

2022 Webinar Series

ZBA Basics in New Hampshire

Presented by:

Stephen Buckley, Legal Services Counsel

Jonathan Cowal, Municipal Services Counsel

April 13, 2022



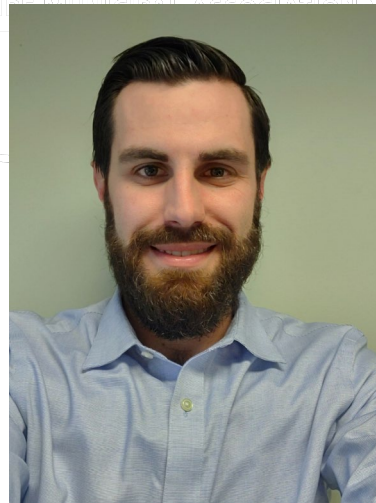
Our Presenters



Stephen Buckley
Legal Services Counsel



Jonathan Cowl
Municipal Services Counsel



The Zoning Board of Adjustment



ZBA Basics

Holding the Hearing & Making the Decision

Special Exceptions & Variances

Rehearings

Right-to-Know Law & Conflicts of Interest

How Do I Ask a Question?



To ask a question:

1. Type your question into the Q&A box. Click **Send**.

Note: Check **Send Anonymously** if you do not want your name attached to your question in the Q&A.

2. If the host replies via the Q&A, you will see a reply in the Q&A window.

A screenshot of a web browser window titled "Q&A". The window displays a question and an answer. The question is: "You asked: What happens when I raise my hand?" with a timestamp of 18:03. The answer is: "Molly Parker answered: I can take you off of mute." with a timestamp of 18:04. Below the answer, there is a text input field with the placeholder text "Please input your question". At the bottom left of the window, there is a checkbox labeled "Send Anonymously" which is currently unchecked. At the bottom right, there is a blue button labeled "Send".

The chat function for this workshop has been disabled.

In order to ask a question of our host or a panelist, please refer to graphic.

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

What is the Role of the ZBA?

Safety valve

Quasi-Judicial

No enforcement authority

Obligation to assist public
(reasonable)

Rules of procedure

No requirement for monthly meeting

What is the ZBA's Jurisdiction?

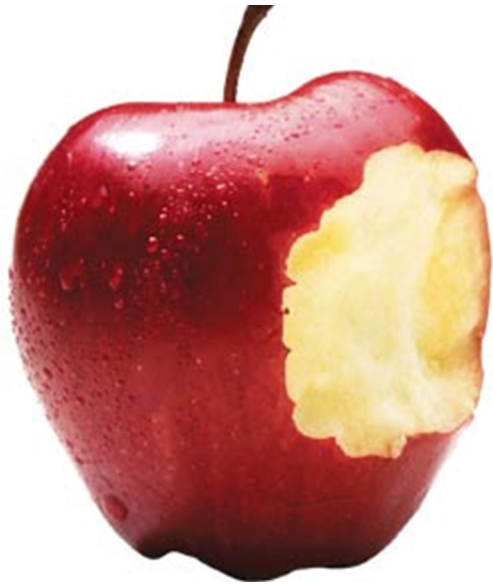


- RSA 674:33:
 - Administrative appeals (RSA 674:33 & 676:5)
 - Variances
 - Special Exceptions
- RSA 674:33-a: Equitable waivers of dimensional requirements
- RSA 674:41, II: Special waiver, building on Class VI/private roads
- RSA 674:32-c, II: Special waiver, agricultural uses
- Variances for disabled,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

Appeals to the ZBA RSA 676:5

- ▶ ZBA hears appeals, per RSA 674:33
- ▶ Heard within reasonable time, per ZBA rules
- ▶ ZBA may impose reasonable fees
- ▶ ZBA may require applicant to reimburse for third party review & consultation





“One Bite of the Apple”



Fisher v. Dover



Appeal to the board within a reasonable time (in your rules, RSA 676:5)



Hearing within 45 days



Notice to affected persons, RSA 676:7

Public Notice: 5 days

Individual Notice

Continuing the hearing



Opportunity to be heard, RSA 676:7

Certain individuals must be heard

Others may be heard



Decision based on facts and evidence, RSA 674:33, 91-A



Decision by impartial tribunal, RSA 673:14



Written decision with reasons, RSA 676:3

The Evidence

What does the board do during the hearing?

- Collect evidence and determine the facts
- Apply legal tests (e.g., the variance criteria)
- Develop a record for court review

Board has considerable discretion to choose between competing expert opinions:

- General studies and articles may not be enough to contradict specific expert opinion
- Board may question expert's qualifications, methodology, etc.
- Board may rely on personal knowledge of the area
- BUT uncontradicted expert testimony overcomes general member knowledge

All land use boards may hire consultants, RSA 673:16

ZBA may ask applicants to pay for special investigative studies

The Decision

RSA 674:33 & 676:3



- ▶ 3 members must concur
- ▶ Must use one consistent voting method, RSA 674:33, I(c)
- ▶ Decision must be in writing
 - ▶ (State reasons for approval/ disapproval)
- ▶ Conditions of approval?
- ▶ Issue decision w/in 5 business days

How to Make the Decision



- ▶ ZBA need not mindlessly accept the conclusions of experts with knowledge of the project.
 - ▶ ZBA entitled to question and reject the methodology or conclusions of the expert's studies of the proposed development.
- ▶ Although the ZBA may not disregard an expert opinion based upon vague and unsupported concerns of town residents, it may rely upon residents' statements of objective facts in its determination of how much weight to give an expert opinion.
- ▶ *Three Ponds Resort v. Town of Milton is illustrative*
 - ▶ Applicant commissioned a traffic study.
 - ▶ Traffic study concluded no additional impact.
 - ▶ ZBA considered Three Ponds' traffic study in detail and identified at least three significant concerns (all of which were supported by the record), before rejecting the expert's conclusions.

What if Someone Doesn't Like the Decision?



- ▶ “Any person aggrieved” may appeal to Superior Court or Housing Appeals Board w/in 30 days.
- ▶ Housing Appeals Board (HAB) is new, alternative route to Superior Court.
- ▶ HAB recently had first case and adopted rules of procedure.
- ▶ Concerns voiced about fairness of HAB, but too early to know whether any pattern to decisions and/or how HAB will function once it is totally up and running.
- ▶ (See <https://hab.nh.gov/> for updates as they adopt/modify rules and issue ruling.)

ZBA Authority to Rule Zoning Relief is Unnecessary

- ▶ Contained in every variance application is the threshold question whether the applicant's proposed use of property requires a variance because the zoning board of adjustment (ZBA) will invariably consider this issue in deciding whether unnecessary hardship exists.
- ▶ Given the complexity of zoning regulation, the obligation of municipalities to provide assistance to all their citizens seeking approval under zoning ordinances, and the importance of the constitutional right to enjoy property, the Court concludes that the mere filing of a variance application does not limit the ZBA's ability to determine whether the applicant's proposed use of property requires a variance in the first place.

Bartlett v. City of Manchester, 164 N.H. 634, 635 (2013)

Special Exceptions

- Permission to do something zoning ordinance permits under specific circumstances
- Must be in zoning ordinance!

Variances

- Permission to do something not permitted by zoning ordinance
- Five criteria, RSA 674:33, I



Variance Criteria 1 & 2



1. The variance will not be contrary to the public interest.

Examine whether the variance would

- (a) alter the essential character of the locality or
- (b) threaten public health, safety or welfare.

2. The spirit of the ordinance is observed.

Examine the effect of the variance in light of the goals of the zoning ordinance, which might begin, or end, with a review of the comprehensive master plan upon which the ordinance is supposed to be based.

Variance Criteria 3



Substantial justice is done.

→ Perhaps the only guiding rule is that any loss to the individual that is not outweighed by a gain to the general public is an injustice. The injustice must be capable of relief by the granting of a variance that meets the other qualifications. Courts will also look at whether proposed development is consistent with the area's present use.

Variance Criteria 4



The values of surrounding properties are not diminished.

In considering whether an application will diminish surrounding property values, consider not only expert testimony from realtors and/or appraisers, but also from residents in the affected neighborhood. Equally as important, Board members may consider their own experience and knowledge of the physical location when analyzing these criteria; but be cautious in relying solely on that experience/knowledge if it contravenes the evidence of professional experts. It is the board's job to weigh competing evidence.

Variance Criteria 5



Literal enforcement of the zoning ordinance would result in an *unnecessary hardship*.

1. “UNNECESSARY HARDSHIP” MEANS THAT, OWING TO SPECIAL CONDITIONS OF THE PROPERTY THAT DISTINGUISH IT FROM OTHER PROPERTIES IN THE AREA:

- (i) NO FAIR AND SUBSTANTIAL RELATIONSHIP BETWEEN THE GENERAL PUBLIC PURPOSES OF THE ORDINANCE PROVISION AND THE SPECIFIC APPLICATION OF THAT PROVISION TO THE PROPERTY;**
- (ii) THE PROPOSED USED IS A REASONABLE ONE.**

OR If #1 not satisfied:

2. AN UNNECESSARY HARDSHIP WILL BE DEEMED TO EXIST IF, AND ONLY IF, OWING TO SPECIAL CONDITIONS OF THE PROPERTY THAT DISTINGUISH IT FROM OTHER PROPERTIES IN THE AREA, THE PROPERTY CANNOT BE REASONABLY USED IN STRICT CONFORMANCE WITH THE ORDINANCE AND A VARIANCE IS THEREFORE NECESSARY TO ENABLE A REASONABLE USE OF IT.

Special Exception Criteria



- ▶ The review standards for variances does not apply to special exceptions.
- ▶ In contrast to a variance, a special exception is a use permitted upon certain conditions as set forth in a town's zoning ordinance.
- ▶ If the conditions for granting a special exception are met, the zoning board must grant it, and by so doing, no exception to the application of the ordinance is truly made.
- ▶ A special exception is not the equivalent of a nonconforming use. Uses that are permitted as special exceptions are deemed to be permitted so long as they satisfy the special exception provisions in the ordinance.

Is Cumulative Impact a Permissible Consideration?



- ▶ Perreault v. Town of New Hampton, 171 N.H. 183 (2018).
- ▶ Applicant sought variance to construct a shed within the 20-foot side yard set back, that was denied by the ZBA.
- ▶ There was evidence of sixteen other properties, all located on the same road as the applicants' property, with storage buildings in locations that the applicants asserted were in violation of the setback requirements.
- ▶ According to the applicants, this evidence demonstrated that their proposed shed would not alter the essential character of the neighborhood or threaten the public health, safety, or welfare.
- ▶ The ZBA's denial was based upon the conclusion that allowing many sheds to be built on a small lot within those setbacks creates overcrowding and is contrary to the spirit of the ordinance.
- ▶ The Court assumed without deciding, that cumulative impact is a proper consideration in the variance context.

Cumulative Impact - *Foley v. Enfield*



- ▶ The applicant sought to construct two-story house and an attached, two-car garage within the 30-foot setback from Rollins Point Road, eight to ten feet from his lot line. He argued that the ZBA erred in finding that the variance would violate the spirit of the ordinance by promoting overcrowding of the land.
- ▶ The ZBA chair noted that while the plaintiff's proposed construction of a larger house on his property may not have a "great effect" on Rollins Point, the cumulative effect of granting similar variance requests in the future could be "large and irreversible."
- ▶ During deliberations, the majority of the ZBA observed that the plaintiff's proposed construction "would crowd the land of Rollins Point and might encourage further such crowding and thereby would degrade the natural environment of the point."
- ▶ Court concluded that, in evaluating the plaintiff's variance request, the ZBA acted properly in considering the cumulative impact of granting similar variances in the future on Rollins Point. See id.

Time for Exercising Variances and Special Exceptions



2 years from the date of final approval, or as further extended by local ordinance or by the zoning board of adjustment for good cause,...



RSA 674:33, I-a



2018 amendment allows for termination of variances granted prior to 8/19/13 by zoning amendment

Rehearings, RSA 677:2

- Motion must be filed within 30 days
- ZBA may even consider its own decision within time period
- Hold meeting to determine whether to grant rehearing
- Grant rehearing when board committed technical error or there is new evidence that was not available at the time of the first hearing
- If rehearing is granted, may consider certain issue(s) or rehear entire case

Beyond the Rehearing

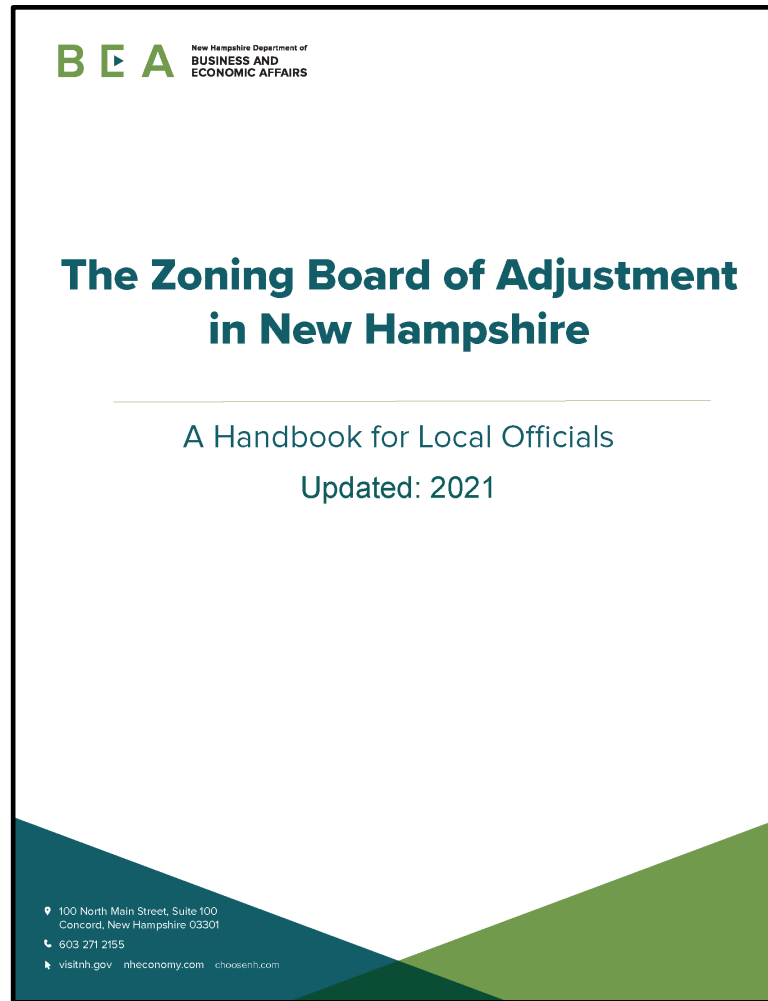
- ▶ Affected party with standing may appeal to Superior Court within 30 days, RSA 677:4, or, if the application involves housing and housing development, to the Housing Appeals Board.
- ▶ Be sure to compile and preserve “the record” as completely as possible.
- ▶ If an appeal is filed, the local governing body will manage the litigation with the municipal attorney.



Best Resource: ZBA Handbook



- ▶ Downloadable
- ▶ Free digitally
- ▶ Searchable
- ▶ Linked TOC



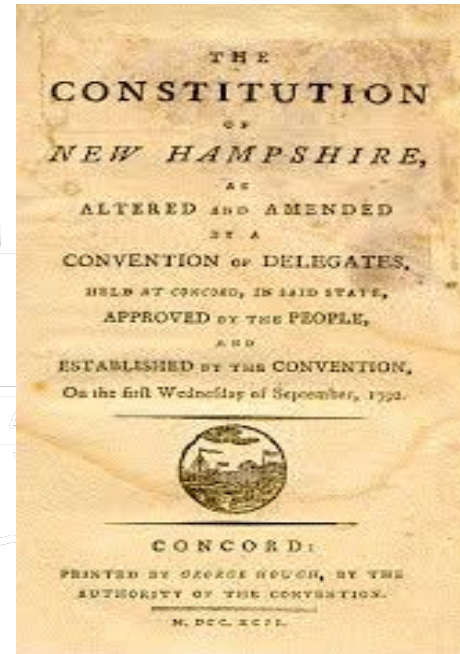
<https://www.nh.gov/osi/planning/resources/documents/zoning-board-handbook.pdf>

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

“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

“Convene”

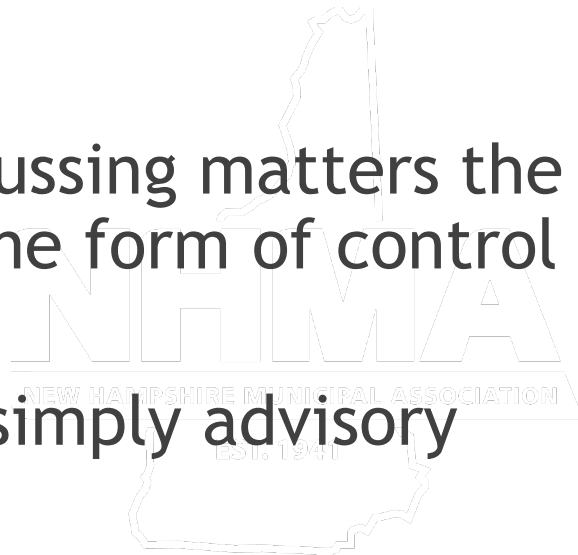
- In person gathering
- Discussions via email, text chains, reply all
- Emails and text can be considered government records
- Communications outside of a meeting shall not be used to circumvent the spirit and intent of 91-A
- All discussions of a public body should take place at a public meeting



Discussing Board Business



- ▶ Chance encounters or social gatherings don't count
- ▶ Must be discussing matters the public body has some form of control over
- ▶ This can be simply advisory
- ▶ Multiple members of one public body serving on a different public body could get complicated





Public notice



Open to the public



Meeting minutes

NEW HAMPSHIRE MUNICIPAL ASSOCIATION

What are the requirements of a public meeting?

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

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.

Land Use Specific Statute



[RSA 673:14, I](#) Disqualification of Member.

No member of a zoning board of adjustment, building code board of appeals, planning board, heritage commission, historic district commission, agricultural commission, or housing commission shall participate in deciding or shall sit upon the hearing of any question which the board is to decide in a judicial capacity if that member has a direct personal or pecuniary interest in the outcome 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. Reasons for disqualification do not include exemption from service as a juror or knowledge of the facts involved gained in the performance of the member's official duties.

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.

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

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.

“Legislative” decisions

- Court will only invalidate the action if the person with the conflict cast the deciding vote.

“Quasi-Judicial” decisions

- Court will automatically invalidate the decision and remand the decision to the board with instructions to begin again, without the disqualified person.

NEW HAMPSHIRE

MUNICIPAL ASSOCIATION

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

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

Recusal vs. Abstaining



Recuse: Immediately remove from discussion and voting



Abstain: does not vote



Recusing is the remedy for avoiding conflict, not abstaining

Avoiding Conflicts

- ▶ Advisory Vote - RSA 673:14, II.
- ▶ Recuse (yes) vs. Abstain (no)
- ▶ Avoid Social Media Opinions on Pending Matters
- ▶ Disclose and Remove Yourself
- ▶ Err on the Side of Caution!

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.

Case Study: Winslow v. Holderness Planning Board (1984)



- ▶ Abutter appeal of a PB subdivision approval (with waivers granted)
- ▶ Resident (at the time) spoke in favor of the application and subsequently became a member of the board who voted in favor of the proposal (6-1 vote)
- ▶ Superior Court reversed PB decision & applicant appealed
- ▶ Supreme Court affirmed the lower court:
 - Proper to disqualify PB member as evidence showed he was not indifferent
 - Mere participation by a single DQ'd member can invalidate a board's decision
- ▶ Quasi-judicial vs. administrative / legislative discussion

Case Study: W. Robert Foley, Trustee v. Enfield (2017)



- ▶ ZBA chair e-mailed a “list serve” asking, “Should the board members consider precedents when deciding their position on a case?” The chair received replies from municipal employees and zoning board members in other communities.
- ▶ The ZBA denied the rehearing request the day after the chair's e-mail on the ground that granting the requested variance would violate the spirit of the ordinance by promoting overcrowding.
- ▶ Applicant learned of email after he appealed to superior court and argued that ex parte communications violated his right to a fair hearing and he might have asked for a recusal.
- ▶ The Court noted that plaintiff failed to appropriately preserve issue for appeal and concluded that the plaintiff failed to demonstrate prejudice as a result of the communications.

Case Study: Z-1 Express v. Manchester (2019)



- ▶ CUP application before planning board.
- ▶ After the public hearing portion, but before deliberations, two members voiced opposition to the project on a social media site established by residents opposing the project.
- ▶ One of the members who voiced opposition on social media was asked to recuse himself, he refused and he later voted to deny the application.
- ▶ Superior Court remanded the case after finding that the member's failure to enter into and participate in deliberations with an open mind “threaten[ed] the integrity of the deliberative process” undermining public trust in the overall function of the planning board.

Upcoming Workshops & Webinars

[REGISTRATION OPEN!](#)



2022 Right-to-Know Law Hybrid Workshop on Meetings and Records

9:00 am - 1:00 pm, Thursday, April 28, 2022. Costs: \$65 (in-person); \$55 (virtual/Zoom). Join NHMA's attorneys as they discuss the requirements for holding a proper public meeting as well as provide guidance on handling of governmental record matters.

[REGISTER NOW!](#)



DON'T MISS OUT - NHOSI 2022 Planning & Zoning Conference

9:00 am - 12:00 pm
Saturdays, April 30 and May 7

The New Hampshire Office of Planning and Development (OPD) Spring 2022 Planning and Zoning Conference will be held as a free, two, half-day, online conference on Saturdays, April 30 and May 7, from 9:00 am to 12:00 pm on both days.

On both days, the conference will have two tracks: a Planning Board and Zoning Board of Adjustment track. On May 7, the conference will include a third, Housing-focused track. All conference sessions will be recorded and available on [OPD's YouTube channel](#) following the conference.

For additional conference details including the agenda, which includes information about each session, please see the [2022 Planning and Zoning Conference webpage](#).

To Register:

Please complete the [conference registration form](#) by April 22, 2022. For assistance registering, please email: planning@livefree.nh.gov

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

Upcoming Workshops & Webinars

REGISTRATION OPEN!



2022 Hard Road to Travel Hybrid Workshop

9:00 am - 12:30 pm, Thursday, May 5, 2022. Cost is \$65 (in-person) and \$55 (virtual). Join NHMA's legal services attorneys who will discuss the management of local highways through the office of an elected or appointed road agent, the select board, and planning board.

REGISTRATION OPEN!

FREE Local Officials Workshop

[REGISTRATION OPEN!](#)



2022 Local Officials FREE Virtual Workshops

9:00 am - 4:00 pm, Tuesday, May 17, 2022

FREE virtual workshops for veteran and newly-elected municipal officials and appointed employees of NHMA member municipalities.

IT'S FREE! REGISTER NOW!

FREE

HealthTrust

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Upcoming Workshops & Webinars



REGISTRATION OPEN

Join Us for Investigations 101 Webinar

12:00 noon - 1:00 pm., Wednesday, May 18, 2022. Join Attorney Talesha Saint-Marc from Bernstein Shur who will examine when municipalities need to conduct an investigation and how to do it.

**BERN
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SHUR**

REGISTRATION NOW OPEN!



*for attending
our workshop
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.