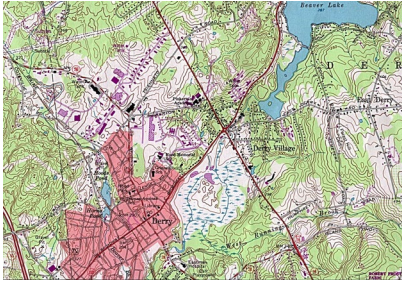


2021 Webinar Series



The Workings of a Planning Board

Presented by:

Michael A. Klass, Principal Planner, Office of Strategic Initiatives
Stephen Buckley, Legal Services Counsel
Natch Greyes, Municipal Services Counsel

March 23, 2021

Our Presenters



Stephen Buckley
Legal Services Counsel



Michael Klass
Principal Planner
NH Office of Strategic Initiatives



Natch Greyes
Municipal Services Counsel

Today's Presentation

Statutory Duties - Steve

Subdivisions & Site Plans, Master Plan, Workforce Housing, CIP, Zoning Amendments, Innovative Land Use, Streets, Driveways, Merged lots

Planning Board Procedures -Natch

Preliminary review, Applications, Timeline for Review, 3rd Party consultants, 2nd Applications, Public Hearing, Deliberations, Making the decision, Conditional approvals, Vesting, Superior Court Appeal

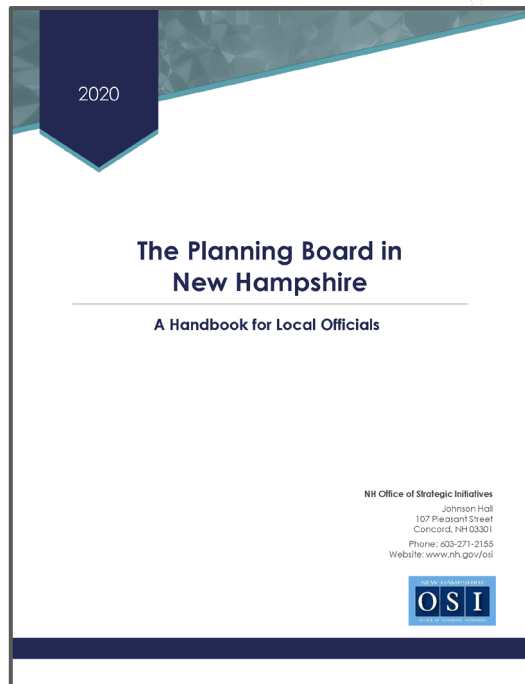
Office of Strategic Initiatives - Michael

Introduction to OSI, Planning Division; Floodplain Management; State Data Center; Municipal and Regional Planning Assistance; Developments of Regional Impact; Innovative Land Use Control; Conflicts of Interest

The NHOSI Planning Board Handbook is an invaluable resource!



Download your copy today!



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

Planning Board - Statutory Duties



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

Subdivision & Site Plan Approval

SUBDIVISION:

- ✓ Require preliminary review of subdivisions.
- ✓ Approve plats and plans.
- ✓ Approval showing streets.
- ✓ Approval showing utility facilities & services.

SITE PLAN:

- ✓ Municipality must have zoning.
- ✓ Planning board has adopted subdivision regulations.
- ✓ Board may approve site plans for the *development or change or expansion of use* for nonresidential uses or for multi-family dwelling units (structures with > 2 dwelling units).

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

Workforce Housing Statute

RSA 674:58-:61

- ✓ Allow workforce housing in a majority of the land area zoned residential.
- ✓ Does municipality have its fair share of workforce housing?
- ✓ Housing for sale - affordable to a household with an income of no more than 100 percent of the median income for a 4-person household for County in which the housing is located.
- ✓ Rental housing - affordable to a household with an income of no more than 60 percent of the median income for a 3-person household for County in which the housing is located.

Capital Improvements Program

- ▶ Aid with budgeting decisions.
- ▶ Not a basis to deny subdivision application
Zukis v. Fitzwilliam, 135 N.H. 384 (1992).
- ▶ Prerequisite for:
 - ▶ Impact fees
 - ▶ Growth Management



Zoning Amendments

RSA 675:3

- ▶ Planning Board proposes initial zoning adoption.
- ▶ Planning Board & Select Board may propose amendments.
- ▶ At least one public hearing by Planning Board.
- ▶ Another hearing 14 days later if proposal substantively modified.
- ▶ Deliver final proposal to town clerk 5th Tuesday before town meeting.
- ▶ Petitioned Amendments RSA 675:4, Planning Board states approval or disapproval on ballot.

Improvements in Unapproved Streets RSA 674:40



Once municipality has established a planning board under RSA 674:35:

Streets shall not thereafter be accepted or laid out as public highways *unless* such street:

(a) Has been accepted or opened as, or has otherwise received the legal status of, a public street prior to the conferring of platting jurisdiction upon the planning board; or

(b) Corresponds in its location and lines with a street shown on the official map, or with a street shown on a subdivision plat approved by the planning board, *or with a street on a street plat made by and adopted by the board.*

Planning Board & Public Streets

- ▶ Approves Subdivision Roads 674:36, II (e)
- ▶ Approves Site Plan Roads RSA 674:44, II, (d) (e) (f)
- ▶ Establishes Road Construction Standards
- ▶ Establishes minimum completion before occupancy 676:12, V
- ▶ Imposes performance bonding, 674:36, III

Driveways – RSA 236:13



- Planning Board authorized to approve driveway permits on town roads.
- Must adopt driveway regulations.
- Delegate permit issuance and enforcement to Road Agent or other designee.
- Continuing authority over any driveway even if no permit issued.
- Property owner can be ordered to fix driveway that is hazard to traveling public or threat to road integrity.

**Planning
Board
Authority to
Prevent
Scattered and
Premature
Development**
RSA 674:36, II
(a)

674:36 Subdivision Regulations.

–

II. The subdivision regulations which the planning board adopts may:

(a) Provide against such scattered or premature subdivision of land as would involve danger or injury to health, safety, or prosperity by reason of the lack of water supply, drainage, transportation, schools, fire protection, or other public services, or necessitate the excessive expenditure of public funds for the supply of such services;

Merged Lots – RSA 674:39-a



Merger of 2 or more *contiguous* preexisting approved or subdivided lots or parcels.

No public hearing or notice shall be required.

No new survey plat need be recorded.

Notice of the merger endorsed by the planning board recorded at registry of deeds.

If any lot is under a mortgage, lender must consent.

Off-site Exactions

RSA 674:21, V (j)



- ▶ No impact fee ordinance adoption necessary to impose exactions as condition of Planning Board approval.
- ▶ Improvements that are necessitated by a development located outside the project boundaries.
- ▶ Subject to rational nexus test.
- ▶ Limited to highway, drainage, and sewer and water upgrades pertinent to that development.



Preliminary
Review:

Conceptual
Consultation

Design
Review

Formal Application, RSA 676:4, I

Completed application.

Regulations specify what is completed application.

Checklist can specify types of plans, studies, designs, etc. to minimize review and revisions.

Fees for costs & consultants' studies; detailed accounting. RSA 676:4-b

Application accepted by vote at meeting, with abutter and published notice.

Timeline for Decision, RSA 676:4, I



Preliminary Consultation No Set Time Limit



Application submitted 21 days before acceptance at meeting.



Notice to Abutters and public 10 days before meeting for plan acceptance.



Hold at least one public hearing and make decision within 65 days of plan acceptance.



Issue written decision within 5 business days.

Alternative Site Plan Approval and Review Procedures



- ▶ The town meeting or town or city council may authorize the planning board to delegate its site review powers for minor site plans to a committee of technically qualified administrators. RSA 674:43, III.
- ▶ Establish Technical Review Group to provide advice to planning board applicants on their proposed projects.
- ▶ City Council or planning board establish thresholds based on the size of a project or a tract below which site plan review shall not be required. RSA 674:43, IV

Acceptance Vesting RSA 676:12, VI



No proposed subdivision or site plan review or zoning ordinance or amendment thereto shall affect a plat or application which has been the subject of notice by the planning board pursuant to RSA 676:4, I(d) so long as said plat or application was the subject of notice prior to the first legal notice of said change or amendment. The provisions of this paragraph shall also apply to proposals submitted to a planning board for design review pursuant to RSA 676:4, II(b), provided that a formal application is filed with the planning board within 12 months of the end of the design review process.



NEW HAMPSHIRE MUNICIPAL ASSOCIATION

EST. 1941

Only One Bite of the Apple

Third Party Consultants – RSA 676:4-b



- ▶ May require applicant to pay for third party consultant review and construction monitoring.
- ▶ Cannot substantially duplicate same review at ZBA.

Public Hearing Procedures

- ▶ 676:4, I (e) hear from applicant, abutters, others with direct interest, and others as permitted by board.
- ▶ Impartially follow rules of procedure.
- ▶ Site visits are public meetings.
- ▶ Riggins Rules.



Deliberation & Weighing the Evidence



- Get all necessary information before closing public hearing.
- Board can deliberate and vote at later meeting.
- Avoid ex parte contacts with parties or deliberation among members outside meeting.
- Board may rely on personal knowledge of the area; and not bound to accept conclusions of experts, *Vannah v. Bedford*, 111 N.H. 105 (1971), only if some evidence and explained in written decision. *Malachy Glen Associates, Inc. v. Chichester*, 155 N.H. 102 (2007)
- Cannot ignore uncontradicted expert testimony, unless board can adequately explain in written decision. *Condos East Corp. v. Conway*, 132 N.H. 431 (1989)

Dartmouth v. Hanover

New Hampshire Supreme Court

November 6, 2018

- ▶ Planning Boards cannot rely upon lay opinions and anecdotes refuted by uncontroverted expert evidence.
- ▶ Planning Boards cannot supplant the specific regulations and ordinances that control the site plan review process with their own personal feelings.

Written Notice of Decision

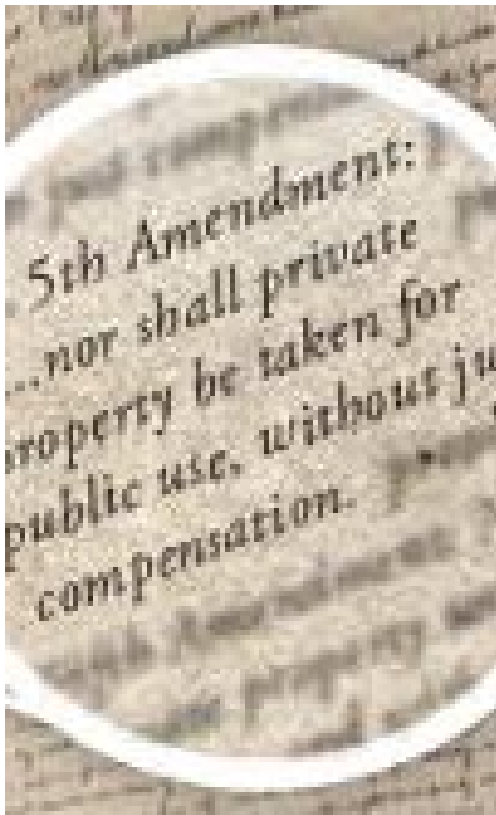


- ✓ Written decision is required, and written reasons in event of disapproval. RSA 676:3, I.
- ✓ RSA 676:4, I (c) (1) also requires decision to approve, approve with conditions or disapprove.
- ✓ Decision and meeting minutes must be on file for public inspection within 5 business days of vote. RSA 676:3, II.
- ✓ A tie vote is not a decision.

Conditional Approval

- ▶ Representations by applicant are not binding unless clearly made a condition of approval.
- ▶ Conditions must reasonably relate to ensuring compliance with relevant criteria.
- ▶ Standard conditions.
- ▶ Conditions precedent.
- ▶ Conditions subsequent.
- ▶ Compliance hearing.

“Grandfather Rights”



- Planning Board Regulations may define “substantial completion of improvements etc.” and “active and substantial development etc.” RSA 674:39, III.
- Failure to define “active and substantial development” awards 5-year exemption automatically.

Housing Appeals Board



- Went into effect July 1, 2020; Legislation to Repeal 2021.
- Three members, appointed by the supreme court.
- Will hear appeals of final decisions of municipal boards regarding “questions of housing and housing development.”
- Party has option of appealing to superior court or HAB; appealing to one waives right to appeal to the other.
- Hearing procedure is identical to procedure in superior court.
- Standard of review is identical to that in superior court.
- Board must hold hearing on the merits within 90 days after receipt of notice of appeal and must make decision within 60 days after hearing.
- Decisions may be appealed to N.H. Supreme Court.



Superior Court Appeal

[RSA 677:15](#)



Planning Division

- ▶ Conservation Land Stewardship Program
- ▶ Floodplain Management Program
- ▶ Geographic Information Systems
- ▶ Municipal and Regional Planning Assistance
- ▶ State Data Center (Census Data)

Energy Division

- Develops state energy policy
- Administers misc. state and federal energy programs

Floodplain Management Program



(Source: Dan MacDonald, New Boston Fire Chief)



(Source: Kellie Walsh)



State Data Center



- Provides access to Census info and other statistics across the state for planning, government, education, and business
- Population Estimates
 - ▶ Group Quarter Survey
 - ▶ Building Permit Survey
- Populations Projections
- Resource for finding and interpreting data

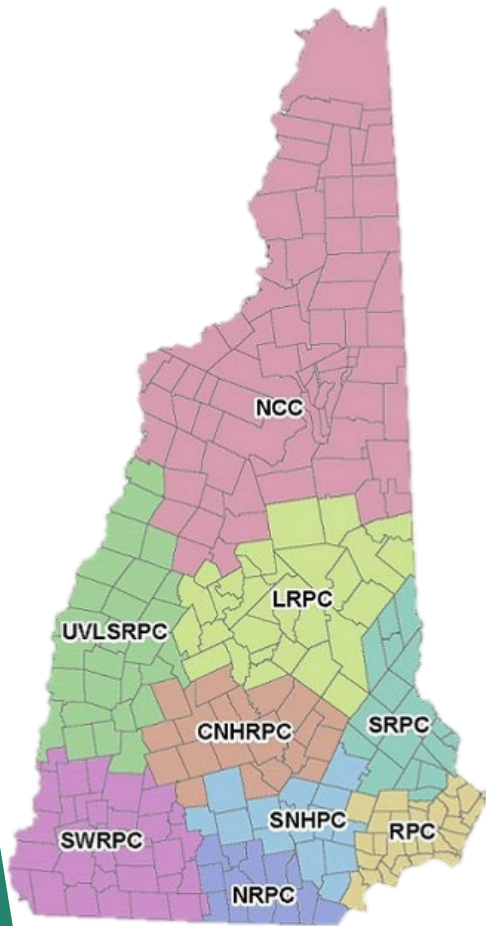
United States[®]
Census
2020

Municipal & Regional Planning Assistance (MRA)



- ▶ Provides general assistance to land use development and municipal planning requests.
- ▶ Coordinates with planning partners to provide training and guidance for municipalities and board members.
- ▶ Produces various publications.
- ▶ Conducts an annual municipal land use regulation survey.

Regional Planning Commissions (RPCs)



- ▶ RSA 36
- ▶ 9 Regional Planning Commissions
- ▶ Support local municipalities with planning and community development
- ▶ Voluntary
- ▶ No regulatory jurisdiction over local land use planning

Developments of Regional Impact (RSA 36:54 - :58)



- ▶ DRI when development “could reasonably be expected to impact on a neighboring municipality” because of factors such as:
 - I. Relative size or number of dwelling units as compared with existing stock.
 - II. Proximity to the borders of a neighboring community.
 - III. Transportation networks.
 - IV. Anticipated emissions such as light, noise, smoke, odors, or particles.
 - V. Proximity to aquifers or surface waters which transcend municipal boundaries.
 - VI. Shared facilities such as schools and solid waste disposal facilities.

DRI - Why?



- ▶ Provide timely notice to potentially affected communities of land use board's meetings and public hearings involving the proposed development.
- ▶ Allow RPCs and the potentially affected neighboring municipalities to furnish timely input (as abutters).
- ▶ Encourage the land use boards to consider the interests of other potentially affected municipalities.

DRI - When?



RSA 36:56, I states that

“[a] local land use board, as defined in RSA 672:7, upon receipt of an application for development, shall review it promptly and determine whether or not the development, if approved, reasonably could be construed as having the potential for regional impact. Doubt concerning regional impact shall be resolved in a determination that the development has a potential regional impact.”

(Emphasis added.)

DRI – Procedure?



- ▶ Within five (5) days of the meeting at which the DRI determination was made, send copies of the minutes of that meeting, by certified mail, to the RPC and to the affected neighboring municipalities.
- ▶ At the same time, submit a set of initial development plans to the RPC. The applicant bears the cost of providing and sending such plans.
- ▶ At least 14 days before the public hearing, the board must notify, by certified mail, all affected municipalities and the RPC of the date, time, and place of the hearing and of their right to testify concerning the development.
- ▶ Don't forget the Building Inspector!

Innovative Land Use Controls

RSA 674:21

- ▶ Must be supported by the master plan.
- ▶ Administration of the ordinance can be granted to the PB, BOS, ZBA, or other such person or board according to the ordinance.
- ▶ If administration is not designated to the PB, any proposal under the regulation shall be reviewed by the PB prior to final consideration by the administrator.

Innovative Land Use (con't)

- ▶ Timing incentives
- ▶ Phased development (49)
- ▶ Intensity and use incentives
- ▶ Transfer of development rights (8)
- ▶ Planned unit development (44)
- ▶ Cluster development (176)
- ▶ Impact zoning
- ▶ Performance standards (164)
- ▶ Flexible and discretionary zoning
- ▶ Environmental characteristics zoning
- ▶ Inclusionary zoning (47)
- ▶ Impact fees (86)
- ▶ Village Plan alternative subdivision (5)
- ▶ Integrated land development permit option (NOT ACTIVE)

Conflicts of Interest



RSA 673:14 Disqualification of Member.

I. 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 Standard



500-A:12 Examination. –

I. Any juror may be required by the court, on motion of a party in the case to be tried, to answer upon oath if he:

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

II. If it appears that any juror is not indifferent, he shall be set aside on that trial.

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.

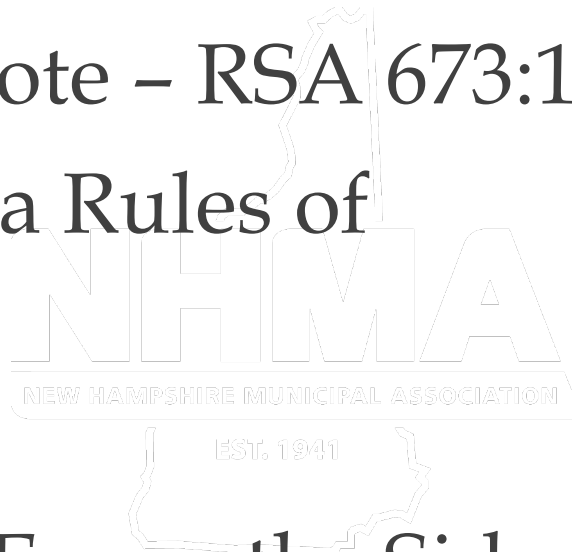
Case Study: Z-1 Express v. Manchester (2019)

- ▶ 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.

Conflicts of Interest



- ▶ Advisory Vote – RSA 673:14, II.
- ▶ Social Media Rules of Procedure?
- ▶ Takeaway: Err on the Side of Caution!



Upcoming Virtual Workshops and Complimentary Webinar



2021 Local Officials Workshops

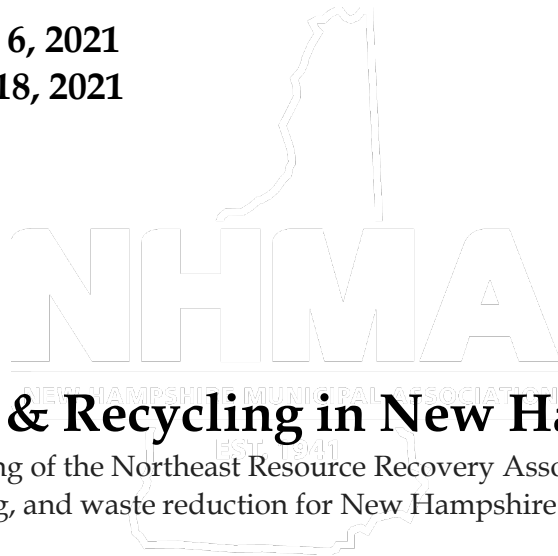
Two FREE virtual workshops designed specifically for newly-elected and experienced municipal officials and employees of member municipalities.

9:00 am – 4:00 pm, **Tuesday, April 6, 2021**

9:00 am – 4:00 pm, **Tuesday, May 18, 2021**

COST: FREE

[REGISTRATION OPEN!](#)



Municipal Solid Waste & Recycling in New Hampshire

Join Reagan Bissonette and Heather Herring of the Northeast Resource Recovery Association (NRRRA) for an in-depth workshop on solid waste, recycling, and waste reduction for New Hampshire municipalities.

9:00 am - 12:00 non

Thursday, April 22, 2021

COST: \$40.00

[REGISTRATION OPEN!](#)

Upcoming Virtual Workshops and Complimentary Webinar



NHMA Webinar: *ZBA Basics*

Join Legal Services Counsel Stephen Buckley, Municipal Services Counsel Natch Greyes, and New Hampshire Office of Strategic Initiative's Principal Planner Michael Klass, who will share their expertise on how to keep your board's affairs in order (including rules of procedure), the do's and don'ts for conducting meetings and hearings, your board's issuance of decisions, and its rehearing procedures.

12:00 noon - 2:00 pm

Tuesday, April 13, 2021

FREE FOR MEMBERS

[REGISTRATION OPEN!](#)



The Right-to-Know Law: Meetings and Governmental Records Join Legal Services Counsel Stephen Buckley and Municipal Services Counsel Natch Greyes who will discuss the requirements for holding a proper public meeting, as well the exceptions to the meeting requirement (the so-called "non-meeting"), along with modified public meeting procedures in light of the COVID-19 pandemic. The attorneys will also provide guidance on handling governmental record matters arising under the Right-to-Know Law.

1:30 pm - 3:30 pm

Thursday, April 15, 2021

Cost: \$40.00

[REGISTRATION OPEN!](#)



*THANK YOU for
attending our
webinar TODAY!*

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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