



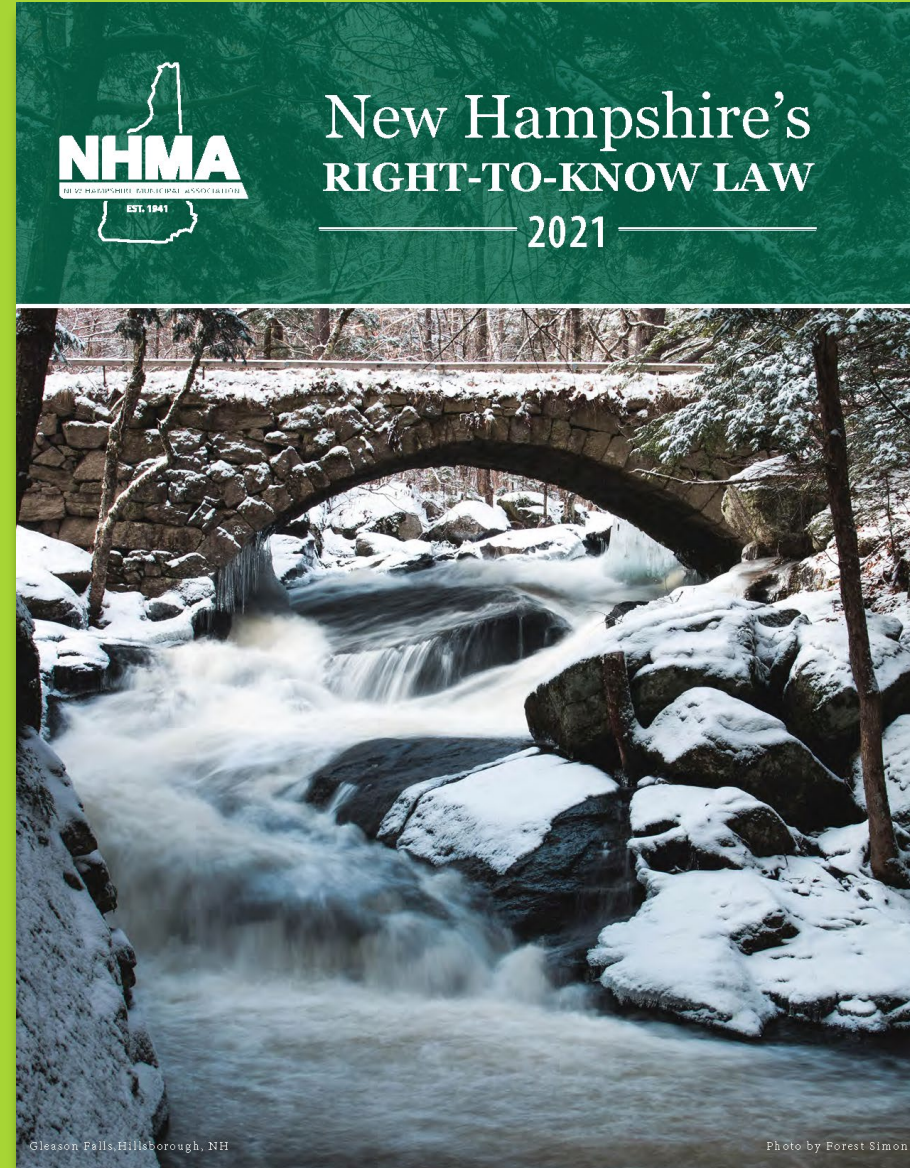
RIGHT TO KNOW LAW- GOVERNMENTAL MEETINGS & NONPUBLIC SESSION

Stephen C. Buckley, Legal Services Counsel
Jonathan Cowal, Municipal Services Counsel

June 13, 2023

NHMA's Publication: *New Hampshire's Right-to-Know Law*

- Glossary
- Remote Participation Checklist
- Nonpublic Session Checklist
- Law Enforcement Guidance
- Complete copy 91-A & 33-A
- Table of Cases
- Table of Statutes



Agenda

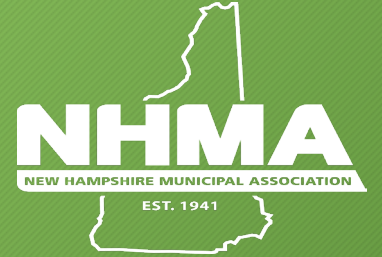
- Governmental Meetings
- Nonpublic sessions



Governmental Meetings & The Right-to-Know Law



Overview of How RTK Governs Meetings Content



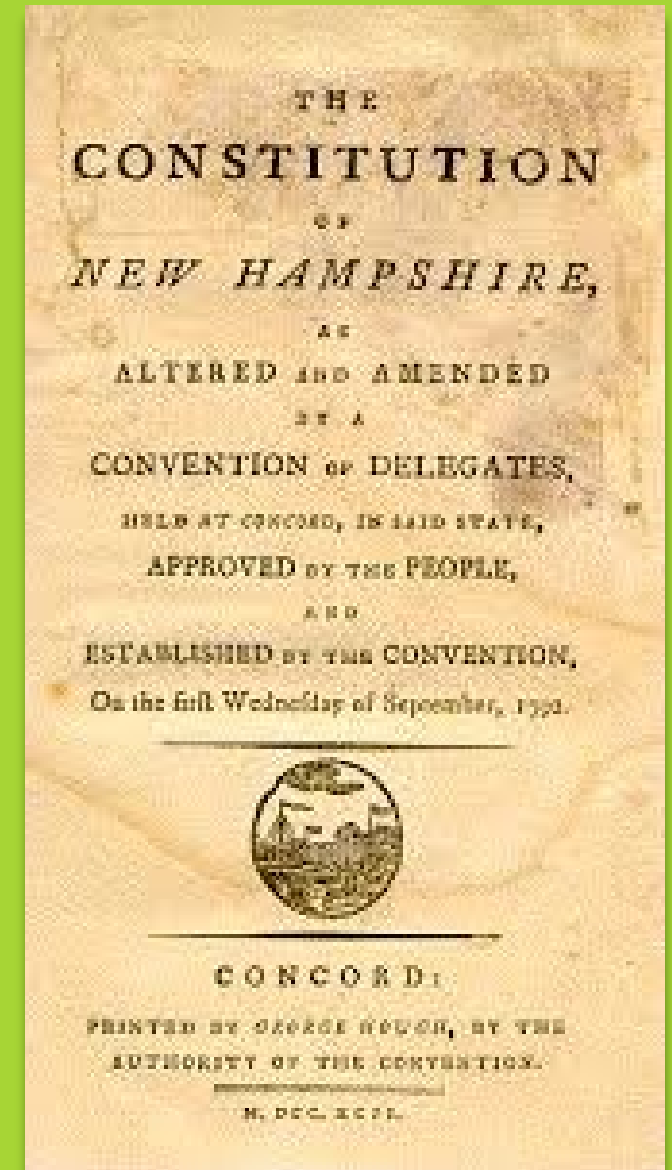
- I. What is a “meeting”?
- II. What is not a meeting, i.e., a “nonmeeting”?
- III. What are the requirements for holding a proper “meeting”?
- IV. How to hold meetings virtually.

The Right-to-Know Law RSA Chapter 91-A

PART I, ARTICLE 8 OF THE NH Constitution: Government ...
should be open,

SECTION 1 OF RSA 91-A:

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.



What is a Public Meeting? RSA 91-A:2

Quorum

Public body

Convenes so that they can communicate contemporaneously

To discuss or act upon a something over which the public body has supervision, control, jurisdiction, or advisory power

“Quorum”

Majority of membership

Can't define as more than majority to circumvent law

Another statute may apply

Meetings Among Public Body Members Outside of Public Meetings



Meetings of public body members that are less than a quorum to discuss public business should not be undertaken - all public business should only be discussed at properly convened public meetings.

91-A:2-a Communications Outside Meetings. -

I. Unless exempted from the definition of "meeting" under RSA 91-A:2, I, public bodies shall deliberate on matters over which they have supervision, control, jurisdiction, or advisory power only in meetings held pursuant to and in compliance with the provisions of RSA 91-A:2, II or III.

II. 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 as expressed in RSA 91-A:1.

“Public Body”

RSA 91-A:1-a, VI:

- Any legislative body, governing body, board, commission, committee of any county, town, municipal corporation, school district, SAU or other political subdivision
- Any committee, subcommittee, advisory committee thereto
- New Case: But a committee of city employees providing advice to planning board applicants is not a public body. *Martin v. Rochester*



When Public Meetings - Purpose of Public Meetings



Convenes such that all participating members are able to communicate with each other contemporaneously

What is Not a “Meeting”? (i.e. “Non-meeting”)

Social or other encounter, no decisions

Collective bargaining

Consultation with legal counsel

Circulation of draft documents

Different than nonpublic session!

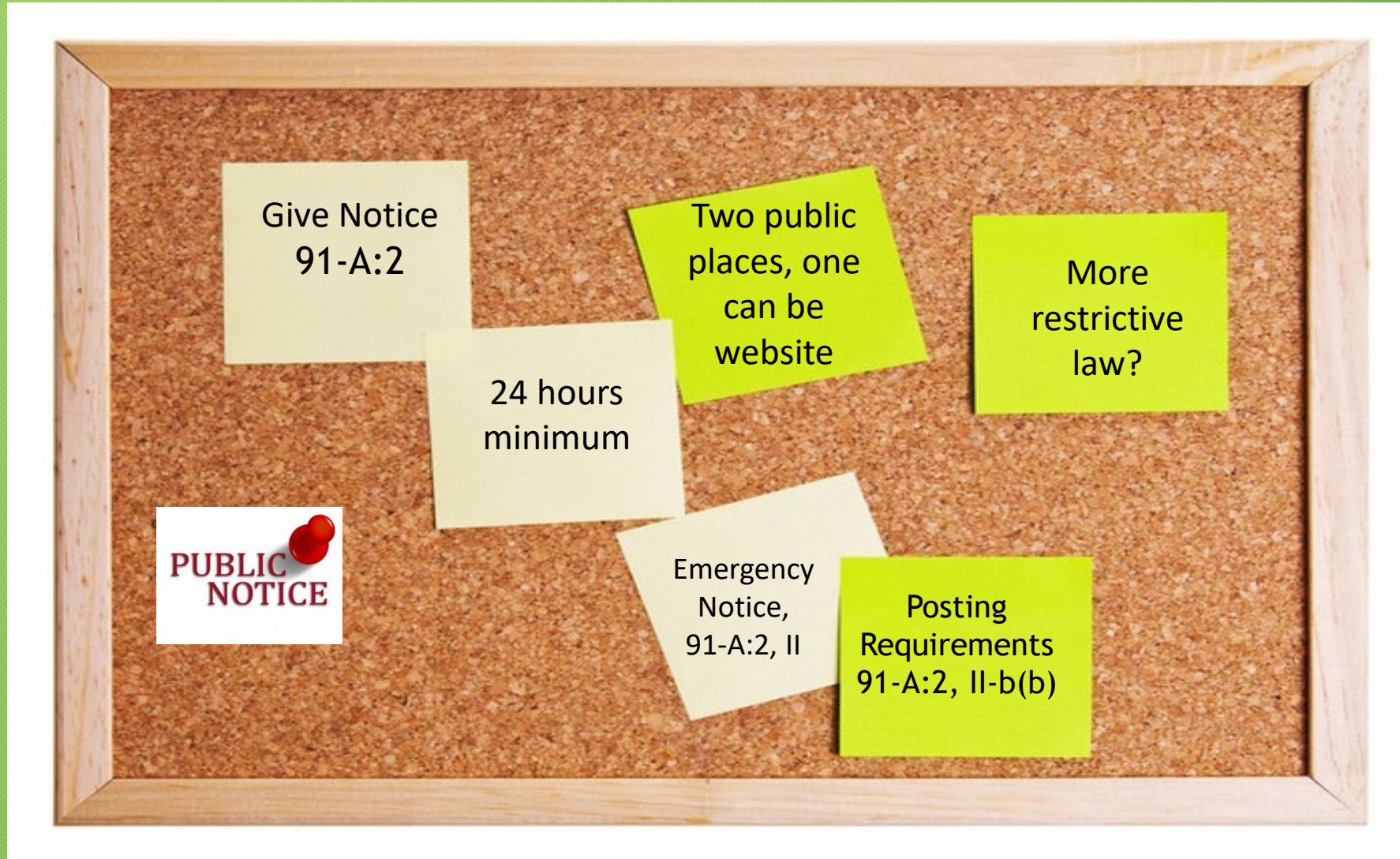
What are the Requirements of a Public Meeting?

Public notice

Open to the public

Meeting minutes

“Posting Requirements”



Switching Back to In-Person Meetings

- Emergency Order #12, allowed virtual meetings during the State of Emergency
- Since State of Emergency expired on June 11, 2021, boards can still have partially remote meetings
 - There must be a physical location for the public to attend, and, in most cases,
 - A quorum of the board must be present at that location.
- Nothing prohibits boards from continuing to offer electronic access (telephonic, Zoom, etc.) to the public.



Option 1: Remote Board Member Participation - RSA 91-A:2, III(a)

- Public body *may* allow
- Personal attendance “not practical” (in minutes)
- Quorum *present at physical location*
- All board members can hear and be heard
- Identify board members in remote location
- All votes by roll call



Option 2: “Emergency”

RSA 91-A:2, III(b)

- Chair must declare that “emergency” exists sufficient to satisfy requirements of RSA 91-A:2, III
- Still requires physical location
- However, a quorum of the board need not be present at the physical location.
- Everyone can hear and be heard
- Identify persons in remote location
- All votes by roll call

What is an “Emergency? & Notice Requirements

“Emergency”: a situation where immediate undelayed action is deemed to be imperative by the chairman or presiding officer of the public body.

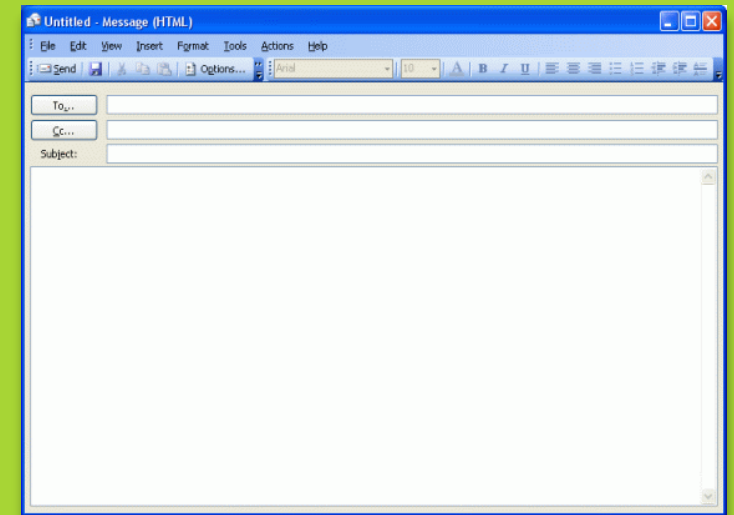
That presiding officer shall post a notice of the time and place of such meeting as soon as practicable.

Further, the presiding officer shall employ whatever further means are reasonably available to inform the public that a meeting is to be held.

“Emergency” meetings do not require 24-hour notice posted in 2 public places but should provide as much notice as practical.

“Electronic Communications”

- Avoid substantive discussions via email
- Circumventing spirit and intent of 91-A
- Less than a quorum communicating by email
- “Reply All”
- Emails are governmental records



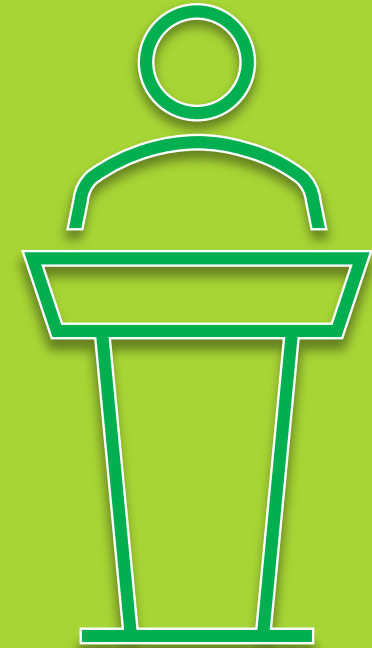


Meetings “Open to the Public”

- ▶ “All meetings . . . shall be open to the public.” RSA 91-A:2, II.
- ▶ “Each part of a meeting required to be open to the public shall be audible or otherwise discernable to the public at the location specified in the meeting notice as the location of the meeting.”
- ▶ Public has right to record, etc.
- ▶ No secret ballot voting.
- ▶ Public Comment?

Public Comment

- No right to speak in meeting, unless you say public can speak(remember hearings are different)
- Establish & explain rules, apply consistently
- First Amendment: Many restrictions are not acceptable!
- Maintain control & order
 - Removal?



Public Comment: Some Observations

- The public body should have rules governing public comment before it occurs. Explain the rules clearly to everyone at every meeting. Repeat as necessary.
- When you allow public comment the First Amendment applies - only “time, place and manner” restrictions -no content restriction
- You can limit time for comments, require speaking in order of sign-up.
- You cannot require only positive comments, or prohibit comments about municipal employees
- A person who is not complying with the public comment rules, and after reminders by the chair, may in extreme cases be removed from the meeting by law enforcement (*State v. Dominic*, 117 N.H. 573 (1977)).

Public Meeting Minutes

RSA 91-A:2

- Minimum required contents:
 - (1) the names of members, (2) persons appearing before the public bodies, (3) a brief description of the subject matter discussed , (4) state final decisions made, and, (5) state the names of the members who made or seconded each motion shall be recorded in the minutes.
- Made available within 5 business days
- Posting requirements-
 - RSA 91-A:2, II-b(a)
- If the software used to conduct a remote meeting allows for recording, use it to aid the minute taker, but remember that recordings are not a substitute for written minutes.



Nonpublic Sessions RSA 91-A:3

It's a nonpublic session, not a nonpublic meeting

A nonpublic session is different from a “non-meeting”

Nonpublic session is the exception, not the rule

Nonpublic sessions are permitted, not required

Most Commonly Use Reasons for Nonpublic Sessions*



- Public employee (specific employee)
- Hiring
- Reputation
- Real or personal property
- Lawsuits
- Emergency preparation
- Discuss legal advice
- Discuss student tuition contract

*But not complete list

RSA 91-A:3, II (a) dismissal, promotion, compensation, discipline, investigation of charges concerning a public employee

- Must concern a particular municipal employee - not a grouping of employees or a department
- This provision states that the meeting must be held in public if 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.
 - Thus, the “right to a meeting” refers to some written rule entitling the employee to a public airing of the matter under investigation.
 - By way of example, under RSA 41:48, an appointed police officer cannot be removed from office unless she is provided notice and a public hearing before the governing body.
 - Similarly, under RSA 202-A:17, no public employee of a public library can be removed from employment unless they are provided written notice and a public hearing on their removal if requested.

RSA 91-A:3, II (c) Matters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the public body itself



- The harm to reputation must be severe and not trivial
- The claim of reputational harm cannot be asserted by a member of the public body that is convening the nonpublic session
- Person who might suffer the reputational harm can nevertheless request an open meeting
- This exemption extends to 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
- Notice of a nonpublic session based on harm to reputation need not be provided to the person whose reputation could be adversely affected. *Sivalingam v. Newton*, 174 N.H. 489 (2021)

How Does a Public Body Enter Nonpublic Session? RSA 91-A:3, I

Motion

Motion to enter nonpublic session must be made and seconded.

Motion Content

Motion must state on its face the specific exemption relied upon.

Voting

Vote must be by roll call; simple majority is sufficient. RSA 91-A:3, I(b).

Minutes of Nonpublic Sessions

Minutes must be kept—
same as for public session.

Must “record all actions in
such a manner that the
vote of each member is
ascertained and recorded.”

Conducting the Nonpublic Session

May make decisions in nonpublic session

Member objecting session violations—note objection. If board persists, objecting member may continue to participate without being subject to penalties

RSA 91-A:2, II-a

Returning to public session

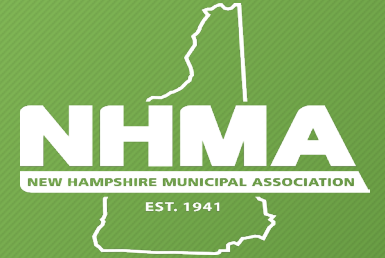
Other Considerations

Include nonpublic session on posted agenda.

Timing—beginning or end of meeting?



Disclose or Seal?



Minutes must be publicly disclosed within 72 hours unless board determines, by 2/3 vote taken in public session, that:

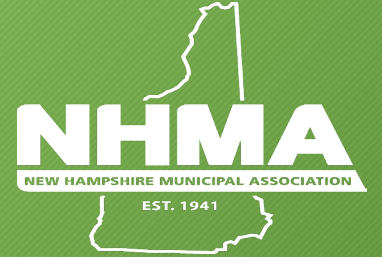
- Disclosure would have adverse effect on reputation;
- Disclosure would “render the proposed action ineffective”; or
- Discussion in nonpublic session pertained to terrorism.

New Law: HB 108 - Maintain List of Nonpublic meeting minutes



- Effective January 1, 2022 (assuming bill is signed by Governor)
- List of sealed nonpublic meeting minutes must:
 - Identify the public body
 - State the date & time of the nonpublic session
 - State the exemption for the nonpublic session
 - State the date of the decision to seal the minutes
 - State the date of any subsequent decision to unseal minutes
- Minutes sealed under RSA 91-A:3, II (d) (sale or acquisition of real or personal property) “shall be made available to the public as soon as practicable after the transaction has closed or the public body has decided not to proceed with the transaction.”

Free Coaching and Technical Assistance (CTAP)



FREE TECHNICAL ASSISTANCE FOR NH MUNICIPALITIES

Coaching and Technical Assistance Program (CTAP)

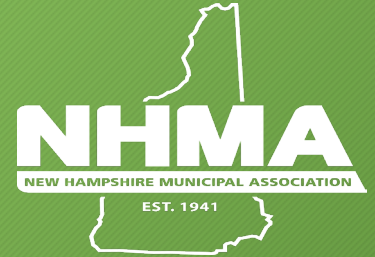
Helping New Hampshire municipalities access grant funding to
implement successful community and economic development projects.



[LEARN MORE!](#)

legalinquiries@nhmunicipal.org/603.224.7447/www.nhmunicipal.org

Upcoming Webinars



CLOSED LANDFILLS IN NEW HAMPSHIRE

Old Closed Landfills – What Towns Need to Know Webinar

12:00 noon – 1:00 pm, Wednesday, June 21, 2023. Join Jennifer Griffith, Project Manager with NEWMOA, who will help municipal officials understand the problems old landfills can create and actions they should take to reduce environmental contamination and liabilities.

REGISTRATION OPEN!



[REGISTER NOW!](#)

legalinquiries@nhmunicipal.org/603.224.7447/www.nhmunicipal.org

Free Local Officials Workshop Rescheduled



FREE FOR MEMBERS: Local Officials Workshop Rescheduled to June 29!

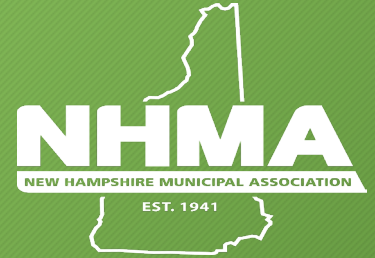
9:00 am - 4:00 pm, Thursday, June 29. Free hybrid workshop is a great primer for new local officials or as a refresher for more experienced local officials on the basics of town government. **Please join us.**

REGISTRATION OPEN!

[REGISTER NOW!](#)

legalinquiries@nhmunicipal.org/603.224.7447/www.nhmunicipal.org

Upcoming Webinars



REGISTRATION OPEN: Exploring Current Trends in Citizen Engagement

12:00 noon - 1:00 pm, Wednesday, July 12, 2023. Join representatives from Edmunds GovTech who will review the current trends in citizen engagement and give insight into helpful ways you can better communicate with your residents.

REGISTRATION OPEN!



[REGISTER NOW!](#)

legalinquiries@nhmunicipal.org/603.224.7447/www.nhmunicipal.org

Upcoming Webinars



REGISTRATION OPEN: The Workings of a Planning Board Webinar

12:00 noon - 1:30 pm, Thursday, July 20, 2023. This webinar is geared for new planning board members and alternates, as well as seasoned veterans, who want a refresher course on planning board basics.

REGISTRATION OPEN!

[REGISTER NOW!](#)

legalinquiries@nhmunicipal.org/603.224.7447/www.nhmunicipal.org

Free - Subscribe Today!



New Hampshire Municipal Association

THE SERVICE AND ACTION ARM OF NEW HAMPSHIRE MUNICIPALITIES

LEGISLATIVE BULLETIN

[SUBSCRIBE](#)

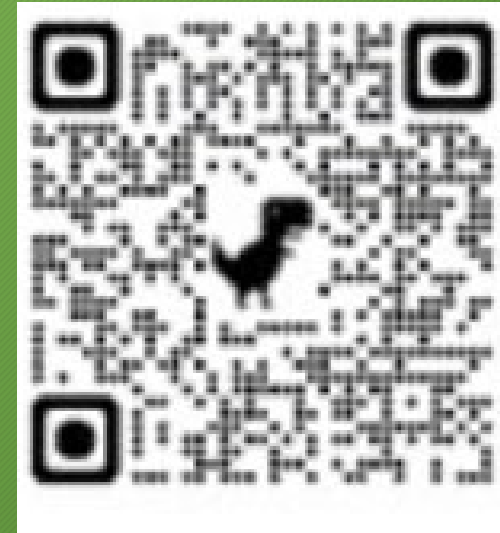


[SUBSCRIBE](#)



[SUBSCRIBE](#)

legalinquiries@nhmunicipal.org / [603.224.7447](tel:603.224.7447) / www.nhmunicipal.org





*For attending
our Webinar
Today!*



NHMA'S MISSION

Through the collective power of cities and towns, NHMA promotes effective municipal government by providing education, training, advocacy and legal services.



603-224-7447

www.nhmunicipal.org

legalinquiries@nhmunicipal.org