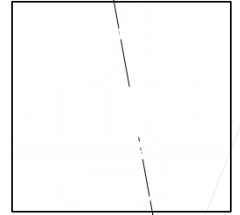




New Hampshire Department of
**BUSINESS AND
ECONOMIC AFFAIRS**



2023 Land Use Law Conference

Planning Board Roles & Responsibilities

Stephen C. Buckley, NHMA Legal Services Counsel

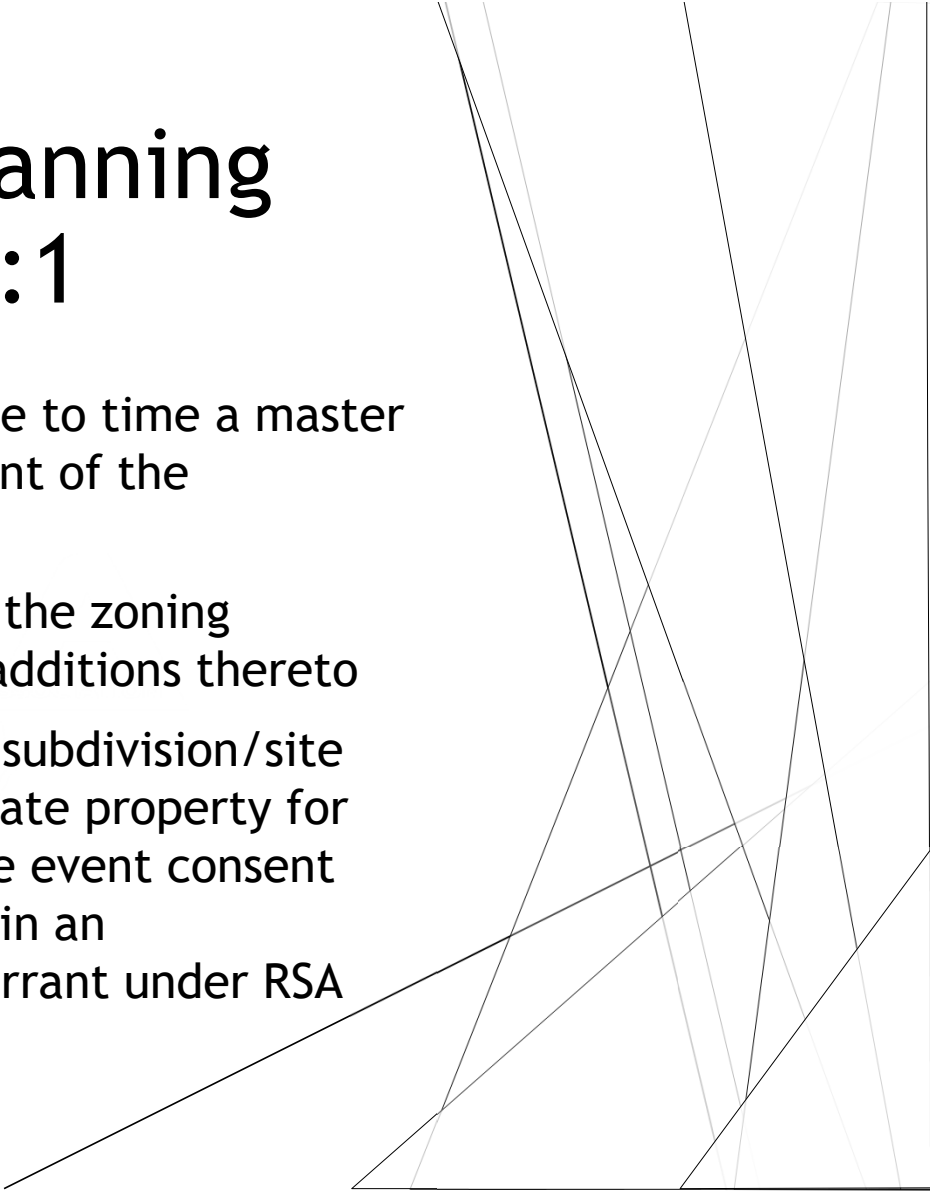
October 14, 2023

Today's Presentation

- ✓ **General Concepts:** Duties of Planning Board; Duty to Assist; Principled Decisions; Conflicts of Interest
- ✓ **Statutory Duties:** Master Plan; Subdivisions & Site Plans; Driveways; Capital Improvement Planning; Zoning Amendments; Innovative Land Use Controls, Workforce Housing Statute; Governmental Land Uses; Developments of Regional Impact; Excavation Regulation.
- ✓ **Hearings & Decision Making:** Deliberation & Weighing Evidence; Written Notice of Decision; Findings of Fact; Conditional Approval; Vested Rights.
- ✓ **Appellate Review:** Housing Appeals Board; Superior Court.



Duties of the Planning Board - RSA 674:1

- ▶ Prepare and amend from time to time a master plan to guide the development of the municipality
 - ▶ Recommend amendments to the zoning ordinance or zoning map or additions thereto
 - ▶ Be authorized by ordinance (subdivision/site plan regs) to enter upon private property for necessary inspections - in the event consent for such entry is denied obtain an administrative inspection warrant under RSA 595-B.
- 

Duty to Assist

- ▶ Planning boards have an obligation under the New Hampshire Constitution to provide assistance to all citizens. *Richmond Co. v. City of Concord*, 149 N.H. 312 (2003)
- ▶ The subdivision/site plan process is not a completely adversarial process.
- ▶ The planning board has a duty to advise applicants and otherwise work with them as they attempt to negotiate the permit process.

Principled Decision Making - Dartmouth v. Hanover

- ▶ 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.

Conflicts of Interest

RSA 673:14 Disqualification of Member.

- ▶ No member of a planning board 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

- (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.

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.
- ▶ Recuse (yes) vs. Abstain (no)
- ▶ Avoid Social Media Opinions on Pending Matters
- ▶ Disclose and Remove Yourself
- ▶ Err on the Side of Caution!

Planning Board - Statutory Duties

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

Master Plan: RSA 674:2 - :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 to the plan are recommended every 5 to 10 years

Subdivision

- ✓ "Subdivision" the division of a parcel into 2 or more lots, plats, sites, or other divisions of land for the purpose, whether immediate or future, of sale, rent, lease, condominium conveyance or building development
- ✓ Authority approved by vote of town meeting/legislative body - RSA 674:35
- ✓ Includes boundary line agreements, and resubdivision (modification of prior subdivision approval)
- ✓ Includes the manner in which streets within subdivisions shall be graded and improved and to which streets water, sewer, and other utility mains, piping, connections, or facilities within subdivisions shall be installed
- ✓ Condominiums only regulated as subdivisions if subdivision regulations expressly provide as such - RSA 356-B:5

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.

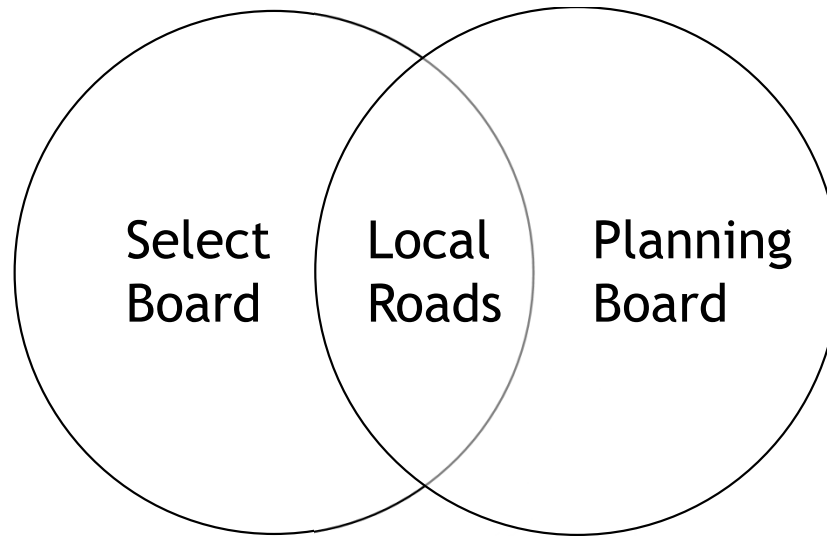
No new survey plat
need be recorded.

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

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

Preliminary Review- Conceptual Consultation - Design Review

- ▶ Planning boards may mandate preliminary review, if authorized by town meeting. RSA 674:35, I
- ▶ Preliminary Conceptual Consultation, RSA 676:4, II (a): nonbinding, no abutter notification required - general discussion of type of development.
- ▶ Design Review, RSA 676:4, II (b): Still nonbinding, but abutter and published notice required, but no public hearing; identify special studies that may be required, neighborhood or environmental impacts, specific issues with the parcel rough layout of lots and roads, topo maps, soils information, etc.



- ▶ Layout of new roads - Select Board - RSA 231:8
- ▶ Acceptance of new roads - Select Board 674:40-a
- ▶ Maintenance of existing roads - Select Board 231:65
- ▶ Town Road Construction Standards - Select Board RSA 41:11, RSA 47:17, VII, VIII, XVIII
- ▶ Approval of new subdivision Roads - Planning Board RSA - 674:36
- ▶ Planning for new and existing roads - Planning Board - RSA 674:2, II
- ▶ Capital Improvement Planning for roads - Planning Board
- ▶ Subdivision & Site Plan Road Construction Standards - Planning Board RSA - 674:36, I, (e); RSA 674:44, II, (d) (c) (f)
- ▶ Imposes performance bonding - 674:36, III

Site Plan Review

Approve or disapprove site plans for the *development or change or expansion* of use of tracts:

- ✓ For nonresidential uses (commercial or industrial)
- ✓ For multi-family dwelling units, which are defined as any structures containing more than 2 dwelling units.

Change of Use?:

- ✓ The purpose of site plan review is to permit the planning board to evaluate issues of public safety, health, and welfare when the use of property changes.
Town of Seabrook v. Vachon Mgmt., Inc., 144 N.H. 660, 664 (2000)

Alternative Site Plan Approval and Review Procedures

- ▶ The legislative body 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.
- ▶ Legislative body or planning board may 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

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

Driveways - RSA 236:13



- Planning Board or Select Board authorized to approve driveway permits on municipal roads
- Must adopt driveway regulations
- Delegate permit issuance and enforcement to Public Works Director 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

Capital Improvement Planning

CIP preparation by planning board or CIP Committee as approved by legislative body - RSA 674:5 - :7

- ✓ **A CIP “shall” do the following:**
 - ▶Address capital improvement projects over a period of at least six years.
 - ▶Classify projects according to the urgency and need for implementation.
 - ▶Include a timetable for implementation of projects.
 - ▶Take into account public facility needs shown in the master plan.

- ✓ **A CIP “may” include the following:**
 - ▶The estimated cost of each project.
 - ▶The probable operation and maintenance costs
 - ▶The probable revenues (if any) from each project

Zoning Amendments RSA 675:3 - RSA 675:4

- ▶ Zoning, historic district ordinance, or building code amendments proposed by planning board, select board, village district commissioners or by petition.
- ▶ Planning Board shall hold a public hearing on all such amendments.
- ▶ If an amendment is submitted by the select board, village district commissioners, or by petition the ballot shall so indicate. A notation on the ballot stating the planning board's approval or disapproval shall immediately follow the question's description.

Local Excavation Regulations - RSA 155-E

- ▶ By default, the planning board is the excavation regulator, unless town meeting delegates to the ZBA or the Select Board.
- ▶ Must hold public hearing on any new or amended excavation permit within 30 days of the application, with notice published and posted 10 clear days before the hearing.
- ▶ Render a decision on any excavation application with 20 days of the hearing.
- ▶ Aggrieved parties must first file a motion for rehearing with the regulator within 10 days of the decision and those still aggrieved after rehearing may appeal in conformity with RSA 677:4-15.
- ▶ The regulator may adopt regulations to carry out the provisions the excavation statute, including adopting a permit fee schedule.

Innovative Land Use Controls- RSA 674:21

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

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

Governmental Uses of Land - RSA 674:54

- ▶ Municipal land use regulations do not apply to state, county, city, town or village district construction projects, when in furtherance of an essential function of government
- ▶ When a governmental entity proposes shall provide written notice of the project to the governing body 60 days prior to the commencement of construction
- ▶ The governing body or the Planning Board can then hold a public hearing on the proposed project
- ▶ After the public hearing the governing body or Planning Board “may issue nonbinding written comments relative to conformity or nonconformity of the proposal with normally applicable land use regulations to the sponsor of the governmental use within 30 days after the hearing”

Acceptance Vesting - RSA 676:12, VI

- Amendments to zoning or planning regulations do not apply to an application which has been the subject of legal notice of plan acceptance prior to the first legal notice of any such change or amendment
- This also applies 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

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

- ▶ DRI when development “could reasonably be expected to impact on a neighboring municipality.”
- ▶ 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.

Public Hearing Procedures

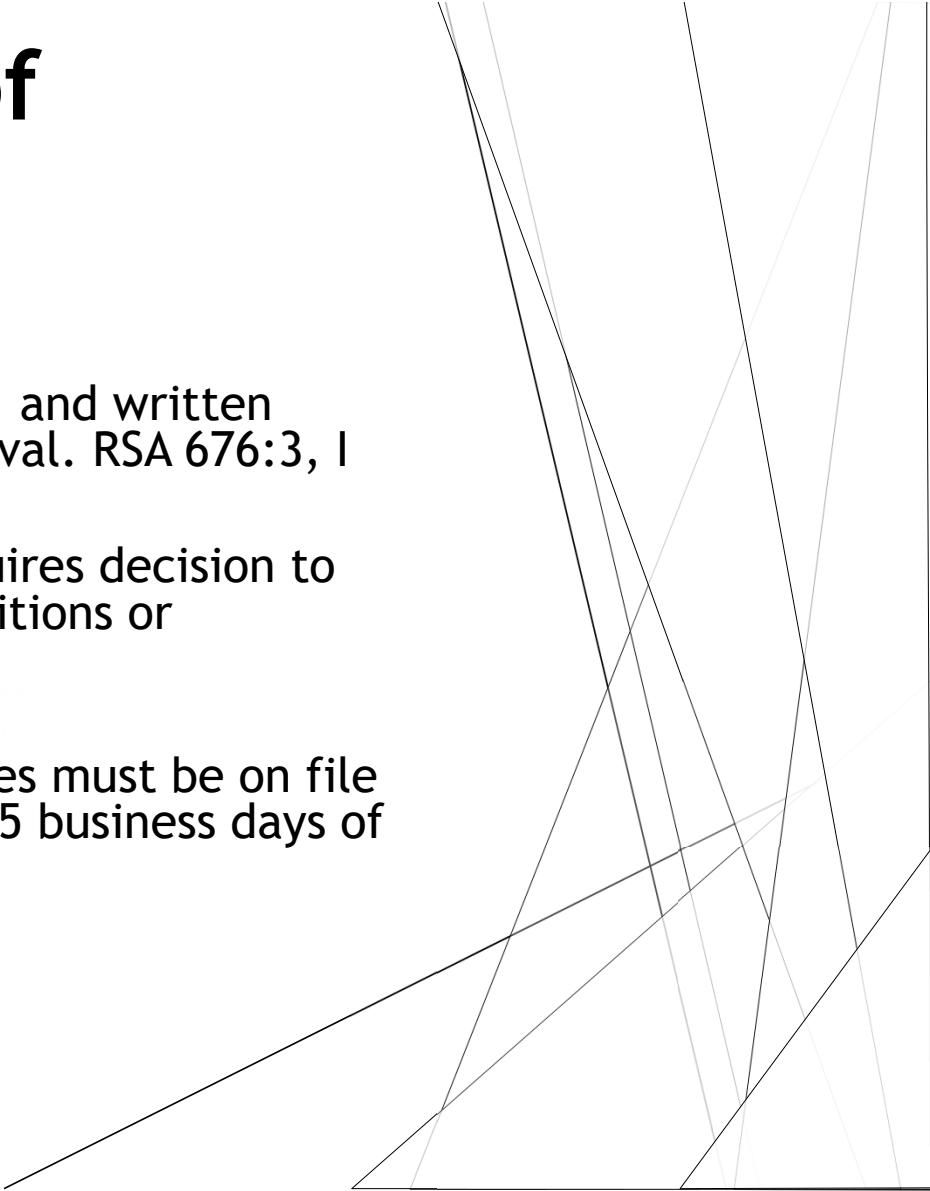
- 676:4, I (e) hear from applicant, abutters, others with direct interest, and others as permitted by board
- Impartially follow rules of procedure
- Site visits are public meetings
- Riggins Rules

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), but the board must have an evidentiary basis supporting their decision that is explained in the 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)



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
- 

Decisions Shall Include Written Findings of Fact

New language in RSA 676:3, I expands on requirement that local land use boards provide specific written findings of fact that support an approval or disapproval:

The decision shall include specific written findings of fact that support the decision. Failure of the board to make specific written findings of fact supporting a disapproval shall be grounds for automatic reversal and remand by the superior court upon appeal, in accordance with the time periods set forth in RSA 677:5 or RSA 677:15, unless the court determines that there are other factors warranting the disapproval.

Conditional Approval

- ▶ If the application is approved with conditions, the board shall include in the written decision a detailed description of all conditions necessary to obtain final 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 (attached to all approvals)
- ▶ Conditions precedent (must be satisfied to obtain final approval)
- ▶ Conditions subsequent (site specific conditions binding on the use)
- ▶ Compliance hearing (necessary to give final approval where satisfaction of conditions precedent requires discretionary judgment)

Vested 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

- 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.
- 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

- ▶ Party aggrieved with standing may appeal within 30 days of the board's vote
- ▶ Party aggrieved may also appeal zoning decisions to the ZBA
- ▶ Court may send an appeal with a zoning issue back to the ZBA for resolution and will stay the planning board appeal while zoning issue is resolved
- ▶ Court will issue a certiorari order requesting delivery of certified copy of board's records to court
- ▶ Certiorari order will stay all proceedings - don't sign plan, do nothing in furtherance of the approval
- ▶ Planning board is not the proper party, only the town is the proper party.
- ▶ Trial is on the certified record, no testimony
- ▶ Court can reverse or affirm - is the board's decision unreasonable?
- ▶ Costs not allowed against town unless town acted in bad faith

The image features a white background with abstract geometric lines in the corners. On the left, a single thin black line extends from the top-left towards the center. On the right, a complex network of thin black lines forms a series of overlapping triangles and quadrilaterals, extending from the top-right towards the center. The word "Questions?" is centered in a large, bold, black sans-serif font.

Questions?

Thank you for attending today!

The New Hampshire Municipal Association is a non-profit, 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.

25 Triangle Park Drive
Concord, NH 03301
www.nhmunicipal.org
legalinquiries@nhmunicipal.org
603.224.7447