



NHMA
NEW HAMPSHIRE MUNICIPAL ASSOCIATION
EST. 1941

HYBRID WORKSHOP

2023 Local Officials Workshop


Presented by:

- ▶ Stephen Buckley, Legal Services Counsel
- ▶ Jonathan Cowal, Municipal Services Counsel

June 29, 2023

1


1



Today's Presenters



Stephen Buckley
Legal Services Counsel



Jonathan Cowal
Municipal Services Counsel

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2

2

NHMA's Legal Advisory Service

Open 8:30 a.m. - 4:30 p.m.

- Email: legalinquiries@nhmunicipal.org
- Phone: 603-224-7447

Provide general legal advice

- Not comprehensive legal review of documents,
- Not drafting individualized ordinances or charters,
- Not reviewing specific applications before local boards,
- Not settle intra-municipal disputes.

Goal: Response w/in 48 hours.

3

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3

Today's Agenda

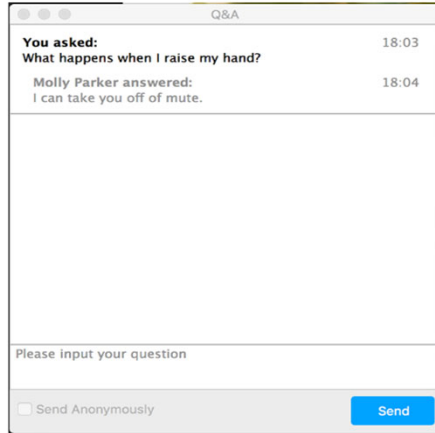
9:00 am	Welcome - Margaret Byrnes, Executive Director
9:05 am	Program Overview - Steve Buckley
9:10 am	HealthTrust - Theresa Williams
9:20 am	Review of electronic <i>Knowing the Territory</i> - Steve Buckley
9:25 am	Governance & Select Board Authority - Steve Buckley
10:25 am	Break
10:35 am	Governmental Records, Retention of Records, Remedies under the Right-to-Know Law - Jonathan Cowal
12:00 pm	Lunch
1:00 pm	Right-to-Know Law: Meetings/Nonpublic Sessions - Steve Buckley
1:45 pm	Conflicts of Interest - Jonathan Cowal
2:30 pm	Break
2:40 pm	Budgeting Essentials - Steve Buckley
3:15 pm	Legislative Update - Natch Greyes
3:30 pm	Land Use 101 - Steve Buckley
4:15 pm	Final Questions - Upcoming Workshop Information
4:30 pm	Finish

4

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4

How Do I Ask a Question?



The chat function for this workshop has been disabled.

In order to ask a question of please use the Q&A function in Zoom.

Once your question has been answered, it will then appear under the *Answered* tab.

5

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GET TO KNOW HEALTHTRUST!

Who is HealthTrust?

A nonprofit, public risk pool dedicated to serving our Members – New Hampshire’s schools, towns, cities, counties and other public entities.

- *Exceptional service with a personal touch*
- *More than 70,000 NH public sector workers and their family members choose HealthTrust for their coverage*

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 BRIAN RAPP Deputy Chief Clement Fire Department	 JILL SHENG HR Payroll Coordinator Stafford County	 CATHY ANN STACEY Register of Deeds Rockingham County	 SARAH TRAHAN Social Studies Teacher Worcester High School	

6

6

WHY HEALTHTRUST

Our focus is YOU!

- Quality, cost-effective, comprehensive benefit plans
- Innovative programs
- Enrollee Services Center
- Slice of Life
- HealthTrust 360
- Secure Enrollee Portal - www.healthtrustnh.org
- Transition Care & Survivor Care
- Vision and Hearing Discount Programs

- Anthem Blue Cross and Blue Shield
- Extensive Provider Network
 - LiveHealth Online, AWARE Recovery Care, Lark

- CVS Caremark
- Nationwide Network of Retail Pharmacies
 - Maintenance Choice (Mail Service or CVS Pharmacy)

- Northeast Delta Dental
- Extensive Provider Network

- National Insurance Services (NIS)
- Life and Long-Term Disability



7

7

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8

Knowing the Territory - *Electronic*



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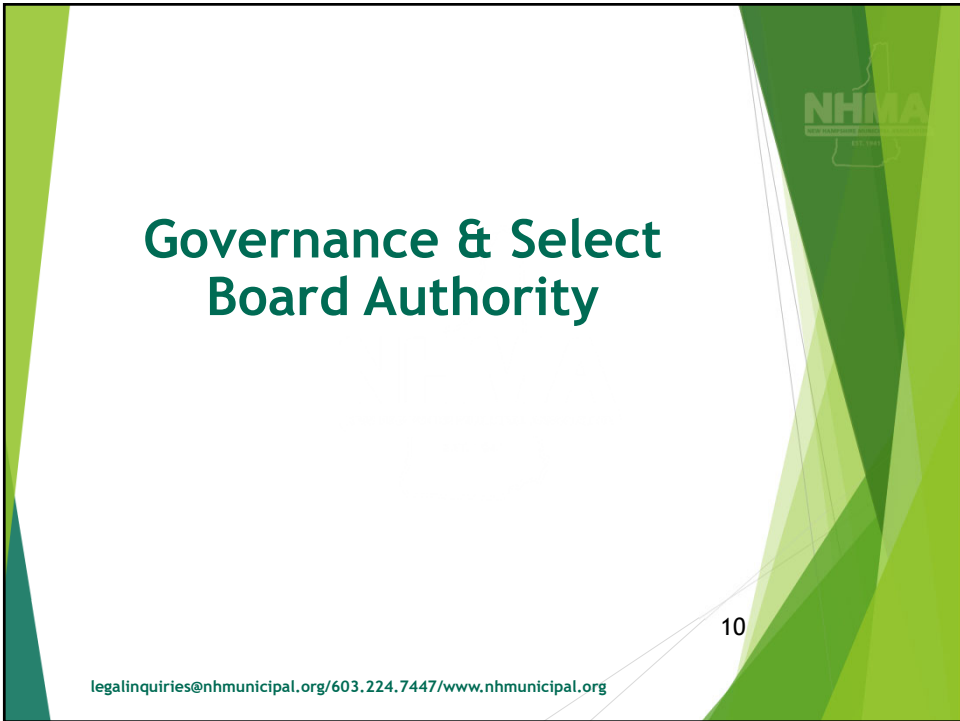
**Knowing the
TERRITORY**
2023

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

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9

9




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**Governance & Select
Board Authority**

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10

10




Types of Governmental Entities

- Cities - 13, Operate via a Charter
- Towns - 221, Traditional, SB2 or Charter
- Village Districts - 105, Special Purposes
- School Districts
- Counties
- Intergovernmental Agreements - RSA 53-A

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Authority of Towns & Cities

- ✓ No Home Rule: The Legislature grants the power act in particular fields of law, and silence in the law does not imply authority.
- ✓ Statutory Law: Revised Statutes Annotated published by Thomson Reuters, available online:
<http://www.gencourt.state.nh.us/rsa/html/indexes/default.html>
- ✓ Administrative Rules:
<http://www.gencourt.state.nh.us/rules/>
- ✓ NH Supreme Court Orders & Decisions:
<https://www.courts.nh.gov/our-courts/supreme-court/orders-and-opinions>
- ✓ Preemption: Article VI of the U.S. Constitution = Supreme Law of the Land. State statute can occupy a field of law with the intent to supersede local regulation.

12

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12


Separation of Powers

“Governing body” means the select board or town/city council, or board of aldermen; manage prudential affairs - RSA 21:48

“Town” or “legislative body” means the town meeting, town/city council, or aldermen - RSA 21:47

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Town Meeting is the Legislative Body

- ▶ Traditional:
 1. Ballot vote: Vote by ballot to elect officers and zoning ordinance (official ballot)
 2. Business session; discuss and amend warrant articles and vote on whether to adopt the articles
- ▶ SB2:
 1. Divides town meeting into two parts
 2. First session - (“Deliberative Session”), for debate and amendments of article language
 3. Second session - “Official Ballot Voting Day” voting on all warrant articles and elections
 4. If operating budget rejected by voters, SB 2 towns have default budget option

14

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14



The Town Meeting






- Elects Town Officials
- Approves all appropriations
- Votes to Adopt Ordinances & Bylaws - RSA 31:39
- Citizen authority to propose warrant articles
- Citizens can petition for special town meeting
- Must approve sale or purchase of town real property unless RSA 41:14-a has been adopted

15

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15

Checklist for Adopting Ordinances

-  Authority - Derived from statute, explicit or inherent
-  Preemption? - Does ordinance conflict with Federal or State Statute?
-  Who votes/adopts? - Is ordinance one the meeting can adopt or is the ordinance enactment delegated to another board or body?
-  Procedure - Does the ordinance require notice or hearings before the meeting?
-  Enforcement - Pattern of non-enforcement may = policy of non-enforcement

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Select Board as Governing Body

- 3 members by default may have 5 members if approved by town meeting
- The words "selectwoman," "selectperson," and "select board" may be used interchangeably with "selectman" in all instances, where appropriate. RSA 21:28
- Select board does not have alternates, *except* pro tem may be appointed by the absent board member to perform election duties. RSA 658:21-a.
- A select board only takes official actions as a select board through a majority of the members.



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Actions by Select Board at Public Meetings

All actions taken by the select board must be voted on by a majority of the board at a public meeting that complies with the Right to Know Law, RSA chapter 91-A, **PROVIDED, HOWEVER:**

- Under RSA 41:29 the select board can approve a manifest for payment of town expenses noncontemporaneously (no need for a public meeting with quorum of the select board).
- Acting as the assessing officials the select board may sign a notice of intent to cut under RSA 79:10 outside a public meeting. When a notice is to be signed by the assessing officials outside a public meeting, public notice shall be posted by the municipality at least 24 hours, excluding Sundays and holidays, before it is signed. The notice shall be posted in the 2 places where the municipality regularly posts notices of its governing body meetings.



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Select Board's Essential - Executive, Managerial, Administrative Body

- ▶ Calls annual meeting and posts warrant, RSA Chapter 39
- ▶ Manages prudential affairs, RSA 41:8
- ▶ Financial responsibilities/duties: presents budget, handles expenditures, RSA 41:9, financial duties, RSA 41:9
- ▶ Manages public property, RSA 41:11-a/41:14-a
- ▶ Regulates town highways, RSA 41:11
- ▶ Manages employment



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Select Board: Financial Duties

- ▶ Select boards must keep a fair and correct account of all moneys received, all accounts and claims settled and all orders drawn by them, and of all their other financial transactions on behalf of the town.
- ▶ Select boards must publish in the annual report, or post at the annual meeting, the general fund balance sheet from the most recently completed audited financial statements or from the financial report filed pursuant to RSA 21-J:34, V.
- ▶ Select board must insert an article in the warrant recommending such action as they deem appropriate when there is an accumulated general fund deficit,
 - ❖ That may include, but is not limited to, raising additional taxes.
- ▶ Select board is responsible for establishing and maintaining appropriate internal control procedures to ensure the safeguarding of all town assets and properties.



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Vacancies & Appointments

- ▶ Generally, a vacancy occurs in public office when the elected or appointed official resigns, ceases to have domicile in town (where required) or dies. RSA 652:12
- ▶ Because there is no clear law on how an official submits their resignation and when it is effective, the select board should have a written policy, that all resignations shall be in writing and shall become effective when delivered to the board.
- ▶ In most instances the select board makes all appointments and fill vacancies.
- ▶ When filling a vacancy in an elected position, the person appointed in most instances serves until the next town meeting where a person is elected to serve the unexpired term or is elected to a new term as the case may be. RSA 669:61.
- ▶ A person appointed or elected does not assume their office until they are “qualified,” and that requires to office holder to take the oath of office as required by RSA chapter 42.

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21

21

Select Board & Elections

- ▶ Members of the Select Board are Election Officers. RSA 652:14.
- ▶ NH Constitution requires the attendance of the entire select board during voting and vote tabulation at a State General Election. As for town and school district elections, the presence of the entire select board is not mandated, but it is recommended.
- ▶ The Select Board shall provide for a suitable place in which to hold state and town elections and shall see that the same is “warmed, lighted, and furnished with proper supplies and conveniences.” RSA 658:9
- ▶ Along with the clerk and the moderator, the Select Board constitute the Board of Recount. RSA 669:32.

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22

22

Select Board Supervisory Authority Over Certain Key Officials



- **Road Agent - RSA 231:65**
The selectmen may supervise the methods and manner of performance of such agents.
- **Appointed Police Chief - RSA 105:2-a**
Direct and control all employees in their normal course of duty and shall be responsible for the efficient and economical use of all department equipment.
- **Appointed Fire Chief - RSA 154:5**
Direct and control all employees in their normal course of duty and shall be responsible for the efficient and economical use of all department equipment

23

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Select Board Relationship with Other Elected Officials, Generally



- ▶ No Interference
- ▶ Cooperation
- ▶ Statutory Term and Duties

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Town Administrator:

- ✓ Not defined in statute
- ✓ Employee Appointed by Select Board
- ✓ Duties defined by written contract, job description or personnel manual



Town Manager - RSA chapter 37:

- ✓ Duties defined by statute
- ✓ Must be adopted by town meeting
- ✓ Administrative/supervisory head of all departments
- ✓ Responsible to the governing body, serves at their pleasure or as set forth in written contract



25

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26

26




Governmental Records & The Right-to-Know Law

27

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27



RSA 91-A:4, I: Any Citizen Can Request Records

- ▶ No definition of “citizen” in statute or relevant case-law, but, presumably, at least a New Hampshire citizen.
- ▶ Best practice is anyone who shows up should be assumed to qualify as a “citizen” for the purposes of requesting records.
- ▶ This can make online requests tricky.

28

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What They're Requesting Must Be "Reasonably Described"

- ▶ Municipal employees must know what they are looking for in the voluminous materials kept by the municipality.
- ▶ Municipal employees do have an obligation to clarify with the citizen what the citizen is requesting. *Salcetti v. City of Keene*, No. 2019-0217 (June 3, 2020) (speaking in *dicta* about a "spirit of collaboration").
- ▶ This may require a clarifying phone call.

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Search for Records Must Be Reasonable

- ▶ Whatever record is requested must also be met with a reasonably calculated search by the municipality to uncover the record. *ATV Watch v. N.H. Dep't of Transp.*, 161 N.H. 746 (2011).
- ▶ The crucial issue is not whether relevant documents might exist, but whether the agency's search was reasonably calculated to discover the requested documents.
- ▶ This can have major implications in electronic records searches.

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30

30

Three Key Steps

STEP 1: Is it a *Governmental Record*?

STEP 2: Is the record exempt from disclosure?

STEP 3: Make available non-exempt records.

31

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31

Is it a **Governmental Record?** **RSA 91-A:1-a**

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

32

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32

“Public Body”

RSA 91-A:1-a, VI:



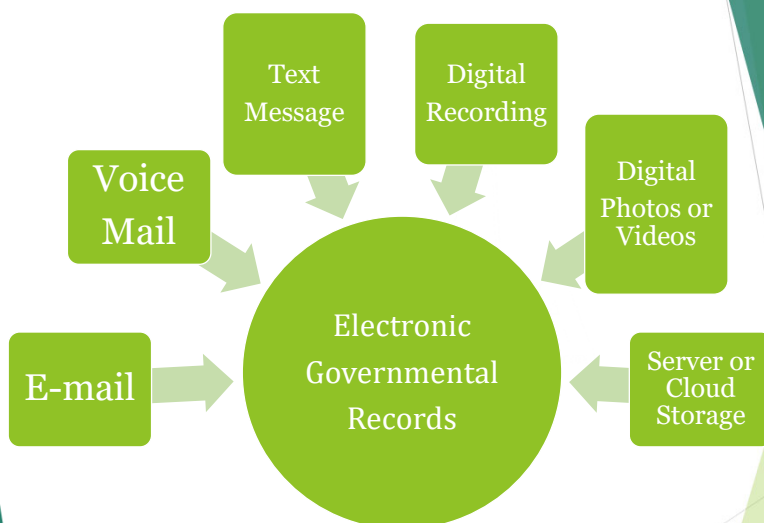
- Any legislative body, governing body, board, commission, committee of any county, town, municipal corporation, school district, SAU or other political subdivision
- Any committee, subcommittee, advisory committee thereto
- New Case: But a committee of city employees providing advice to planning board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



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33

33



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34


34






35

A presentation slide with a white background on the left and a green geometric pattern on the right. The title 'Mandated Access to Certain Records' is in teal. The NHMA logo is in the top right. Three items are listed in grey boxes, each with a red icon: a dollar sign for employee separation payments, a clock for meeting minutes, and a building for lawsuit settlements. The number '36' is in the bottom right, and contact information is at the bottom left.

Mandated Access to Certain Records

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-  Employee separation payments if in addition to regular salary, or accrued vacation or sick time - 91-A:4, I-a
-  Meeting minute raw materials available after completion of public meeting - 91-A:4, II
-  All lawsuit settlements on file with town clerk and available for public inspection for 10 years - 91-A:4, VI

36

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36

Exemptions to Disclosure of Governmental Records



General Standards Governing Exemptions - RSA 91-A:5

- ▶ RSA 91-A:5 provides a list of records categorically exempt from disclosure; master jury list or teacher certification records.
- ▶ Some statutory exemptions require detailed analysis, such as records whose disclosure would constitute invasion of privacy.
- ▶ The Right-to-Know Law's purpose is to provide the utmost information to the public about what its government is up to. If disclosing the information does not serve this purpose, disclosure may not be required.
- ▶ When a public body or agency seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a heavy burden to avoid nondisclosure.

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37

37

RSA 91-A:5, IV: Most Common Exemption

Records pertaining to internal personnel practices; confidential, commercial, or financial information; test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations; and personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy. 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.

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38

38

Union Leader v. Salem Describes Privacy Balancing Test

If governmental records are properly classified as “internal personnel practices” then whether such records are subject to disclosure depends on evaluating whether that disclosure would constitute an invasion of privacy.

- ▶ First, evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. If no privacy interest is at stake, the Right-to-Know Law mandates disclosure.
- ▶ Second, assess the public’s interest in disclosure. Disclosure of the requested information should inform the public about the conduct and activities of their government.
- ▶ Finally, balance the public interest in disclosure against the government’s interest in nondisclosure and the individual’s privacy interest in nondisclosure.

39

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39

“Confidential, Commercial or Financial Information”

- ▶ This determination must be made objectively and should not be based on the subjective expectations of the party generating it.
- ▶ The emphasis placed on the potential harm that will result from disclosure, rather than simply promises of confidentiality, or whether the information has customarily been regarded as confidential.


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“Other Files Whose Disclosure would be an Invasion of Privacy”




Private	Evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. If no privacy interest is at stake, the Right-to-Know Law mandates disclosure.
Public	Assess the public’s interest in disclosure. Disclosure of the requested information should inform the public about the conduct and activities of their government.
Balance	Balance the public’s interest in disclosure against the government’s interest in nondisclosure and the individual’s privacy interest in nondisclosure.

41

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41

Drafts & Notes



Preliminary Drafts - RSA 91-A:5, IX -

- “[N]ot in their final form and not disclosed, circulated, or available to a quorum or a majority of the members of a public body.”

Personal Notes - RSA 91-A:5, VIII -

- “Any notes or other materials made for personal use that do not have an official purpose are exempt from disclosure.”

42

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42

Law Enforcement Records? *Use FOIA*



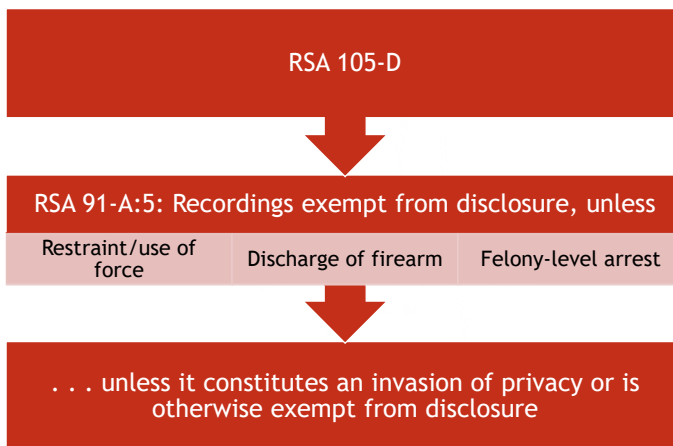
- ▶ Factor A: Interfere with law enforcement proceedings
- ▶ Factor B: Interfere with fair trial
- ▶ Factor C: Invasion of privacy
- ▶ Factor D: Confidential sources
- ▶ Factor E: Disclosing investigative techniques and procedures
- ▶ Factor F: Endangering life or safety

43

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43

Body Worn Cameras (BWCs)




44

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44

IT Security



As of Aug. 4, 2020, RSA 91-A:5 was amended by adding a new paragraph XI, providing that records pertaining to information technology systems are exempt from disclosure under the Right-to-Know Law if release of those records would disclose security details that would aid an attempted security breach or circumvention of law.

↓

Very limited exemption. Applies, essentially, to the security protocols and measures installed on municipally owned systems.

↓


Attempt to limit hackability of municipal systems.

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Attorney- Information



- ▶ As of July 30, 2021, RSA 91-A:5 was amended by adding new paragraph XII in response to a (now withdrawn) N.H. Supreme Court decision subjecting attorney-client privileged communications and attorney work product to the privacy balancing test.
- ▶ Blanket exception for: “Records protected under the attorney-client privilege or the attorney work product doctrine.”

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46


46







Make Non-Exempt Records Available

47

Basics of Record Production





-  Records must be provided immediately *only* when they are immediately available for release.
-  RTK *does not* give citizens the right to review records in any quantity and wherever kept immediately upon demand.
-  Requiring appointment to review records is permitted.
-  RTK does not require document “compilation.”

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48

Before Providing Records: Redact Exempt Information





49

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49

No Flat Fees!



- ▶ **ONLY** Reasonable fees are allowed!
- ▶ RSA 91-A:4, IV
- ▶ FIFTY CENTS PER PAGE FOR FIRST 10 PAGES, AND THEN TEN CENTS PER PAGE DEEMED REASONABLE.
MARTIN V. ROCHESTER,
173 NH 378 (2020)

50

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A Note About Fees & Electronic Records...

- ▶ 91-A:4, IV: No fee shall be charged for the inspection or delivery, without copying, of governmental records, whether in paper, electronic, or other form. Nothing in this section shall exempt any person from paying fees otherwise established by law for obtaining copies of governmental records or documents, but if such fee is established for the copy, no additional costs or fees shall be charged.
- ▶ Green v. SAU #55: Electronic Records Produced Electronically.
- ▶ Taylor v. SAU #55: School Administrative Unit’s policy requiring use of a thumb drive to produce electronic records was valid under The Right-to-Know Law.

51

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51

How Much Time To Produce Records?

We have 5 days...



...right?

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52

“Something” w/in 5 Days



- ▶ As of Jan. 1, 2020, municipalities must:
 - ▶ Provide a written statement of time necessary to determine whether request granted or denied; AND
 - ▶ *Provide a reason for the delay!*
 - ▶ Amendment to RSA 91-A:4, IV - HB 396 - 2019 NH Laws Chapter 107
- ▶ NHMA Suggestion for Reason for Delay -
 - ▶ Need time to determine whether or not record exists;
 - ▶ Need time to determine whether it is disclosable;
 - ▶ If disclosable, need time to determine how much time it will take to make the requested records ready for review or copying.

53

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53




Retention & Remedies



54

Records Retention



-  RSA 33-A:3-a contains 156 categories of records to be retained.
-  Records retained for the prescribed period.
-  Once the retention period has expired records may be discarded, but if still available must be produced.



55

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Archive Paper Records in PDF/A?

Any municipal records in paper form listed in RSA 33-A:3-a may be transferred to electronic form (PDF/A Format ONLY), and the original paper records may be disposed of as the municipality chooses.






56

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56

Deletion of Electronic Governmental Records




-  A governmental record in electronic form is no longer required to be disclosed once it has been “initially and legally deleted.” RSA 91-A:4, III-b.
-  A record can be “legally deleted” if it is not subject to a retention period, or if the required retention period for that record has expired.





57

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57

How are Violations of RSA Chapter 91-A Enforced?



-  Office of Right-to Know Ombudsman established effective 7/1/22
-  “Aggrieved person”
-  Lawsuit or by complaint to Ombudsman
-  RSA 91-A:7, :7-a, :7-b, :7-c,:8

58

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Right-to-Know Ombudsman (eff. 7/1/22)



- ▶ Simplified complaint process -after complaint received, public body is given notice and required to respond with an answer to within 20 days
- ▶ Ombudsman is empowered to: (1) Compel timely delivery of public records; (2) conduct in-camera review of records; (3) compel interviews with the parties; (3) order attendance at hearings; (4) order access to public records or access to meetings; (5) make any finding or order as permitted by the Superior Court under RSA 91-A:8

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59

59

Ombudsman Current Procedures



- ▶ RTK Ombudsman Thomas F. Kehr is currently taking cases.
- ▶ Currently in the rule making process under RSA 541-A.
- ▶ Operating based on procedures outlined in Jus 800.
- ▶ [rko-general-procedureal-order-1-pre-rulemaking.pdf](#) (nh.gov).

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60

60

Remedies for Violations



- ▶ Attorney’s fees and/or costs to petitioner
- ▶ Invalidation of an action
- ▶ Civil penalty against an individual officer, employee, or other official for bad faith violations
- ▶ Injunction
- ▶ Remedial training
- ▶ Knowing destruction: misdemeanor
- ▶ Attorney’s fees and costs may also be awarded to a public body, agency, employee, or official when the lawsuit was brought in bad faith, or was frivolous, unjust, vexatious, wanton, or oppressive

61

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61

Main Takeaways



Every citizen can request records. *

The record request must be “reasonably described.” RSA 91-A:4, IV.

Any search for records must be reasonably calculated to uncover relevant documents.

There is no obligation to compile, cross reference or assemble records.

Requiring a citizen make an appointment to review records is permitted.

When denying access provide written reasons.

Redact exempt information.

Reasonable fees allowed.

Is it really deleted? RSA 91-A:4, III-b.

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62

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**LUNCH
BREAK!**



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Resources, Inc.




HealthTrust

63

63



**Governmental
Meetings & The
Right-to-Know Law**



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64

64

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.

65

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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




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“Quorum”




-  Majority of membership
-  Can't define as more than majority to circumvent law
-  Another statute may apply

67


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“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*

68

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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!*

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What are the Requirements of a Public Meeting?

-  Public notice
-  Open to the public
-  Meeting minutes

70

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“Posting Requirements”

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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.

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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



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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.

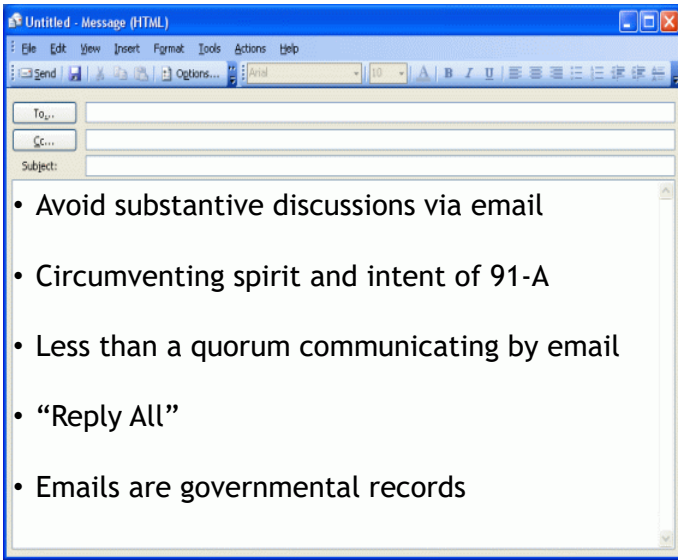


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“Electronic Communications”




- 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

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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?

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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?

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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.

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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

79

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When May a Public Body Enter Nonpublic Session?* RSA 91-A:3, II



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


*Most common, but not complete list




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




-  Motion to enter nonpublic session must be made and seconded.
-  Motion must state on its face the specific exemption relied upon.
-  Vote must be by roll call; simple majority is sufficient. RSA 91-A:3, I(b).



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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.”

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82

82




Conducting the Nonpublic Session

- May make decisions in nonpublic session
- Member objecting to 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

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83



Other Considerations

- Include nonpublic session on posted agenda.
- Timing—beginning or end of meeting?
- Attendance by non-members
 - Legally, there is no limit on who may be permitted to attend a nonpublic session. However, it is best to exclude anyone whose presence is not essential. This may mean excusing the administrator and/or the recording secretary and instead having one of the board members take minutes. Whether to do this is a judgment call to be made by the board.

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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.



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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.”



86

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86



87

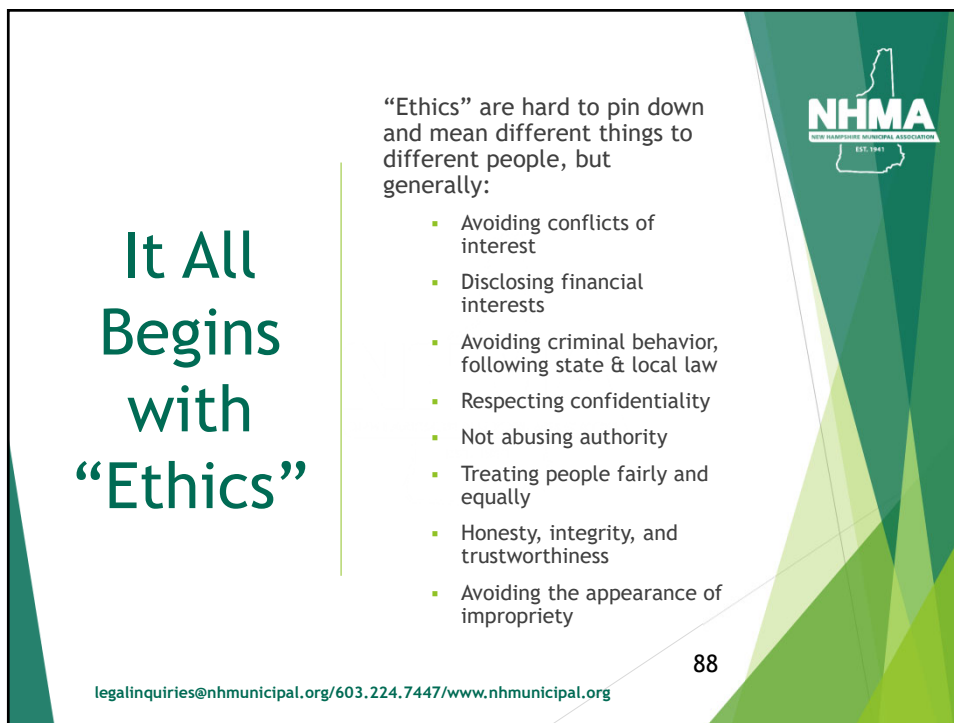
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 **Conflicts of Interest**

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It All Begins with "Ethics"

"Ethics" are hard to pin down and mean different things to different people, but generally:

- Avoiding conflicts of interest
- Disclosing financial interests
- Avoiding criminal behavior, following state & local law
- Respecting confidentiality
- Not abusing authority
- Treating people fairly and equally
- Honesty, integrity, and trustworthiness
- Avoiding the appearance of impropriety

88

88

Few Statutory Rules

- ▶ Incompatibility statutes contain clear rules, but they're not the *only* ethical rules.
- ▶ Case law does provide a number of examples not contained in statute, but even that isn't complete.
- ▶ Ethical Golden Rule:
 - ▶ If you were to read about the same scenario occurring somewhere else in a newspaper, would you feel good about everyone who participated?
 - ▶ If the answer is "no," then take steps to correct the problem.

89

89

Incompatibility

Whether the person can hold a particular office in the first place:

- ▶ 669:7 (general)
- ▶ 673:7 (land use boards)
- ▶ 32:15 (budget committee members)
- ▶ Other statutes
- ▶ Local ordinances (which we will talk more about later)
- ▶ Common law: positions may be incompatible even if not stated in a 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. *Cotton v. Phillips*, 56 N.H. 220 (1875).



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When Do Conflicts of Interest Arise?



- ▶ A conflict of interest exists if “an official has a direct interest in the outcome of a proceeding, see *State ex rel. Thomson v. State Bd. of Parole*, 115 N.H. 414, 422, 342 A.2d 634, 639 (1975), or any “conne[ct]ion with the parties in interest, as would be likely, improperly, to influence [his or her] judgment,” *New Hampshire Milk Dealers' Ass'n v. Milk Control Board*, 107 N.H. 335, 338, 222 A.2d 194, 198 (1966) (quotation omitted). *Appeal of City of Keene*, 141 N.H. 797, 801, 693 A.2d 412, 415 (1997).
- ▶ The direct interest is:
 - personal or financial.
 - immediate, definite and capable of demonstration; not remote, uncertain, contingent or speculative.
- ▶ The idea is that one person cannot serve two masters at the same time.
- ▶ RSA 95:1- Public Officials Barred From Certain Private Dealings

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91

91

Areas That Tend to Present Conflicts:



- ▶ Prejudgment. An abutter to land that is the subject of an application before a land use board.
- ▶ Employment relationship, which is connected to the financial interest in the outcome. Just like the financial interest, the employment relationship must create an immediate/definite conflict. The mere existence of the employment relationship is not going to be sufficient.
- ▶ Family relationships: Not necessarily a conflict. *Webster v. Candia*, 146 N.H. 430 (2001).

92

92

What if the Official Participates Anyway?

Whether an official is disqualified, and what the consequences of a disqualified member's participation are depends on whether the decision was legislative or quasi-judicial.

<p>“Legislative” decisions</p> <ul style="list-style-type: none"> • Court will only invalidate the action if the person with the conflict cast the deciding vote. 	<p>“Quasi-Judicial” decisions</p> <ul style="list-style-type: none"> • Court will automatically invalidate the decision and remand the decision to the board with instructions to begin again, without the disqualified person.
---	---

↓

Courts resolve “conflict of interest” disputes by examining the type of action taken + the facts.

93

93


Difference Between Legislative vs. Quasi-Judicial

Legislative

- ▶ Widely felt
- ▶ Policy decisions
- ▶ Must act in public's interest, but don't need to be “indifferent”

Quasi-Judicial

- ▶ Affect rights of specific petitioner
- ▶ Notify & hear parties
- ▶ Weigh evidence
- ▶ Must be indifferent



94

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Juror Disqualification Standard: RSA 500-A:12

A juror is disqualified if the juror is “not indifferent” because he or she:

- ▶ Expects to gain or lose upon the disposition of the case;
- ▶ Is related to either party;
- ▶ Has advised or assisted either party;
- ▶ Has directly or indirectly given his opinion or has formed an opinion;
- ▶ Is employed by or employs any party in the case;
- ▶ Is prejudiced to any degree regarding the case; or
- ▶ Employs any of the counsel appearing in the case in any action then pending in the court.

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Recusal vs. Abstaining



Recuse: Immediately
remove from discussion
and voting



Abstain: does not vote



Recusing is the remedy
for avoiding conflict,
not abstaining

96

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Ethical Violations and Conflicts of Interest



- ▶ Could be criminal
 - ▶ RSA 640- bribery, threatening harm to influence someone's actions
 - ▶ RSA 643- official oppression, failing to carry out a duty while purporting to be acting officially with the purpose of benefitting oneself or others. Misuse of information, insider trading.
- ▶ Could result in removal from office
 - ▶ Requires judicial intervention

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Local Conflicts of Interest Ordinances - RSA 31:39-a



- ▶ Adopted by legislative body (town meeting/city council).
- ▶ Regulate conflicts of interest for officers (elected or appointed) & employees.
- ▶ May require financial disclosures by officers and employees.
- ▶ May enact more stringent incompatibility standards.
- ▶ May provide for conditions that warrant removal from office with the Superior Court having sole jurisdiction over the removal process.

98

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99

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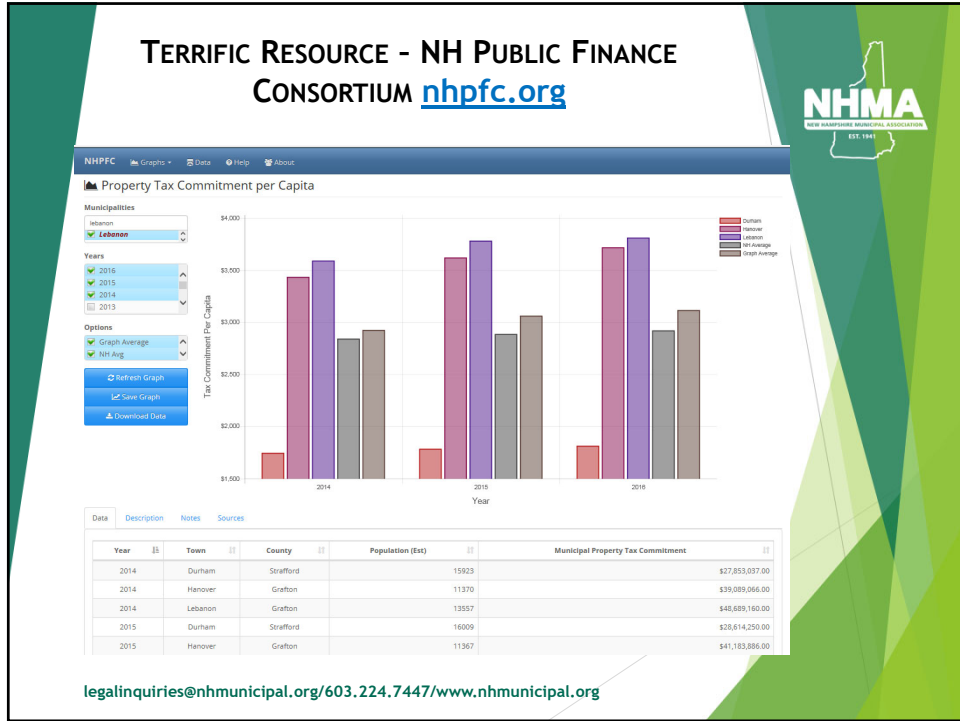


Budgeting Essentials



100

100



101



102

102

Information From DRA



- ▶ DRA maintains a “permanent record file” for all municipalities that is a record of all definitive warrant articles adopted by your town meeting (i.e., capital reserve funds, town manager statute, SB 2, etc.)
- ▶ The permanent record file is in the portal, Towns are instructed in the portal to : “Please check your DRA “permanent file” to be sure that state records match this original fund name; your municipal auditor can forward a copy of the permanent file, if needed.”
- ▶ DRA Municipal Advisor list:
<https://www.revenue.nh.gov/municipal/documents/advisors-towns.pdf>

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The Budget Process: Key Players



- ▶ Legislative Body
- ▶ Governing Body
- ▶ Budget Committee:
Advisory v. Official



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The Legislative Body

- ▶ Approves all appropriations
- ▶ Votes to create and fund common municipal funds
- ▶ Citizen authority to propose appropriations by petition
- ▶ May amend separate articles to reduce or zero out appropriations
- ▶ May amend budget to reduce (or increase) total bottom line appropriation
- ▶ Can zero out line-item appropriations in DRA budget form

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Governing Body

- ▶ Prepares warrant, drafts separate warrant articles
- ▶ Pay all sums of money received to the town treasurer
- ▶ Prepare manifest to pay all town expenses
- ▶ Maintain records of all town financial transactions
- ▶ Publish in annual report, the general fund balance sheet based upon audited financial statements
- ▶ Establish and maintain appropriate internal control procedures
- ▶ Annually review and adopt an investment policy
- ▶ Ensure all funds totaling \$500 or more are remitted by departments, town clerk and tax collection to the treasurer
- ▶ Submit proposed budget to the Budget Committee or Town Meeting

106

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Budget Committee

- ▶ Review current year's expenditures
- ▶ Review proposals, request information
- ▶ Prepare budget
- ▶ Schedule and hold budget hearings
- ▶ Forward final proposed budget to governing body
- ▶ **Does not control spending**
- ▶ 10% Rule in towns with official budget committee

107

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107

Procedural Requirements for Valid Appropriations (Budget Creation)

- ✓ Public budget hearing
- ✓ Disclosure of purpose and amounts at hearing
- ✓ Disclosure of default budget at first budget hearing
- ✓ Budgeting on gross basis
- ✓ Recommendations
- ✓ Warrant Notice
- ✓ Listing of all appropriations and separate warrant articles on posted budget

108

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108

Other Forms of Spending

- ▶ Transfers, RSA 32:10
- ▶ Legal judgments, RSA 32:9
- ▶ DRA permission, RSA 32:11
- ▶ Spending prior to town meeting, RSA 32:13
- ▶ Unanticipated revenue, RSA 31:95-b
- ▶ Capital reserve/trust funds
- ▶ Other statutory funds
- ▶ Certain multi-year appropriations

109

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109

Lapse of Appropriations RSA 32:7


- ▶ All appropriations lapse at the end of the fiscal year and any unexpended portion thereof shall not be expended without further appropriation, **UNLESS**:
 - Encumbered by legally-enforceable obligation;
 - Placed in nonlapsing fund: e.g., conservation fund;
 - Appropriated to a capital reserve fund;
 - Amount is raised through bonds or notes (then lapses upon completion of purpose);
 - Money received from state, federal, or private grant (then nonlapsing for as long as program rules)
 - Special warrant article:
 - Governing body can vote to encumber for one year; OR
 - Article was labeled as nonlapsing by meeting (specifies lapse, up to 5 years).

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Common Municipal Funds

- ▶ Capital Reserve Funds
- ▶ Special Revenue Funds
- ▶ Expendable Trust Funds
- ▶ Revolving Funds
- ▶ (Private) Trust Funds

111

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SB 2 & The Default Budget: RSA 40:13

- Governing body calculates, unless delegated to budget committee.
- As long as statutory formula is used, default budget may be higher or lower than last year's budget*
- Default budget is amount of the same appropriations as contained in the operating budget authorized for the previous year . . .
 - reduced and increased, as the case may be, by debt service, contracts, and other obligations previously incurred or mandated by law, and
 - reduced by one-time expenditures contained in the operating budget and by *salaries and benefits of positions that have been eliminated in the proposed budget*. RSA 40:13, IX(b).

112

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112



2023 Legislative Update

NATCH GREYES,
GOVERNMENT AFFAIRS COUNSEL



113

113

What Does Gov't Affairs Dept. Do?

- Provide education and information to legislators.
- Coordinate with legal services to learn what issues are arising at the local level and may need solutions at the state level.
- Help our members and member groups navigate the legislature and state government.



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114

114

Advocacy

We are registered lobbyists and take positions on bills based on our member-adopted legislative policies.

We are always looking for member volunteers to help us with the policy process, providing the legislature with information about how specific legislation would affect specific communities via testimony, and building connections between legislators and municipal officials.



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115



2023-2024 Legislative Policy Positions

- Adopted September 2022 for the 2023-2024 Legislative Years
- 17 Specific Policy Areas, and 11 Principles
- No Major Shifts in Policies or Principles
 - Rewrites and clarifications
 - Adoption of policies related to key areas of legislative interest
- [Read NHMA's 2023-2024 Policies & Principles](#)



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116


Bill Data 2023

1,187 LSRs filed – More than any prior election year.

More than 50 LSRs withdrawn or 4.2% of all bills filed – more than a dozen with a municipal component.

357 bills tracked by NHMA, so far. Almost 30% of all bills filed have a municipal component.

Ongoing conversations with dozens of legislators and lobbyists about their bills and bill ideas.

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117

117

Trainings?

- Just let us know. That’s our mantra to legislators and local officials.
 - Legal Services provides invaluable advice, education, and training on a wide variety of topics – and gov’t affairs helps fill in the gaps.
- Always a good idea to check with us before asking legislators to file legislation to see if we can help.
 - We love to help our members understand the complex process at the state house and provide input on matters that we may have heard about from other members as well.
- We also (as of this year) do a spring road-show to bring legislative previews to our members and their legislators in different parts of the state.

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118

118

Stay Informed & Get Involved



The Legislative Bulletin is NHMA's primary means of communicating legislative information to member towns and cities. Sent via email and posted on the [NHMA website](#).



It also serves as a communication vehicle for action needed from your municipality, including : It often contains requests for letters or calls in support or opposition as well as in person testimony on important bills.



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119

119

NHMA Bill Tracker: FastDemocracy

The New Hampshire Municipal Association (NHMA) represents the interests of cities and towns before the New Hampshire General Court (House and Senate) and various state agencies based on its member-adopted [principles and policies](#). The New Hampshire legislative session happens each year between the months of January and June. Each legislative cycle, NHMA tracks state actions that could significantly affect New Hampshire's 234 municipalities.

In addition to the weekly Legislative Bulletin, NHMA provides members access to FastDemocracy, an online bill tracking platform, for efficient, real-time updates to legislative activity of interest to members. Members do not need to create a FastDemocracy account to access this information, but they are able to create an account if they wish.

Click on the subgroups below to see information on bills from either the previous, or current legislative cycle within each category, and view the NHMA's stance on the measures. Subscribe to the bill list(s) to receive daily or weekly email updates, including new bill actions and upcoming hearings.

ALL BILLS

ECONOMIC DEVELOPMENT

EDUCATION FUNDING

ELECTIONS

ENERGY AND ENVIRONMENT

INFORMATION TECHNOLOGY

LABOR

LAND USE

LOCAL AUTHORITY

PROPERTY TAX

RETIREMENT


RIGHT-TO-KNOW

STATE AID

SUBSTANCE USE

TRANSPORTATION

FAST DEMOCRACY:
OUR BILL TABLE IS NOW ONLINE



120

120

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251-282 of 282 1 2 3 4 5 6

NH 2023 LSR 2023-0830 relative to New Hampshire workforce training programs.

David Watters

[Track Bill](#)

NH 2023 LSR 2023-0832 relative to the payment of salaried employees.

Keith Murphy

[Track Bill](#)

NH 2023 LSR 2023-0833 establishing a first responder career development, recruitment, and retention program.


David Watters

[Track Bill](#)

NH 2023 LSR 2023-0836 relative to the definition of "way" in driving or operating under the influence of drugs or liquor.

Regina Birdsell

[Track Bill](#)



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121

121

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122

122



Questions?




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123

123


Thank you



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The New Hampshire Municipal Association is a nonprofit, non-partisan association working to strengthen New Hampshire cities and towns and their ability to serve the public as a member-funded, member-governed and member-driven association since 1941. We serve as a resource for information, education and legal services. NHMA is a strong, clear voice advocating for New Hampshire municipal interests.



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124

124



LAND USE 101

125

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125



Master Plan: RSA 674:1 - :4

Mandatory Section:

- “Vision” (goals and objectives): statements to “articulate the desires of the citizens,” including set of “guiding principles and priorities.”
- Land use: studies of population, economic activity, resources, shows existing conditions and proposed future land uses.
- Prerequisites for zoning ordinance, RSA 674:18.

Optional Sections: 14 optional elements

Revisions recommended every 5 - 10 years

Adopted by Planning Board after public hearing

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126

Zoning Ordinances

- ▶ Zoning ordinances designate zones for residential, commercial or industrial purposes, and may also regulate lot size, placement, bulk (or density) and the height of structures.
- ▶ Most zoning ordinances in New Hampshire are so-called “permissive” ordinances; the ordinance prohibits all uses of land unless such uses are expressly permitted (either as primary or accessory uses).
- ▶ The statutory power to adopt a zoning ordinance requires that certain favored uses may not be unreasonably regulated - Energy efficiency, Agriculture, Forestry, Affordable Housing, Commercial & recreational fisheries.



127

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127

Adoption of Zoning Amendments

- ▶ Amendments to zoning ordinance may be proposed by the planning board, select board, village district commissioners or by citizen petition
- ▶ All zoning proposals must first receive a public hearing before planning board
- ▶ When notice of a zoning amendment public hearing is posted by planning board within 120 days of town meeting, building permit requests that would be denied if a zoning amendment were adopted must be held in abeyance until vote by town meeting - if amendment approved permit is denied, if amendment is defeated permit is issued
- ▶ Zoning amendments are effective upon approval by legislative body




128

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128

Land Use Boards Generally




- ▶ Establishment and composition of local land use boards is controlled by RSA chapter 673
- ▶ Legislative Body may vote to establish - planning board; ZBA; building code board of appeals; historic district commission
- ▶ Legislative Body may also vote to establish heritage commission, agricultural commission, but these boards are advisory not regulatory

129

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129

Governing Body & Land Use Boards



- ▶ Governing body appoints land use board members (unless the planning board or ZBA are elected)
- ▶ Governing Body has ex-officio member on planning board
- ▶ Governing Body appoints alternates where town meeting has authorized land use board alternates (elected boards appoints alternates)
- ▶ Governing Body can remove elected or appointed land use board members for inefficiency, neglect of duty or malfeasance in office.

130

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130

Land Use Board Staff, Finances & Fees

- ▶ Under RSA 673:16, a land use board may propose a person to be hired to work for the land use board, but the select board would in all other respects manage the employment relationship between the town and the employee, including hiring and firing
- ▶ Planning Boards and ZBAs may establish fees to cover administrative expenses of applications
- ▶ The power to direct the payment of expenses incurred by either the planning board or zoning board from funds held by the treasurer belongs solely to the respective board *unless* application, permit, or inspection fees which have been set by the local legislative body as part of an ordinance, or by the selectmen under RSA 41:9-a
- ▶ Land use board fees must be published in an accessible location



131

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131

Planning Board - Statutory Duties

- ✓ Master Plan - RSA 674:2
- ✓ Capital Improvements Program 674:5
- ✓ Recommend Zoning Ordinance & Amendments RSA 675:3
- ✓ Subdivision Regulation 674:36
- ✓ Site Plan Regulation 674:44
- ✓ Excavation Regulation 155-E:1 (III) (a)
- ✓ Driveway Regulation - 236:13



132

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132

Authority of ZBA

- Grant Zoning Relief - RSA 674:33:
 - Administrative appeals (RSA 674:33 & 676:5)
 - Variances
 - Special Exceptions
- RSA 674:33-a: Equitable waivers of dimensional requirements
- RSA 674:41, II: Special waiver, building on Class VI/private roads
- RSA 674:32-c, II: Special waiver, agricultural uses
- Variances for disabled, RSA 674:33, V
- RSA 236:115: Certificates of approval, junkyards
- Often serves as building code board of appeals



133

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133

Historic District Commission - RSA 674:46-a

- ✓ The HDC reviews applications for building permits to assess impact of the permit on the historic district - RSA 676:8-10.
- ✓ The HDC shall file a certificate of approval or a notice of disapproval - no building permit shall be issued until a certificate of approval has been filed with the building inspector.




134

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Conservation Commission



- ▶ Addresses the proper utilization and protection of natural resources and for the protection of watershed resources
- ▶ Conducts research into and keeps and index of local natural resources
- ▶ Manages Conservation Fund for preservation of natural resources
- ▶ May have a role in commenting on proposed dredge and fill operations in wetlands

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135


135


InvestNH Municipal Planning & Zoning Grant Program


www.NHHOPgrants.org
info@NHHOPgrants.org


- \$5 million grant program for municipalities, and in some cases Regional Planning Commissions
- Aimed at increasing housing supply by changing local land use regulations; strong community engagement focus
- Over \$3.5 Million Awarded to date
 - 5 Navigator Grants - serving 12 communities
 - 48 Housing Opportunity Planning Grants













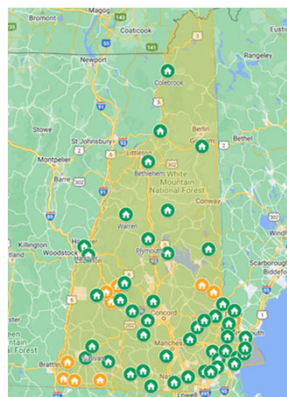
136

136

InvestNH Municipal Planning & Zoning Grant Program

www.NHHOPgrants.org
info@NHHOPgrants.org

- The current allocation of program funding is fully obligated for the Housing Opportunity Planning (HOP) Grants.
- The HOP Steering Committee will continue to review your application so as not to delay its review if additional funds become available.
- Applications will be reviewed in the order they are submitted.



137

137

Upcoming Attractions



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!

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138

138

Upcoming Attractions



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.

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139

139

Upcoming Attractions



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.

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140

140

Upcoming Attractions




RESCHEDULED TO SEPTEMBER 7: Charter Government in New Hampshire Webinar

Rescheduled to 12:00 noon - 1:30 pm, Thursday, September 7, 2023. Presentation by NHMA attorneys will provide city and town council members, and alderpersons, a thorough introduction to the governance of municipalities with municipal charters.


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141

141

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142

142

Free Coaching and Technical Assistance (CTAP)!



Coaching and Technical Assistance Pilot Program (CTAP)

FREE TECHNICAL ASSISTANCE FOR NH MUNICIPALITIES

NHMA is partnering with the Arnett Development Group to pilot providing NH municipalities with technical assistance to attain funding for local projects.

Coaching and Technical Assistance Program (CTAP)

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

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143

143

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THE SERVICE AND ACTION ARM OF NEW HAMPSHIRE MUNICIPALITIES

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145