

Legal Q AND A

Ordinance and Bylaw Adoption

By Jonathan Cowal, Municipal Services Counsel

When it comes to enacting bylaws or ordinances, it can be difficult to discern which entity has the authority to do such a thing. In most instances, enacting a town wide ordinance will require the vote of the town at town meeting. However, there are several areas specifically designated by statute where the governing body, or some other local official, has the authority to enact a policy, ordinance, bylaw, etc. which will have the desired effect.

This article is a supplement to the flow chart on the next page. This flow chart was designed to be a tool to help answer some of the more common questions surrounding ordinance adoption, but it is not an exhaustive list.

Q. Is it a city or a town?

A. Under RSA 47:17 city councils are given broad authority to enact ordinances or bylaws for the good of the city without needing to receive any further approval from some other governmental entity. Through the city charter the voters have decided to vest in the city council significant authority to act as both the governing body and the legislative body of the city. RSA 47:17 begins by stating that the city council shall have power to make all such salutary and needful bylaws as towns and the police officers of towns and engineers or firewards by law have power to make. The statute goes on to list over 20 additional areas where city councils have authority to make bylaws. Within those additional paragraphs, paragraph XV states “They [city councils] may make any other bylaws and regulations which may seem for the well-being of the city.” This broad statement effectively gives city councils the authority to enact such bylaws as they see fit as long as they do not violate the constitution or other laws of the state.

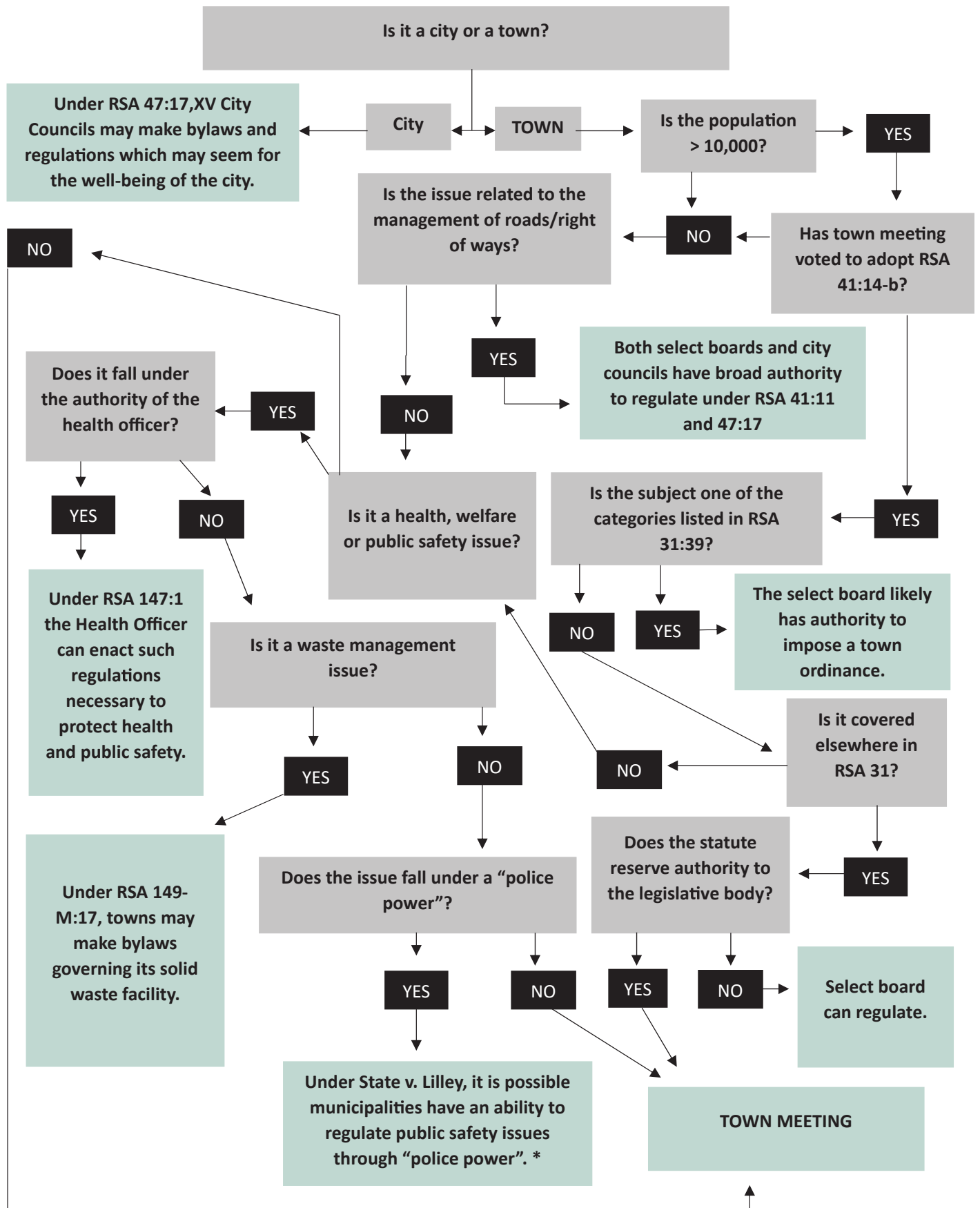
Q. What if it is a town?

A. With towns, it is a much more complicated analysis when determining whether or not the select board, or some other local official, has the authority to enact a bylaw or ordinance, or if it must be put to a vote at town meeting. When answering this question, size matters. Only towns with a population greater than 10,000 can grant authority to their select board to enact ordinances. In towns of this size, the select board will not have this power unless the town meeting has voted to give it to them under RSA 41:14-b. Even then, the select board’s authority is limited, in most circumstances, to the specific areas listed in RSA 31:39 when it comes to ordinance adoption. If the issue falls outside one of the listed categories in 31:39, it is likely that the town meeting will still need to vote on a proposed ordinance.

Q. If a town of >10,000 residents grants their select board authority to enact ordinances under RSA 41:14-b, what types of ordinances can the select board create without further approval from town meeting?

A. The legislature has granted towns the authority to make bylaws under RSA 31:39, but only if the issue falls into certain categories. Those categories are listed in RSA 31:39 and include things like the observance of Memorial Day, regulation of mufflers, regulating conduct at public dances and roller skating rinks and regulating noise. Now, there are other areas found within the RSA’s where towns can create rules and regulations, but this statute is the primary grant of authority from the state to local governments outlining their regulatory power. There are some other areas listed in RSA chapter 31 where towns are also granted authority to create ordinances, including conflict of interest ordinances,

SELECT BOARD/ CITY COUNCIL AUTHORITY TO ADOPT ORDINANCES AND BYLAWS



bylaws affecting forestry activities, taxicabs, open-air movie theaters, race tracks, etc. However, it is important to look at each statute because there are some instances where the authority to create such an ordinance is specifically reserved for the legislative body which is the town meeting. If that is the case, like for a conflicts of interest ordinance, the select board can never create this type of ordinance without town meeting approval.

Q. What if the issue has to do with regulating town roads?

A. The authority to regulate town roads is an area that has been specifically carved out as something the local governing body has broad authority to regulate. RSA 41:11 gives the select board authority to regulate the use of all public highways, sidewalks, and commons in their respective towns and gives select boards the same authority as city councils in this area. This means that the select board can enact such things as weight limits, parking ordinances, traffic signs, etc. relating to the use of town roads without needing to go to the town meeting for approval. This authority is vested in select boards regardless of the size of the town. For more information on road regulation see our publication *A Hard Road to Travel* or one of the many other road related articles published in past *Town and City* editions.

Q. What if my town has less than 10,000 residents or the issue doesn't fall within one of the categories listed in RSA 31?

A. For the most part, the answer is going to be that you need to present a warrant article for vote at the next

town meeting. However, there are a few areas where some creative thinking can allow the town to regulate certain activities if there is a health or safety concern. For example, the health officer has the authority to enact such regulations necessary to protect the health and safety of the public under RSA 147:1. While a health officer imposed regulation is not exactly the same as a town bylaw or ordinance, and enforcement procedures may be a little different, towns can still use this authority to address pressing health issues without having to wait until town meeting. For example, let's say that people in town are allowing their pools to fall into decay and the result is the perfect breeding ground for mosquitoes. There have been some recent cases of EEE in the area and residents are concerned that these neglected pools need to be drained, but the town doesn't have a standing water ordinance on the books. In this instance, the health officer could enact a regulation relative to the unnecessary creation of mosquito breeding grounds given the EEE concern and use this regulation to force the neglected pools to be drained.

There are a few other areas in the statutes concerning health and safety issues where towns can enact specific regulations, such as when dealing with solid waste facilities under RSA 149-M:17. When all else fails, and there still remains a significant public safety concern that needs to be immediately addressed, the issue could fall under the "police power" of local government. However, town's should use significant caution before attempting to justify an action under this authority and it would be advisable to have the town attorney involved. In the case of *State v. Lilley*, 171 N.H. 766 (2019), the court stated that the police power is the broad and inherent ability of government to regulate health, wel-

fare, and public safety. This ruling was then used in a case against the City of Nashua when the court upheld the city's mask ordinance. The court ruled that through both the power granted to city councils under RSA 47:17, XV and the implicit police power of municipal government, the City of Nashua's mask ordinance was valid.

It is important to note that the Nashua case involved a city council and as stated above, RSA 47:17 gives city council's significantly more authority to adopt ordinances than select boards. However, the analysis used by the court in the Nashua and Lilley cases would suggest that the police power lies in "municipal government" which would include select boards as the local governing body. Therefore, one could craft an argument that if there is a significant enough public health or safety risk, a select board could attempt to create a regulation using their "police power." This would, however, be an exceptionally rare occurrence and as always, seeking a vote at town meeting is the better approach.

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