

An Introduction the Housing Appeals Board

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Today's Presenter



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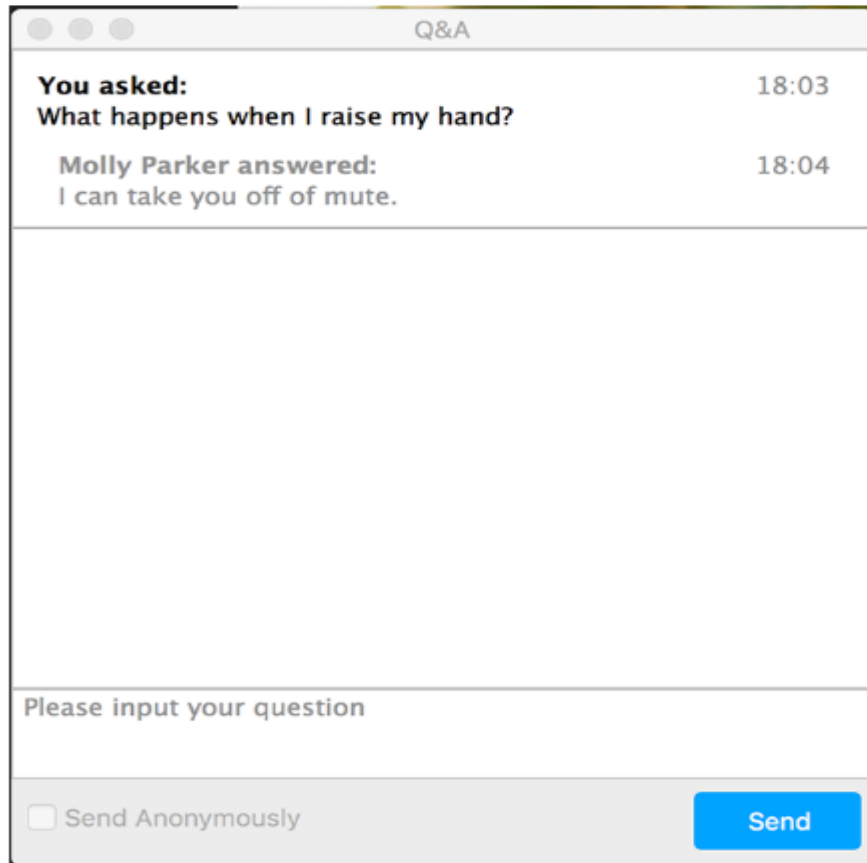
How Do I Ask a Question?

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.



The screenshot shows a window titled "Q&A" with a white background and a grey border. At the top, there are three small grey circles. Below them, the text "You asked:" is followed by the question "What happens when I raise my hand?" and the time "18:03". Below that, "Molly Parker answered:" is followed by the answer "I can take you off of mute." and the time "18:04". A horizontal line separates the question and answer from the input area. The input area has a text box with the placeholder "Please input your question". At the bottom left, there is a checkbox labeled "Send Anonymously". 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.

Agenda

- ▶ The Housing Appeals Board hears appeals from local land use board decisions involving “questions of housing and housing development.”
- ▶ This workshop will review the jurisdiction and procedures of the HAB by detailing the key elements of the governing statutes, RSA chapter 679, and the currently applicable administrative rules.
- ▶ A discussion will also be provided on recent decisions by the HAB involving the *Town of Frankestown* and the *Town of Pembroke*.
- ▶ Governing statutes: RSA 679:1 - :29.

Housing Appeals Board Composition

- ▶ The housing appeals board composed of 3 members learned and experienced in questions of land use law or housing development or both.
- ▶ One member shall be an attorney licensed to practice law in the State of New Hampshire.
- ▶ One member shall be either a professional engineer or land surveyor.
- ▶ The members of the board shall be full-time employees and shall not engage in any other employment, appointments, or duties during their terms that is in conflict with their duties as members of the board.

THE STATE OF NEW HAMPSHIRE HOUSING APPEALS BOARD Governor Hugh J. Gallen State Office Park

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Board Appointment

- ▶ Members appointed by the supreme court and commissioned by the governor for a term of 5 years. The supreme court shall designate one member as chair to serve in that capacity for the duration of his or her term.
- ▶ Current Members:
 - ▶ Gregory Michael, Esq. Board Chair
 - ▶ Elizabeth R. Fischer, Member
 - ▶ Edward L. Rogers, Member

Authority and Jurisdiction

- ▶ Parties that are aggrieved by final decisions by municipal boards, committee and commissions regarding questions of housing and housing development can, in the alternative, appeal to the HAB.
- ▶ The board can hear and affirm, reverse or modify, in whole or in part such final decisions by:
 - (a) Planning board decisions on subdivisions or site plans.
 - (b) Board of adjustment decisions on variances, special exceptions, administrative appeals, and ordinance administration.
 - (c) The use of innovative land use controls.
 - (d) Growth management controls and interim growth management controls.
 - (e) Decisions of historic district commissions, heritage commissions, and conservation commissions.
 - (f) Other municipal permits and fees applicable to housing and housing developments.
 - (g) Matters subject to the board's authority may include mixed-use combinations of residential and nonresidential uses. Such different uses may occur on separate properties, provided such properties are all part of a common scheme of development.





Authority - Workforce Housing - Remedies

HAB can grant relief under RSA 674:61 - Workforce Housing statute -

- Hear and determine appeals of land use board decisions regarding workforce housing.
- Whether municipality's land use ordinances provide a realistic and reasonable opportunity for workforce housing.
- Whether the land use board decision imposed conditions that render a workforce housing proposal economically unviable.
- Whether land use board decision was unreasonable or unlawful.



Authority - Who Can Appeal and Who has Standing

- ▶ Appeals to the Board may be brought by the applicant or other aggrieved or injured party who can demonstrate standing (abutters or those directly affected by a land use or other board decision - must have legal standing as defined in RSA 677:4 for ZBA and RSA 677:15 for planning board).
- ▶ The municipality shall be a party to the action.
- ▶ If the applicant is not the party initiating the action before the board, then the applicant shall automatically be an intervenor.
- ▶ The board shall grant intervenor status to abutters and to any other aggrieved or injured party who can demonstrate legal standing to appeal pursuant to RSA 677:4 or RSA 677:15.

Remedies the HAB can Award

- ▶ The board has the power to award all remedies available to the superior courts in similar cases, including permission to develop the proposed housing (a/k/a builders remedy).
- ▶ Like the Superior Court, in ZBA cases, the HAB can dismiss the appeal, or vacate the order or decision complained of in whole or in part, as the case may be; but, in case such order or decision is wholly or partly vacated, remand the matter to the zoning board of adjustment for such further proceedings, not inconsistent with the decree, as justice may require.
- ▶ Like the Superior Court, in planning board cases the HAB may reverse or affirm, wholly or partly, or may modify the decision brought up for review when there is an error of law or when the court is persuaded by the balance of probabilities, on the evidence before it, that said decision is unreasonable.



▲ Accessory dw

The HAB has Concurrent Jurisdiction with the Superior Court

- ▶ Appealing party and elect to appeal to the HAB or the Superior Court.
- ▶ An election to appeal to the HAB waives the right to appeal to the Superior Court.
- ▶ If the HAB determines that it does not have jurisdiction, the aggrieved party is granted 30 days to appeal to the Superior Court.
- ▶ Actions arising out of a common nucleus of operative facts that is appealed to the Superior Court could be stayed and joined with a related matter being heard in the HAB.



679:6 Timing of Appeals and Board Proceedings

- ▶ Appeals shall be filed with the board within 30 days of the final decision of a municipal board, committee, or commission. At the same time an appeal is filed with the board, the applicant shall notify the municipal board, committee, or commission of such appeal.
- ▶ The municipal board, committee, or commission shall within 30 days of receipt of such notice submit to the board a certified record of its proceedings on the matter subject to the appeal.
- ▶ The board shall hold a hearing on the merits within 90 days of its receipt of a notice of appeal.
- ▶ The board shall make a decision on an appeal within 60 days after conducting a hearing on the merits.

HAB Hearing Procedure; Standard of Review

- ▶ Appeals based on the certified record, and except in such cases as justice may warrant, in the sole discretion of the board, no additional evidence will be introduced.
- ▶ The rules of evidence shall not strictly apply.
- ▶ The board shall not reverse or modify a decision except for errors of law or if the board is persuaded by the balance of probabilities, on the evidence before it, that said decision is unreasonable.

Public Access to Board Proceedings & Decisions

- ▶ Appeal hearings are public proceedings and must comply with RSA 91-A.
- ▶ The board shall record the proceedings of any hearing before it and shall make such recording available to the public for inspection and recording from the date of the hearing to a date which is 15 working days after the board has made a final decision on the matter which is the subject of the hearing, or, if an appeal is made from such decision, the date upon which the matter has been finally adjudicated, whichever date is later.
- ▶ When the board deliberates to make a decision that process is exempt from the public meeting & notice requirements of RSA 91-A.
- ▶ Decisions and Orders are publicly available after they have been signed and by a quorum and served on the parties.
- ▶ Discussions and actions by the board concerning procedural, administrative, legal, and internal matters shall be exempt from the meeting and notice provisions of RSA 91-A:2.



679:15 Rehearing & Appeal

- ▶ Decisions of the board may be appealed to the supreme court by any party in accordance with the provisions of RSA 541.
- ▶ Before appealing to the Supreme Court the aggrieved party must first file a motion for rehearing - must be filed within 30 days of the decision.
- ▶ Rehearing motions shall state with specificity all points of law or fact the moving party contends the board overlooked, misapprehended, or requires clarification. Parties shall submit all evidence and present all arguments at the hearing.
- ▶ Rehearing motions shall not be granted to consider evidence previously available to the moving party but not presented at the hearing or to consider new arguments that could have been raised at the hearing. Except by leave of the board, parties shall not submit new evidence with rehearing motions. Leave shall only be granted when the offering party has shown the evidence was newly discovered and could not have been discovered with due diligence in time for the hearing and when the new evidence will assist the board.

Representation by Non-attorneys - Rules and Regulations

- ▶ Non-attorneys, including professional engineers, architects, and land surveyors, may represent any party before the board.
- ▶ The board may adopt rules under RSA 541-A necessary for carrying out its functions including but not limited to rules of procedure to be followed in hearings conducted by it not inconsistent with the provisions of this chapter.
- ▶ Adopted Rules can be found here:
https://hab.nh.gov/documents/HAB-Administrative-Rules_Hab-100-300.pdf

Recent Decisions

Shattuck v. Francestown

- ▶ Application for a lot line adjustment and subdivision that would create four new residential building lots.
- ▶ Ostensibly plan denied by planning board because it did not conform to the general purposes of the town's subdivision and zoning regulations.
- ▶ Overall, the HAB concluded the reasons stated by the Planning Board to deny the Applicants' plan were either unreasonable or legally deficient.
- ▶ HAB concluded there were no clearly identified regulatory deficiencies that supported the Planning Board's decision that no substantial public benefits would be granted by approving the plan.

Shattuck v. Francestown Practice Pointer

- ▶ If a planning board is to deny a plan due to non-compliance with the zoning ordinance, those must be objectively clear zoning non-conformities, and not generalized statements of a zoning ordinance's purpose.
- ▶ This permits the applicant to appeal any planning board zoning determination to the zoning board of adjustment and satisfies a municipality's obligation to provide assistance to landowners seeking approvals.
- ▶ Planning board members must endeavor to avoid inserting their subjective personal feelings into board decision making.





Recent Decisions

Evans v. Pembroke

- ▶ William Evans, Trustee (Applicant) sought approval from the Pembroke Select Board to reclassify a Class VI Road as Class V to facilitate the residential development of Applicant's abutting, 45-acre property.
- ▶ HAB concluded that a select board member who voted against the reclassification improperly weighed the impact of the proposed residential project contrary to the NH Supreme Court decision in *Green Crow Corp. v. Town of New Ipswich*, 157 N.H. 344 (2008).
- ▶ In *Green Crow* the Court made clear that the legislature did not intend for a select board to use its authority to determine occasion for the layout or upgrade of a highway under RSA 231:8 as a vehicle for effectively conducting land use planning or zoning.

Evans v. Pembroke

Practice Pointer



- ▶ This decision demonstrates that the HAB can exercise jurisdiction over a highway reclassification determination by a select board where that determination is a municipal permit “applicable to housing and housing developments.” RSA 679:5, I (g).
- ▶ Select Board’s must also take note that when it is asked to reclassify a road from Class VI to Class V, it is not appropriate to consider the anticipated impact associated with the development that might result from the upgrade of a road.

Upcoming Workshops and Webinars

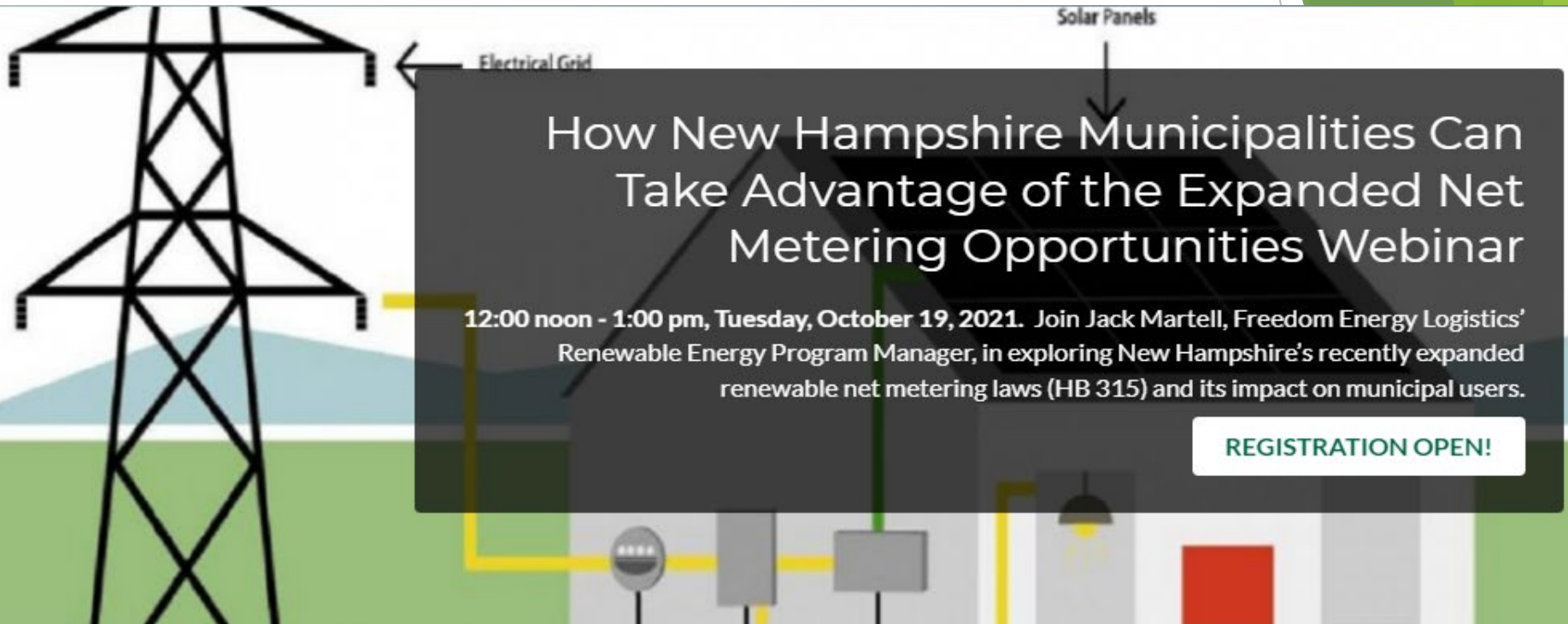
2021 Right-to-Know Law and Governmental Records & Public Meetings Virtual Workshop

9:00 am - 1:00 pm, Thursday, October 14, 2021. Cost: \$55.00. Join NHMA's Stephen Buckley and Natch Greyes as they discuss the requirements for holding a proper public meeting as well as provide guidance on handling of governmental record matters.

REGISTRATION OPEN!

[REGISTRATION NOW OPEN!](#)

Upcoming Workshops and Webinars



How New Hampshire Municipalities Can Take Advantage of the Expanded Net Metering Opportunities Webinar

12:00 noon - 1:00 pm, Tuesday, October 19, 2021. Join Jack Martell, Freedom Energy Logistics' Renewable Energy Program Manager, in exploring New Hampshire's recently expanded renewable net metering laws (HB 315) and its impact on municipal users.

REGISTRATION OPEN!

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Upcoming Workshops and Webinars


Right-to-Know Law Virtual Workshop for Law Enforcement

9:00 am - 12:00 pm, Wednesday, October 20, 2021. Cost \$55.00. Join NHMA's Stephen Buckley and Natch Greyes who will share insights and strategies to assist law enforcement agencies in handling governmental record matters arising under the Right-to-Know Law.

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