

**New Hampshire Office of Energy and Planning**

**OEP Planning Conference May 2, 2015**



***Basics for the Planning Board***

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***Note: This paper incorporates selected materials from the paper prepared by Attorney Matthew Surge for the 2014 OEP Conference. Neither this paper nor attendance at the accompanying conference session constitutes legal advice or guidance. This is intended as a general educational paper and presentation.***

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**Basics for the Planning Board**  
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This session is for new planning board members and alternates, as well as veterans who want a refresher course on the basics. Discussion topics include the planning board's responsibilities, rules of procedure, conflict of interest and disqualification, conducting meetings and public hearings, communication with legal counsel, the zoning amendment process, and more.

***I. Enabling Legislation & Local Government Powers***

*Some words to live by:*

*“Get thee to a statute book!”*

*“Don't try to do it alone or reinvent the wheel – unless you have to!”*

Use available resources:

- OEP, RPCs, & NHMA
- Town Documents: Historical & Current – Including the Master Plan
- RSAs & Your Municipal Lawyer
- NH Municipal Lawyers Association (NHMLA) Local Government Seminars
- Other Board Members and Other Boards
- Common Sense

***II. Planning & Regulation: Past & Present***

*A. Planning and regulation of land use are not new.* To some degree, what we call “pre-historic” civilizations exercised controls over the use and development of land. Sometimes the tools were swords and not paper. But relics, artifacts, and documents from many different eras over eons demonstrate that land use controls and planned development in some form have been around for a long, long time. Consider these highly subjective and certainly non-exhaustive examples:

- Roman cities and their colonies;
- Irish round forts, towers and bee-hive huts;
- European walled communities; and

- Mayan, Incan, and Aztec communities and Pre-Columbian Native American communities, such as Cahokia.

*B. “Modern Planning.”* As population concentrated, need to accommodate increased numbers of people and requirements of living in closer proximity prompted the need for some type of land use controls to avoid chaos and health hazards. Traditional “Euclidean” zoning evolved as one scheme to separate incompatible land uses by restricting and separating land uses within a defined zone. Subdivision controls, originally began as a “platting” statutes, a form of consumer protection, not necessarily as a means of regulating the spread and timing of development.

Both zoning and subdivision control were helped along in the U.S. by the development and release in the 1920s by the then-federal Department of Commerce of two “model” statutes to enable land use controls: The Standard Zoning Enabling Act (SZA) and the Standard City Planning Enabling Act (SCPEA). Most state land use statutes followed these patterns, and zoning and subdivision laws spread across the land. Though the context and fabric of land use controls is now greatly varied, one characteristic has remained as dominant – though not exclusive – the exercise of land use controls primarily at the local government level. In New Hampshire, this has meant action by cities and towns (and occasionally by village districts). Other parts of the country, particularly the Midwest and Western states, may vest power in counties, regional governments, or similar entities.

When environmental protection laws were adopted commencing in the 1970s (e.g., Environmental Protection Act, Clean Water Act, Clean Air Act), the federal and state governments assumed more active roles in land use, a practice which has expanded with concerns now centering on solid and hazardous waste, energy and transportation, and climate change. Yet, even when state and federal governments exercise a role (and sometimes a role pre-emptive of local control), laws and administrative regulations may call on local government to implement policy directives created at the federal and state levels.

The current trends and tools used in land use controls far exceed what now seem like rather simplistic tools as envisioned in the SZA and the SCPEA. Today, land use may focus on concepts such as innovative zoning, rational nexus requirements for exactions and dedications, and unconstitutional, uncompensated takings of property rights, not to mention the Religious Land Use and Institutionalize Persons Act (RLUIPA). Modern land use controls appear to be heading in a bit more “flexible” direction, seeking to allow design elements to accommodate a range of development types. At the same time, property owners and citizens are ready to seek recourse in the courts to address perceived interference with their rights and to enforce “equal protection” of the laws. In land use, where regulation may affect protected property rights, governments may be held to a higher standard than in some other areas of governmental controls.

Governing/enabling statutes and court views on land use evolve over time. Thus, as with so many areas of local government, one may say of land use, “If you don’t like the current situation, wait a minute!”

### ***III. The New Hampshire Scheme***

As have most other jurisdictions, New Hampshire vests primary responsibility for at least basic land use in local government. Here, though, local governments can view themselves as somewhat hampered by having to operate under what is often called “Dillon’s Rule.” In a Dillon’s Rule state, local governments have only those powers expressly delegated to them by law or powers that can be implied from a specific grant. In a “Home Rule” state, local governments have the ability to act to govern their own affairs subject only to certain restrictions such as enactments of statewide concern. An important corollary of Dillon’s rule says that local governments may exercise the powers they do have only in the manner mandated by the legislature.

Thus, a primary rule for New Hampshire cities and towns requires that they find some basis in state law for them to be able to exercise police powers (meaning the power to adopt ordinances or regulations governing conduct of persons or entities).

### ***IV. Planning Board Organization; Officers; General Duties; Conflicts of Interest***

#### ***A. Basics of PB Powers and Duties on Planning & Regulation in NH.***

##### ***“Don’t Stop Thinking About Tomorrow!”***

- Master Planning (RSA 674:1)
- Compiling Capital Improvements Program
- Growth Management
- Zoning Ordinance
- Subdivision and Site Plan Regulations
- Review of Applications
- Official Map (RSA 674:10)
- Earth Excavation Permits
- Special/Conditional Use Permits

#### ***B. Conflicts of Interest. “Know thyself – and Have a Thick Skin!”***

##### ***The Basic Rule:***

##### **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.

II. When uncertainty arises as to the application of paragraph I to a board member in particular circumstances, the board shall, upon the request of that member or another member of the board, vote on the question of whether that member should be disqualified. Any such request and vote shall be made prior to or at the commencement of any required public hearing. Such a vote shall be advisory and non-binding, and may not be requested by persons other than board members, except as provided by local ordinance or by a procedural rule adopted under RSA 676:1.

III. If a member is disqualified or unable to act in any particular case pending before the board, the chairperson shall designate an alternate to act in the member's place, as provided in RSA 673:11.

### ***Local Requirements also May Apply***

**RSA 31:39-a Conflict of Interest Ordinances.** The legislative body of a town or city may adopt an ordinance defining and regulating conflicts of interest for local officers and employees, whether elected or appointed. Any such ordinance may include provisions requiring disclosure of financial interests for specified officers and employees, establishing incompatibility of office requirements stricter than those specified by state law or establishing conditions under which prohibited conflicts of interest shall require removal from office. Any such ordinance shall include provisions to exempt affected officers and employees who are in office or employed at the time the ordinance is adopted for a period not to exceed one year from the date of adoption. The superior court shall have jurisdiction over any removal proceedings instituted under an ordinance adopted under this section.

### **C. Planning Board Organization.**

#### ***Basics.***

- PB is created by legislative body (i.e. vote of town meeting or city council).
- ZBA must exist if municipality has zoning.
- Both are local options as having planning and zoning is not mandated by statute but to use planning, zoning, and most land use powers, municipality must have planning board and ZBA (at least for zoning).

#### ***Some Other Statutes***

- **RSA 673:2            Membership, Appointment or Election**
- **RSA 673:5, :6, :7   Terms, Alternates, Serving on Other Boards**
- **RSA 673:8            Organization, Terms of Chair and Officers**
- **RSA 673:13          Removal of Members**
- **RSA 673:16          Staff and Finances**
- **RSA 673:17          Open Meetings and Records – And Don't Forget RSA 91-A**

#### ***In a nutshell:***

##### ***Membership***

- Cities. 9 members (2/3 ex-officio, 6/7 appointed).
- Town council Towns (7 or 9). See specific charter.
- Other towns (5 or 7).
- In towns, one is ex-officio (meaning "by virtue of the office") - a selectman or administrative official appointed by the board of selectmen.

##### ***Election v. Appointment***

- In towns a PB may be elected or appointed (appointing authority in towns is generally either the town council or board of selectmen depending upon the form of government).
- This option may switch from one to another and back again (by official ballot).

##### ***Terms (RSA 673:5)***

- 3 years, staggered for regular members.
- Varies for ex-officio: 1 year to 4 months or full term.

##### ***Alternates***

- As many as five are allowed for ZBAs and PBs.

- If Land Use Board is appointed, alternates are appointed by appointing authority (town council or board of selectmen). Otherwise, the PB itself chooses them.
- Terms are staggered.
- When do alternates sit? (RSA 673:11)  
Alternates replace absent members. Chair designates. They may now fill temporarily vacant positions. Designation is mandatory. Rules of Procedure may (should) address method of designating alternates to fill absences. Only the ex-officio alternate may sit for absent ex-officio member.

*Officers*

- Must have a chairperson.
- Other officers are optional (secretary, treasurer, etc.); Vice-Chair and Clerk are typical.
- Terms of office are for one year. No term limits. Ex-officio member cannot be chairperson. Usually set out in the Board's Rules of Procedure.

*Removal*

**RSA 673:13 Removal of Members.**

I. After public hearing, appointed members and alternate members of an appointed local land use board may be removed by the appointing authority upon written findings of inefficiency, neglect of duty, or malfeasance in office.

II. The board of selectmen may, for any cause enumerated in paragraph I, remove an elected member or alternate member after a public hearing.

III. The appointing authority or the planning board shall file with the city or town clerk, the village district clerk, or the clerk for the county commissioners, whichever is appropriate, a written statement of reasons for removal under this section.

IV. The council, selectmen, county commissioners with the approval of the county delegation, or district commissioners may for any cause enumerated in this section remove the members selected by them.

*Staff/Finances (RSA 673:16)*

- PB may hire its own consultants and employees (independent of Selectmen), but only within appropriated funds, and employees are subject to rules for municipal employees.
- PB may accept gifts, grants, contributions in accordance with municipal policies.
- PB may use application fees and other fees for the payment of expenses for which the fee was collected without legislative body approval.
- May contract with planners, engineers and other professionals to provide consulting services.
- May require applicants to pay for special investigative studies, but see RSA 674:36, 674:44, and 676:4, I, (g).

***V. Becoming and Being a Planning Board Member.***

*(A) First Things First.* As a governmental official, a PB member takes the Constitutional Oath of Office which reads (NH Constitution, Part II, Art. 84):

*“I, A.B. do solemnly and sincerely swear and affirm that I will faithfully and impartially discharge and perform all duties incumbent on me as ..... according to the best of my abilities, agreeably to the rules and regulations of this constitution and laws of the state of New Hampshire.”*

Briefly noted, this oath requires a planning board member to know the laws in order to discharge and perform the duties of office as the law requires. Stated a little differently:

*You don't need a law degree, but "if a policeman must know the Constitution, why should not a planner?"*

*(B) PB Member "Tool Kit."* The statutes mentioned in this paper and the basics of planning mentioned in Section IV should constitute the elementary "tool kit" by which planning board members may become aware of the laws regulating their office. Among the tools and resources that should be available to all board members and present at all board meetings is the Land Use Bible – a CURRENT copy of the Land Use Statutes of New Hampshire.

Some useful "Nice-to-Haves" include:

- Handy-Dandy guides or checklists of procedures and
- A tickler (reminder) system, so deadlines are not missed.

**VI. Planning Board By-Laws or Rules of Procedure.** "What a lot of rot!" Well, yeah, but the law says . . . ."

*(A) The Procedural Bible, ch. 1, v. 1.*

**RSA 676:1 Method of Adopting Rules of Procedure.** Every local land use board shall adopt rules of procedure concerning the method of conducting its business. Rules of procedure shall be adopted at a regular meeting of the board and shall be placed on file with city, town, village district clerk, or clerk for the county commissioners for public inspection. The rules of procedure shall include when and how an alternate may participate in meetings of the land use board.

Most land use boards will not want to try to follow Robert's Rules of Order or Mason's Parliamentary Procedure. Those are not meant for small local boards like a planning board. But boards need to have procedural rules: 1) because the Legislature says so and 2) any board or body consisting of more than one person really does need to have operational rules.

*(B) Procedures and Rules in a Nutshell.*

- Adoption of rules is required by statute.
- Must be filed with city, town, or village district clerk.
- Rules of Procedure shall also include when and how an alternate may participate in meetings of a local land use board (non-voting alternates participating in deliberations).

*Sample of Selected Matters to Cover in Rules*

Order of Business at meetings/hearings (they may be different)

Election of officers

Hearing procedures

Conflict of interest procedures

Designation and participation of alternates

Record keeping responsibilities

Confidentiality

## ***VII. Meetings and Procedures***

***(A) Meeting v. Hearing.*** Meetings generally may be less formal, unless decisions are made. Meetings may involve some consultation with PB staff and consultants, but most meetings at which evidence, testimony or public participation is allowed should be conducted as a hearing, not just as a meeting. All meetings must be conducted in accordance with RSA 91-A, including notice, access, minutes, non-public sessions. In addition, RSA 673:10 says:

- Planning Board must have at least one regular meeting per month;
  - Compare with Board of Adjustment and other bodies who meet at call of chair or otherwise as board may determine;
- Joint meetings are allowed (RSA 676:2) An applicant seeking a local permit may petition 2 or more land use boards to hold a joint meeting or hearing when the subject matter of the requested permit is within the responsibilities of those land use boards. PB (and other boards) should adopt procedural rules to address joint meetings.

***(B) Notice.*** For “meetings,” notice requirements depend on the nature of the meeting. Minimum is the requirement set forth in RSA 91-A, see part XII. Statutes (particularly in RSA chapter 676) specify hearing notice dates, deadlines, and content.

***(C) Due Process v. Process that is Due.*** Due process refers to procedures that are required to insure that certain rights are protected. In PB context, they usually will arise when a protected property interest is involved, but also when a statute specifies a particular process. The municipal lawyer should be consulted for establishing procedures that meet the basic requirements of “affording due process.” In other cases, a PB may not be required to provide the “full panoply” of due process rights. In these matters (e.g., zoning amendment hearings), PB should seek to provide basic elements of fairness such as: reasonable notice and meaningful opportunity to be heard.

***(D) Dealing with Consultants, Lawyers, and Other Undesirables.*** Throughout a PB member’s “career” there will be instances when some individuals are viewed as problems. These individuals can assume the guise of applicants, gadflies, “concerned citizens,” consultants, and, often, lawyers. One of the more troublesome issues presented by lawyers is a “request for findings and rulings.” Time does not permit full review of the legal requirements – but PBs should not ignore these nor consign to the round file. These are some thoughts to consider in handing these documents:

- Address them in rules of procedure (maximum number, time of submission, opportunity for other parties to respond).
- Consider that they may actually assist the PB in reaching a decision and in creating a notice of decision (required when application is denied, and a good practice particularly when conditions are imposed).
- PB may address them by noting that the notice of decision adequately responds to the requests – just make sure the notice does respond.



### ***VIII. Planning, Zoning, Subdivision Regulation & Site Plan Review***

Zoning Ordinance Amendment Procedure (RSA Ch. 675) (A principal, but not sole, PB function)

#### (1) How?

- In Towns there are three ways zoning amendments may evolve:
- From the PB, by citizen petition of 25 or more registered voters (actual number may vary based on size of municipality); or by request from the selectmen
- These are ballot questions. Deliberative session does not discuss them. In cities, charter or an ordinance will determine the method

#### (2) When?

- Usually at the annual Town Meeting in March (or May).
- However, selectmen may call Special Town Meeting to vote on zoning issue.

#### (3) Citizen Petitions.

- Window of Opportunity 120-90 days before Town Meeting.
- PB must hold a hearing and decide whether it recommends passage of the amendment. PB recommendation is printed on the ballot.
- Can a petition be amended? Withdrawn?

#### (4) Planning Board Must Hold a Public Hearing.

- 10 days posted/published notice.
- Second public hearing required if amendment is substantially altered; must be at least 14 days after first hearing.
- Zoning amendment petitions and selectmen's petitions also must have hearing.
- In SB 2 towns, last day for hearings is third Tuesday of January.
- Posting the notice of a hearing puts amendment "in effect," pending Town vote.

#### (5) Final Amendment Filed with Town Clerk.

- By 5<sup>th</sup> Tuesday before Town Meeting in most towns, but by last Monday of January in SB 2 town.
- Voting by official ballot? Who drafts the wording of question?

#### (6) Protest Petition.

- If valid, requires a 2/3 majority vote to pass a zoning amendment.
- Applies only to zoning map changes, or where a text amendment affects not more than 1/3 of land area of town.
- Submitted by owners of 20% of area of lots included in change, or owners of 20% of area within 100 feet adjacent to area included in change. Streets, government land not included in calculation.
- Must be submitted not later than 7 days before the Town Meeting.

***XI. Decisions and Decision-Making and Notice of Decision.*** A full description of the process of making a decision and recording (i.e., creating notice of a) decision requires much

more detail and time than is available here. The basics of the process, though, can be summarized briefly.

(A) The Decision. Ultimately, the decision will act, in some manner, on an application. The decision is effected by a motion made at a meeting (usually after a second) and follows discussion, including review of reasons for proposed action. This discussion should serve as the basis for the notice of decision, if one is required, and the discussion should be summarized for inclusion in the minutes and notice of decision, again if required. The decision (and reasons, if required) should be part of the decision-making process, not created after the fact.

Whatever decision is made on an application, there must be a decision, of some kind – See RSA 676:4. The decision may be to:

- Reject or accept application;
- Act on waivers if requested;
- Approve or deny approval of the application;
- Defer consideration on an application, being mindful of deadlines to action;
- Impose conditions on approval.

(B) Know when “reasons” for a decision must be stated (not required in all cases).

(C) When conditional approvals are used:

1. Determine if conditions are precedent or subsequent.
2. Determine when and how to decide if conditions satisfied.

(D) Have rules or regulations governing action on any requested amendment.

(E) Have rules or regulations addressing repealing or revoking approval that comply with RSA 676:4-a.

(F) The notice of decision can be vital.

1. It tells the world what the PB did – and maybe why!
2. Purpose of notice of decision is to let all participants know basis of PB action.
3. It may prevent an appeal.
4. It may limit grounds for an appeal.
5. May be key to defending appeal.

## ***XII. Understanding Appeals: Don't Take it Personally!***

A court appeal (or an appeal of a PB administrative decision to the ZBA) most certainly alleges that the PB did something wrong somewhere along the line. In the vast majority of cases, appellant asserts that there is something legally amiss and not that the PB made some egregious error. Complaints must be written in a certain way to gain legal standing and they must state that the PB made some error of law or acted unreasonably. Unless the PB truly did act improperly, lawyers generally will not try to assert allegations of nasty wrongdoing (though some may do so).

The municipality's lawyer certainly will address any improper allegations, a task that should be left to be handled – lawyer to lawyer or perhaps lawyer to court. The complainant and

the PB may have to communicate in the future – perhaps on the same case – perhaps in others. Good advice in these situations may be to disagree agreeably.

**XIII. Access to Proceedings & Record: You Mean They Get to Know How We Think?**

**RIGHT-TO-KNOW LAW - Access to Public Records and Meetings**

(RSA Chapter 91-A)

Main purpose of this chapter is based upon theory that public knowledge of the consideration upon which government action is based and of the decisions taken is essential to the democratic process. *Carter v. City of Nashua*, 113 N.H. 407 (1973).

Remember the NH Constitution.:

All power residing originally in, and being derived from the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted. *New Hampshire Constitution*, Part 1, Article 8.

**ACCESS TO PROCEEDINGS.** Public Proceedings mean transaction of any functions affecting any and all citizens by . . . [municipal] boards, agencies, committees, subordinate bodies, commissions authorities, subcommittees, . . . , etc. Applies to citizen advisory groups of local government and subcommittees of land use boards.

OPEN MEETINGS. “Meetings” must be open to public unless a statutory exemption applies.

- A meeting is the convening of a quorum of a public body whether in person, by means of telephone or electronic communication, or in any other manner such that all participating members are able to communicate with each other contemporaneously . . . for the purpose of discussing or acting upon a matter or matters over which the public body has supervision, control, jurisdiction or advisory power.
- What's not a meeting?
  - Chance, social or other encounters (if no decisions made).
  - Collective bargaining.
  - Consultation with legal counsel (no notice made and no minutes taken) (attorney must be present either physically or on the telephone with the Board in order for the gathering to be considered a consultation with counsel). See *Ettinger v. Town of Madison Planning Board*, 162 N.H. 785 (2011).
  - Circulation to finalize decisions.

NOTE: A site walk is a meeting.

**BASIC RULES FOR MEETINGS - GENERAL**

- Open to public.
- Public may record the proceedings in any manner (but cannot be disruptive to the meeting).
- Minutes must be kept and made available within 5 business days (note special requirements for non-public minutes and PB notices of decision). See RSA 91-A:2, II, re content of minutes.

- Must post meeting notice 24 hours in advance in 2 public places (which may include town's website) or publish in a newspaper of general circulation. Do not count Sundays or holidays.
- Exceptions may apply for emergency sessions.

#### ELECTRONIC PARTICIPATION (RSA 91-A:2, III)

- Optional (apparently on a per-meeting basis).
- Attendance “not reasonably practical.”
- Quorum must be physically present, except in emergency .
- Audible or discernible to public (and to each participant).
- Roll call vote on everything.

#### SEQUENTIAL COMMUNICATIONS (RSA 91-A:2-a)

- Unless exempt, public bodies shall deliberate on matters over which they have supervision, control, jurisdiction, or advisory power only in meetings.
- Chain e-mails & other sequential communications? (telephone calls, face-to-face exchanges between less than a quorum). Cannot be used as a means to avoid the requirements of RSA 91-A.

NON-PUBLIC SESSIONS (RSA 91-A:3) In the municipal government context, nonpublic sessions are allowed only for specific reasons. (Consult statute for the precise language). Presumption is against holding nonpublic sessions. Except for litigation, these rarely arise with a local land use board.

- Hiring public employees.
- So-called “personnel matters.”
- Matters which, if discussed in public, would likely adversely affect reputation of someone, other than a member of the board.
- Acquisition of property.
- Pending claims or litigation filed or threatened in writing (but not property tax exemption applications).
- Preparation for and carrying out emergency functions.

#### RULES FOR NONPUBLIC SESSIONS

Motion must be made and properly seconded to go into nonpublic session. Motion must state which of the exemptions applies (question of whether just citing statutory provision is sufficient). Vote must be a roll call vote. Discussions and decisions made in nonpublic session must be confined to matters stated in motion. Minutes and record of all actions taken must be kept and available to public within 72 hours. However, by 2/3 vote, minutes can be sealed. If minutes so sealed, information may be withheld until, in the opinion of a majority of members, the aforesaid circumstances no longer apply. Board would meet to decide whether to unseal particular minutes.

There is no express statutory guidance on who may be present – but the bigger the crowd, the more difficult it will be to defend the session as properly being non-public.

## **ACCESS TO GOVERNMENTAL (PUBLIC) RECORDS.**

**GOVERNMENTAL RECORD.** What is a “governmental record”? 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. Without limiting the foregoing, the term “governmental records” includes any written communication or other information, whether in paper, electronic, or other physical form, received by a quorum or majority of a public body in furtherance of its official function, whether at a meeting or outside a meeting of the body. The term “governmental records” shall also include the term “public records.” [e.g., Board secretary receiving a site plan application for the PB.] Citizens have a right to inspect governmental records and copy them so long as such records are within the custody, possession or control of the Board. Boards must maintain governmental records at town offices, and must retain them in compliance with RSA 33-A.

**REQUESTING COPIES.** A right-to-know law request for records must reasonably describe the governmental record(s) sought. Keep in mind, though, that litigation discovery rules may impose more stringent requirements for governments to retain and produce records, such as “electronically stored information” (e.g., emails among board members). PB should consult with the municipal attorney about ESI (electronically stored information), use of email, and other practices.

**RESPONDING TO REQUESTS.** A municipality must respond immediately if record is immediately available, or within 5 business days it must

- Make the record available, or
- Deny the request in writing with a reason, or
- Acknowledge request in writing and state amount of time necessary to grant the request or deny it.

Municipality is not required to mail requested records. If volume of records is large, or there is a question concerning whether the response fully addresses the request, the PB might invite the person requesting the documents to visit the municipal offices to inspect the records. A key component in complying and avoiding disputes is to communicate positively with the requestor. Problems arise when lack of responses or partial responses are viewed as delaying tactics.

Public records requirements include electronic records. Downloading files to flash drives is a typical practice to provide copies of records. While the right-to-know law does not require creation of records that do not exist or compiling, assembling or cross-referencing information into a form in which it is not already kept, it does expect that records stored electronically can be produced in a format that is usable to the public. Difficulties in complying with records requests might be reduced by considering how to produce information when the record is being created and stored in the first place.

**EXCEPTIONS.** The law provides some exceptions to requirements to produce public records. The exceptions are interpreted narrowly, and many of them seemingly would not apply

to PB records. The following is a brief description of exemptions, but caution should be exercised as this is not a definitive listing.

- Personnel records (but not retirement/severance payments) and most attorneys agree this exception applies only to personnel records whose disclosure would constitute an invasion of privacy.
- Confidential records, for local land use boards this is generally limited to attorney-client privilege and certain litigation-related material, though there may be some chance that an applicant may have some protection from disclosure of some information. The test for determining if a record of this type must be disclosed involves a balancing of benefits to public of disclosure versus benefit to government of nondisclosure.
- Preliminary drafts, notes, and memoranda and other documents not in their final form and not disclosed, circulated, or available to a quorum or a majority of the members of a public body.

RELIEF FOR VIOLATIONS (RSA 91-A:8). Remedies are set out in the statute, though judges may fashion additional forms of relief. The following generally describes some available relief:

- Court order to produce documents and to comply with law in future.
- Attorneys' fees (if lawsuit necessary and official should have known there was a violation) but a reciprocal provision allows municipality to recover attorneys' fees if lawsuit was brought in bad faith or frivolously. Bad faith on the part of an official may result in award against individuals personally.
- Invalidation of action, if circumstances apply.

The right-to-know law has been amended many times and the Legislature is considering several amendments this session. PB and their members and administrators must be aware of changes as they become effective – just as they are required to do with the law governing their regulatory and procedural powers and duties.