raise or appropriate sufficient sums of money to pay for the lights in accordance with its promise. If it does not do so voluntarily, the law will step in and do it … [such as through] a compulsory assessment and collection of taxes."

(emphasis added) 70 N.H. at 324. The Court in *Childs* equated the phrase "raise and appropriate" in RSA 197:3 and RSA 31:5 with the phrase "grant and vote" used in RSA 31:4 to describe the basic municipal power of appropriation.) Furthermore, the New Hampshire Supreme Court has upheld a governing body's authority to bind the municipality to a multi-year contract as long as "it knew about the cost items for each year of the [contract] at the time it voted to appropriate money for the contract's first year." *Foote v. Manchester Sch. Dist.* 152 N.H. 599 (2005) (quoting *Appeal of Franklin Education Assoc.*, 136 N.H. 332, 334(1992). This is similar to the concept of "sanbornizing" cost items for a CBA.

The case of *Foote v. Manchester School District*, 152 N.H. 599 (2005) presented another phase in the struggle over Bedford tuition agreements with Manchester. The case involved the validity of a three-year tuition agreement made by the Bedford school board. But the Court did not need to decide the question of the multi-year appropriation because the school district voters ratified the agreement before the issue could be litigated.

Based on these cases, as a general principle, a municipality can bind itself to a multiyear agreement as long as the total cost items for the full life of the agreement are fully disclosed and adopted by the legislative body. Essentially, this is the same process for "sanbornizing" collective bargaining agreements that is discussed above.

VI. 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. Your charter and code likely set forth a purchasing procedure, including assigning a purchasing agent and dollar limits for purchases that must be done using competitive bidding. Under RSA 447:16, any municipal project 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.

B. Competitive Bidding Policies

Local purchasing or competitive bidding 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 Responsible Bidder

If the municipality decides to use competitive bidding, the process must be conducted fairly. The municipality 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 municipality's competitive bidding procedures, such as notice. *Irwin Marine, Inc. v. Blizzard, Inc.*, 126 N.H. 271 (1985).

3. Changing Specifications

The municipality 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 EIGHT

LAND USE/PLANNING BOARD/ZBA

The roles and responsibilities for the creation, appointment and removal of land use board members are divided between the local legislative body and the local governing body. As applied to a city, the local legislative body is either the council, mayor and council or mayor and board of alderman. As applied to a charter town, the term local legislative body designates the town council. RSA 672:8. In addition, since certain appointive authority is delegated to the chief executive officer of the municipality, the term "mayor" includes the city or town manager as well as any other official designated in the municipal charter to perform the duties of mayor. RSA 672:9.

I. WORKING WITH 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, building inspector, see RSA 672:7 and RSA 673:1, 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 or the charter regarding the number of land use boards members. On the other hand, greater flexibility is granted with regard to manner of appointment or election of land use board members. In all other respects concerning members' terms of office; numbers and terms of alternates; filling vacancies; and removal of members, the provisions of RSA chapter 673 control.

1. 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 municipal 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 municipality. 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 upon order of the land use board. Application, permit, or inspection fees established by the local legislative body as part of an ordinance 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 governing body, town or city manager, 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 legislative body 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

Under RSA 675:2, in cities or in towns operating under the town council form of government, the local legislative body (town council, city council, board of alderman) shall determine the manner in which a zoning ordinance, historic district ordinance, or a building code is

established and amended. In almost all instances, the zoning provisions will be adopted solely by the city or town council; however, if the municipal charter contains a provision requiring a ballot vote of the town on a zoning matter, it may be placed on a ballot separate from the ballot used to elect city or town officials. 15 *Land Use Planning and Zoning* § 5.02 (2021).

No matter what procedural method is adopted by a municipality, the citizens and landowners affected by any proposed zoning regulations must have fair notice and an opportunity for public debate. Minor deviations in procedure or technical violations will be excused if there is substantial compliance. If the citizens and landowners are deprived of reasonable notice and opportunity to debate, however, the regulation adopted as a result of such a flawed procedure will be invalidated. In that regard, no zoning ordinance, historic district ordinance, or building code shall be established or amended until after a public hearing is held in accordance with the procedures required under RSA 675:7.

In cities and in towns operating under the town council form of government where the right to adopt or amend zoning regulations has been reserved to the voters, all proposed amendments to the zoning ordinance must be forwarded to the town clerk not later than the fifth Tuesday prior to the date for electing city or town officers. 15 *Land Use Planning and Zoning* § 5.02 (2021).

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. Municipalities 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.

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 municipality 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 (2) 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 municipal 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

Municipalities 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 governing body 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. Decisions of the ZBA concerning housing and housing development may now also be appealed to the Housing Appeals Board. RSA 679:5, I

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 Francestown*, 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:

a. 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 municipal 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 governinb body 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.

II. 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 municipality'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 governing body 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 governing body, 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 the legislative body to adopt the provisions of RSA chapter 36-A. The instrument of adoption 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 governing body 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 appointing authority 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 governing body. 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 legislative body 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 council 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 municipal treasurer only upon order of a majority vote of the conservation commission. The governing body has no authority to approve or disapprove expenditure of this money. However, the governing body 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 governing body, and can acquire in the name of the municipality, also subject to the governing body'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 municipality; 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 the legislative body, the heritage commission may assume the composition and duties of the historic district commission. RSA 674:44-b, III. A municipality 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 municipalities 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 legislative body 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 municipality and its residents, viewed in the context of the region in which the municipality is located. A municipality 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 municipality as necessary to conserve and properly use the affordable housing of the municipality, 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 municipality has authority under this statute to take land by eminent domain. RSA 674:44- i, II.

CHAPTER NINE

ETHICAL ISSUES, CONFLICTS OF INTEREST, AND INCOMPATIBILITY OF OFFICE

I. ETHICS

A. What Are 'Ethics'?

It seems like a simple question, but ask several people 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 is conducted in large part by volunteers rather than career politicians, we are not immune from ethical dilemmas. It is easy 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 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. Authority to Enforce Ethical Behavior

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 only have authority to act 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 city 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.

With 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 that prohibit 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

RSA 48:1 disqualifies elected city officials with authority to appropriate or expend public funds, including mayors, aldermen and councilors, from employment by the city, except as a justice or clerk of the municipal court, call fireman or special police officer. However, if there was a provision in the charter that allowed specific city employment by elected officials at the time the statute was adopted,

that charter provision prevails over the provisions of the statute. In the event that an elected official accepts employment in a prohibited position, that elective office is deemed vacant and must be filled according to existing law.

RSA 44:2-a states no candidate for any city office shall file for more than one seat on a city or school district board, commission, committee, or council.

RSA 47:2 states that no person who is a member of the city councils shall be elected by the city councils or appointed by the mayor and alderman to any office pertaining to elections, or where the remuneration of the office exceeds $100 in any one year.

B. Planning Board Members

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.

C. Common Law Incompatibility

Two positions might be incompatible even though they are not listed in any 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*, §12.112. 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. CONFLICT 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 a number of New Hampshire Supreme Court cases to 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. 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 exist- ed, 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:

- 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, that 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 CONFLICT 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. Allenstown*, 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 an- other 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. The Juror Standard

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.

RSA 673:14 and 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 more strict 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 T*he 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 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 it the "misuse of in- formation," 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 with- out 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. An objection to a conflict of interest must be raised at the earliest possible time—i.e., as soon as the individual becomes aware of the conflict—or the objection is waived. *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). It is not worth risking being 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.

3. Ordinance or Policy

Consider a conflict of interest ordinance under RSA 31:39-a. As discussed more fully in section IV-B above, this type of ordinance may only address 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.

4. Replacing a Disqualified Land Use Board Member

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 requires the concurring vote of 3 members of the board to take any action on any matter on which it is required to pass.

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 fact, there is no such power unless it exists by statute. Such statutes include RSA 105:2-a (police chief); RSA 154:5 (fire chief); and RSAs 41:16- c, 41:26-d and 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. Mayor, Aldermen and Councilors

RSA 49-C:13 provides that the mayor and board of aldermen or council may remove the mayor or member of the board or council for cause, after notice and hearing. Cause includes prolonged absence from or inattention to duties, crime or misconduct in office or as provided in the charter. Vacancies shall be filled according to the terms of the charter.

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 part of the penalty is removal from office pursuant to RSA 95:2.

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