

LEGISLATIVE BULLETIN

Bill Would Subject Officials, Municipalities to More Lawsuits

NHMA Legislative Bulletin 09
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The House on Monday heard [HB 111](#), an alarming bill that would subject municipal officials and employees—and, by extension, municipalities themselves (and taxpayers)—to greatly increased risk of liability for alleged violations of individuals’ constitutional or other legal rights. The committee is scheduled to act on the bill this coming Monday, March 1.

The bill’s primary purpose, as stated by its supporters, is to eliminate “qualified immunity,” a federal doctrine that provides limited immunity to government employees and officials when they are sued under federal law for violations of individuals’ federal constitutional rights. Qualified immunity states that an employee or official is protected from liability unless the constitutional right in question was “clearly established” at the time of the conduct in question, such that a reasonable person would have known the conduct was unlawful. The “clearly established” requirement has been criticized as too strict, allowing police officers (usually) to avoid liability for conduct they should have known was unlawful.

While that is debatable, the bill goes far beyond eliminating qualified immunity. It also eliminates any defense, in any case under either state or federal law, that the employee acted in good faith or reasonably believed that his or her conduct was lawful. It expressly preempts RSA 507-B, the statute governing municipal liability for torts, apparently including the damage caps contained in that statute.

This would be a dramatic change in the law and would result in greatly expanded municipal liability. If a police officer takes every reasonable precaution but still arrests the wrong person, or if an officer arrests someone for violating a statute that turns out to be unconstitutional, or if a town manager takes an employment action that is later found to violate some kind of previously unarticulated right, the good faith or reasonableness of the conduct will be no defense, and the municipality will be liable for damages, apparently with no cap. Under the bill, the municipality would also be automatically liable for all of the plaintiff’s

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attorney fees and litigation costs. Finally, the bill allows the municipality to terminate the employee—no matter how reasonable his or her conduct was. This is almost certainly an unconstitutional impairment of the employee’s constitutional rights. Six years ago, the legislature established a committee to study state and municipal liability and immunity. After six meetings where many interested parties provided information and comments, the committee issued a [report](#) that did not recommend any significant changes to the law, but which did eventually lead, in 2018, to [legislation](#) that made minor changes to RSA 507-B. In light of that effort, a bill that would jettison the entire body of law on municipal immunity seems rash.

Please contact members of the [Judiciary Committee](#) and your own representatives and ask them to [kill HB 111](#).

Non-Disparagement Clauses

Another bad bill before the House Judiciary Committee is [HB 83](#), which would prohibit the inclusion of “a non-disparagement clause or other language which either prevents the parties from discussing the facts of the underlying claim or speaking negatively about each other” in any settlement agreement involving a governmental entity.

In a hearing on the bill this week, supporters referred to non-disparagement clauses as “gag orders,” which they are not. They are contractual terms negotiated freely between two parties to a lawsuit. They can operate for the benefit of both the government entity and the other party to the litigation, and they serve the purpose of ending the dispute once the agreement is signed, rather than allowing the parties to continue to trade false or questionable claims (or true but damaging claims) about each other.

As we pointed out, litigation settlements are often discussed and resolved in nonpublic sessions of a board of selectmen, city council, or school board; the minutes are inevitably (and appropriately) sealed, and the members of that body are prohibited by law (RSA 42:1-a) from making any of those discussions public. The other party to the litigation, however, is not subject to any such prohibition, so that party is free to make public statements about the dispute, which the public entity has no ability to counter. That is why a non-disparagement clause may be necessary. These clauses also protect not only the litigants, but others who have a legitimate privacy interest, such as fellow employees.

Non-disparagement clauses are frequently an essential term in settlement agreements, and prohibiting them would take away an important incentive to settle. Removing this long-standing settlement tool will likely lead to protracted litigation, additional attorney fees, and ultimately more taxpayer expense.

The committee is scheduled to take action on [HB 83](#) on **Monday, March 1**. ***Please contact members of the [Judiciary Committee](#) and your own representatives and ask them to [kill HB 83](#).***

NHMA Policy Bill on Electronic Notice

Next Friday, the House Judiciary Committee will hold a hearing on [HB 379](#), an **NHMA policy bill** that would allow municipalities to substitute electronic notice for hearings or meetings in many situations in which publication of notice in a newspaper would otherwise be required.

There are many different public notice requirements for governmental actions scattered throughout the statutes. Some require posting notice “in a public place”; others do not indicate how notice is to be provided; and some require notice by newspaper publication. Newspaper publication is expensive and often inefficient,

because it is not always possible to meet the paper's submission deadline, especially with weekly papers. Further, reality in the 21st century is that far more people look for information on websites than in newspapers.

HB 379 provides a general definition of "electronic notice" and states that electronic notice is authorized in lieu of newspaper publication whenever a statute specifically authorizes it. It then amends several statutes to provide that authorization. Among other things, electronic notice would be allowed for hearings to accept unanticipated funds under RSA 31:95-b; hearings on the establishment of special revenue funds under RSA 31:95-d or 47:1-c; bond hearings under RSA 33:8-a or 33:8-d; hearings on adoption of the official ballot referendum (SB 2) form of town meeting under RSA 40:14; and hearings on the adoption of fees under RSA 41:9-a. The electronic notice, or a link to the notice, would be published prominently on the home page of the municipality's website, and would remain there until the conclusion of the meeting, hearing, or other event or occurrence.

Of course, this would be optional. No municipality would be required to switch from newspaper publication to electronic notice. (We are aware that a few towns do not have websites.)

HB 379 will foster efficiency, save money, and provide better notice to citizens. The hearing is scheduled for **Friday, March 5, at 10:30 a.m.** Please consider signing up to speak in support, or contact members of the [Judiciary Committee](#) and ask them to **support HB 379**.

Municipal Mandates, Restrictions, and Micromanagement

Several bills that would make things more difficult for local government have hearings next week in the House [Municipal and County Government Committee](#). We **oppose** (almost) all of them:

Restricting city council powers. **HB 439** would repeal the authority of city councils (and, by extension, town councils) to adopt "bylaws and regulations which may seem for the well-being of the city." We cannot imagine any good reason to repeal this provision, which has been in RSA 47:17 since time immemorial. The hearing is scheduled for **Monday, March 1, at 9:30 a.m.** City and charter town officials, take note!

Micromanaging the budget process. The committee will hear three bills on Wednesday dealing with town budgets:

- **HB 243** would require all town budgets to use (1) a "full line item detail" in (2) "industry-standard electronic spreadsheet format." The bill does not define either of those terms. Most if not all municipal budgets do use what most people would consider "full line item detail," but why should the state mandate this? And especially why should the state mandate a specific electronic format? Budgets are, and should be, prepared in a manner that works best for the budget writers. We suspect the real concern here is that some citizens want access to the budget in the same format that is presented to the selectmen or budget committee; but they already have that right under RSA 91-A. This bill is an unnecessary intrusion into the local budgeting process.
- **HB 415** requires that after a municipal governing body receives estimated expenditures and revenues from department heads, it must "publish the draft budget and revised versions, after making any updates to the budget, within 5 days." It also requires that the budget be published in "full line item detail" and "made available in CSV and PDF formats for easy viewing and use by common spreadsheet programs."

Upon first reading, this seems to suggest that the governing body must publish the budget within five days after receiving estimates from department heads. That would be impossible. Alternatively, it may be read to mean that the draft budget and each revised version must be published within five days after they are prepared. This is plausible, but the governing body is not required, and should not be, to “publish” its budget on any schedule. Drafts of the budget that have been reviewed by any public body are public records and must be made available upon request. Many municipalities do put drafts of the budget on their websites, but this should not be required.

And again, the state should not be dictating what format must be used. The governing body should use whatever format works best, and make that available to anyone who wants to see it.

- **HB 454** requires that in a town with a budget committee, the governing body shall submit its budget recommendations to the budget committee “at such times and in such detail as the budget committee shall fix.” This is a very minor change from existing law. With the insertion of the word “reasonably” before “fix,” it does not seem inappropriate.

The hearing on **HB 243** is scheduled for **Wednesday, March 9, at 9:00 a.m.**, and the hearings on **HB 415** and **HB 454** are scheduled for **9:30 a.m.** on the same day.

Tiny houses. **HB 588** requires any municipality with a zoning ordinance to “allow tiny houses as a matter of right in all zoning districts that permit single family dwellings.” “Tiny house” is defined as “a structure intended for year-round occupancy that meets the requirements of the state building code, as defined in RSA 155-A, and is of a smaller square footage than may be normally permitted by local zoning requirements, and may include single-room structures, and which is built on either a permanent foundation or on a chassis that is suitable for registration for transport on public highways of the state.” The bill also requires every municipality to “make provisions for locating tiny homes in group park settings of at least 4 units.”

We have nothing against tiny houses, but this is a matter to be decided locally, not at the state level. If there is a popular demand for tiny houses, there is a simple way to accommodate that demand: amend the local zoning ordinance. To the extent tiny houses are seen as a solution to the shortage of affordable housing, municipalities are already required to afford “reasonable and realistic opportunities for the development of workforce housing.” That may include tiny houses, multi-family housing, affordable single-family dwellings, or anything else. Municipalities are also required to allow manufactured housing and accessory dwelling units. We seriously doubt that adding a tiny house mandate to the mix is going to solve the problem.

Subject to limitations in the state building code, municipalities are free to allow tiny houses as they choose. That is as it should be.

The hearing on **HB 588** is scheduled for **Wednesday, March 3, at 12:30 p.m.**

Please register your opinions on these bills with members of the committee and your own representatives.

And these are just a few of the many bills of interest that the committee will be hearing next week. Please check the [House calendar](#) (or our own calendar at the end of this Bulletin) for a complete list.

House Votes Down Retirement Bill in Close Vote

After lengthy argument, the House voted Inexpedient to Legislate, 189-168, on Wednesday on **HB 274**, an **NHMA policy bill** that would have reduced costs for political subdivisions by requiring the state to pay 5 percent of their employer retirement contributions for teachers, police, and firefighters. Although this amount is far less than the 35 percent contributed by the state up until 2009, the cost savings were estimated to be \$17.66 million in fiscal year 2022. A motion for reconsideration was voted down, ensuring that this bill cannot be revived in this session.

House Kills Bad Municipal Budget Bill

By a 198-153 vote, the House on Wednesday killed **HB 459**, the bill we have written about several times that would have prohibited any transfer of funds to a general ledger line item in a municipal budget that had a zero dollar amount, and would have subjected local officials to fines, attorney fees, and removal from office for violating the prohibition.

This was the first of several anti-local government bills to be voted on by the full House, and although it is unfortunate that so much work was required to defeat it, the result was encouraging. We know many local officials talked to their representatives and helped persuade them to kill it. Thank you very much for your efforts.

As the Bulletin went to press, the roll call on the vote had not yet been published. When it is, which should be very soon, you will be able to find it on [the bill's docket](#). (Click on “RC” (for “roll call”) on the bottom line.) The motion on the floor was “inexpedient to legislate,” so a “yes” vote was a vote to kill the bill. ***Please thank your representatives who voted yes!***

Housing Bill Tabled

In an unexpected development, the House yesterday tabled **HB 586**, the bill that would make numerous changes to land use laws as part of an effort to encourage development of more housing, especially affordable housing. Among other things, the bill would require the Office of Strategic Initiatives to develop training materials for land use board members; require municipalities to publish notice of the fees they charge to land use applicants; require municipalities to provide the same incentives for workforce housing that they provide for housing for older persons; expedite the process for land use board applications and appeals; allow the use of tax increment financing districts for the purpose of creating more housing; and allow greater flexibility in using RSA 79-E (community revitalization tax relief) for housing development.

The bill appeared to have broad bipartisan support, including from the governor, and the Municipal and County Government Committee had recommended passage by a 15-3 margin. However, even though NHMA did not oppose the bill, some legislators expressed concerns that it imposes too strict requirements on local land use boards. The motion to table passed by just three votes, 175-172. A subsequent motion to remove it from the table failed, so it remains there for now. Yesterday was the last day for the House to act on bills that are slated to go to a second committee, and we believe **HB 586** was to go to the House Finance Committee if it had passed. Therefore, it appears the bill is likely to die on the table unless something unusual happens.

HOUSE CALENDAR

All hearings will be held remotely. See the [House calendar](#) for links to join each hearing.

MONDAY, MARCH 1, 2021

CRIMINAL JUSTICE AND PUBLIC SAFETY

10:45 a.m.. **HB 419-FN**, relative to assault of a campaign worker at the polling place.

MUNICIPAL AND COUNTY GOVERNMENT

9:00 a.m. **HB 431**, relative to the responsibilities of an elected animal control officer.

9:30 a.m. **HB 439**, relative to the powers of city councils.

10:00 a.m. **HB 463**, requiring the Gorham town clerk to be appointed by the board of selectmen.

10:30 a.m. **HB 467**, relative to current use tax rate eligibility.

11:00 a.m. **HB 486-FN**, relative to eligibility for the low and moderate income homeowners property tax relief.

11:30 a.m. **HB 512**, relative to emergency housing assistance.

12:00 p.m. **HB 545**, relative to the use of certain out-of-state banks by the state treasurer and municipal and county treasurers or trustees.

TUESDAY, MARCH 2

HEALTH, HUMAN SERVICES AND ELDERLY AFFAIRS

9:00 a.m. **HB 295**, relative to initiating amendments and corrections to birth records.

WEDNESDAY, MARCH 3, 2021

MUNICIPAL AND COUNTY GOVERNMENT

9:00 a.m. Continued Public Hearing on **HB 243**, relative to the form of municipal budgets.

9:30 a.m. **HB 415**, relative to municipal estimates of expenditures and revenues; **HB 454**, relative to the requirement that certain governing bodies submit recommendations to the budget committee.

10:30 a.m. **HB 552**, relative to property tax valuations.

11:00 a.m. **HB 573**, relative to the uses of certain large retail properties.

11:30 a.m. **HB 574**, relative to change of use of certain retail properties.

12:00 p.m. **HB 616-FN**, relative to review of planning board decisions.

12:30 p.m. **HB 588**, relative to building codes for tiny houses.

RESOURCES, RECREATION AND DEVELOPMENT

11:00 a.m. **HB 397**, relative to permitting fees under the shoreland protection act.

1:00 p.m. **HB 446**, establishing a committee to study the effects of recreational vehicles and other vehicles used in recreational activities on class 5 and 6 roads.

THURSDAY, MARCH 4, 2021

ELECTION LAW

9:00 a.m. **HB 61**, relative to absentee voting and allowing for partial processing of absentee ballots prior to election day.

10:15 a.m. **HB 516-FN**, allowing voters to vote by absentee ballot.

11:15 a.m. **HB 144**, relative to absentee ballot request forms

1:00 p.m. **HB 292**, relative to the absentee ballot application process.

- 1:30 p.m. **HB 327**, requiring that voters show identification when personally delivering absentee ballots to town and city clerks.
- 2:00 p.m. **HB 291**, relative to public inspection of absentee ballot lists.
- 2:15 p.m. **HB 406**, relative to the ability of the public to observe the processing and counting of absentee ballots
- 2:30 p.m. **HB 372-FN**, relative to enforcement of the election laws.

FRIDAY, MARCH 5, 2021

ELECTION LAW

- 9:30 a.m. **HB 480**, relative to verification of ballots cast in an election.
- 10:00 a.m. **HB 491**, relative to over voted ballots.
- 10:15 a.m. **HB 524-FN**, requiring the secretary of state to conduct random verification counts of polling place results.

JUDICIARY

- 9:00 a.m. **HB 149-FN**, extending certain civil immunity to public and private entities during major public health emergencies.
- 10:30 a.m. **HB 379**, relative to electronic notice. **NHMA Policy.**
- 11:00 a.m. **HB 597-FN**, relative to the expectation of privacy.

- 11:30 a.m. **HB 288-FN**, eliminating the housing appeals board.
- 1:00 p.m. **HB 478**, relative to treatment of PFAS contaminants in the drinking water of the Merrimack Village Water District.

SCIENCE, TECHNOLOGY AND ENERGY

- 10:00 a.m. Full committee work session on **HB 106**, establishing procedures for municipal host customer-generators of electrical energy; **HB 148**, allowing increased net energy metering limits for municipal hydroelectric facilities; **HB 167-FN**, relative to net energy metering limits for customer generators and the purchase of output of limited electrical energy producers; **HB 315**, relative to the aggregation of electric customers.

MONDAY, MARCH 8, 2021

ELECTION LAW

- 9:30 a.m. **HB 429**, relative to college or university student voting.
- 9:45 a.m. **HB 362**, relative to domicile of students for voting purposes.
- 10:15 a.m. **HB 554**, relative to temporary absence from domicile for voting purposes.
- 10:30 a.m. **HB 531-FN-L**, relative to determining the qualifications of voters and establishing provisional voter registration and provisional ballots.
- 11:30 a.m. **HB 538**, relative to domicile residency, voter registration, and investigation of voter verification letters, and relative to the terms “resident,” “inhabitant,” “residence,” and “residency.”

EXECUTIVE DEPARTMENTS AND ADMINISTRATION

- 1:00 p.m. **HB 141-FN**, requiring the department of environmental services to maintain a public registry of where certain fire suppressants have been used.

MUNICIPAL AND COUNTY GOVERNMENT

- 8:30 a.m. **HB 484**, relative to budget committee recommendations on warrant articles.
- 9:00 a.m. **HB 411**, establishing a commission to study the equalization rate used for the calculation of a property tax abatement by the New Hampshire board of tax and land appeals, the superior court, and all cities, towns, and counties.
- 9:30 a.m. **HB 392**, relative to the membership of local land use boards.

- 10:00 a.m. **HB 374**, relative to the official ballot referendum form of town meetings.
- 10:30 a.m. **HB 341**, relative to permissible residential units in a residential zone.
- 11:00 a.m. **HB 266-FN-L**, relative to enforcement of immigration laws and the prohibition of sanctuary policies.

SENATE CALENDAR

All hearings will be held remotely. See the [Senate calendar](#) for links to join each hearing.

MONDAY, MARCH 1, 2021

ELECTION LAW AND MUNICIPAL AFFAIRS

- 9:00 a.m. **SB 87**, adopting omnibus legislation relative to municipal finance.
- 9:30 a.m. **SB 90**, adopting omnibus legislation on redistricting.

ENERGY AND NATURAL RESOURCES

- 1:00 p.m. **SB 146-FN**, adopting omnibus legislation relative to the environment.

TUESDAY, MARCH 2, 2021

COMMERCE

- 9:15 a.m. **SB 126-FN**, adopting omnibus legislation on landlord tenant proceedings.

TRANSPORTATION

- 1:15 p.m. **SB 131-FN**, adopting omnibus legislation relative to vehicles, municipal winter maintenance certificates, safety certificates, nondrivers’s picture I.D.s, decals, and private roads.

WEDNESDAY, MARCH 3, 2021

EXECUTIVE DEPARTMENTS AND ADMINISTRATION

- 9:00 a.m. **SB 153-FN**, relative to retirement benefits for a police officer or firefighter disabled as a result of a violent injury.

HOUSE FLOOR ACTION

Wednesday, February 24, 2021

Thursday, February 25, 2021

HB 73, relative to public notice requirements for certain permits issued by the department of environmental services. **Passed.**

HB 110, relative to the distribution of adequate education grants. **Passed.**

HB 121-FN-A, establishing an independent redistricting commission. **Inexpedient to Legislate.**

HB 127, relative to placement and removal of political advertising. **Inexpedient to Legislate.**

HB 173-FN, requiring the independent investment committee of the New Hampshire retirement system to report investment fees. **Passed.**

HB 181, relative to the local option for operation of sports book retail locations. **Inexpedient to Legislate.**

HB 189, relative to accessory dwelling units. **Inexpedient to Legislate.**

HB 222-FN, authorizing New Hampshire municipalities to issue decals for motor vehicle plates to municipal officers. **Passed with amendment.**

HB 231, relative to workplace lactation rights. **Inexpedient to Legislate.**

HB 256, adding members from Londonderry to the commission to investigate and analyze the environmental and public health impacts relating to releases of perfluorinated chemicals into the air, soil, and groundwater in Merrimack, Bedford, and Litchfield. **Passed.**

HB 258, relative to employee time records. **Passed with amendment.**

HB 274-FN-LOCAL, relative to payment by the state of a portion of retirement system contributions of political subdivision employers. **Inexpedient to Legislate.**

HB 302, relative to the creation and use of electronic records by government agencies. **Passed.**

HB 331-FN, relative to a forfeiture of personal property. **Passed with amendment.**

HB 340, permitting the designation of an open container area for the consumption of alcoholic beverages. **Inexpedient to Legislate.**

HB 354, relative to the local option for sports betting. **Passed.**

HB 356, relative to the city of Manchester employees' contributory retirement system. **Passed.**

HB 375, allowing the destruction of valueless contraband by the chief of police. **Passed.**

HB 377, relative to the authority of the state fire marshal to grant an exemption from fire code requirements to recovery houses. **Passed.**

HB 383, relative to the quarterly or semi-annual collection of taxes in certain municipalities. **Passed.**

HB 390-FN-LOCAL, relative to the amortization of retirement system unfunded accrued liability. **Inexpedient to Legislate.**

HB 404, relative to the perambulation of town lines. **Inexpedient to Legislate.**

HB 459, prohibiting a transfer of funds within an adopted budget to a general ledger line item in such budget that contains an entry of zero dollars. **Inexpedient to Legislate.**

HB 481-FN-A, establishing the office of the right-to-know ombudsman and making an appropriation therefor. **Passed; referred to Finance.**

HB 505, allowing voters to vote for multiple candidates for an office. **Inexpedient to Legislate.**

HB 530, relative to candidate background checks for law enforcement officers. **Passed.**

HB 536-FN, relative to death benefits for public works employees killed in the line of duty, and relative to workers' compensation offsets for certain retirement system benefits. **Passed; referred to Finance.**

HB 586-FN-A-LOCAL, relative to training and procedures for zoning and planning boards and relative to financial investments and incentives for affordable housing development. **Laid on the Table.**

HB 590-FN, relative to paid sick time. **Inexpedient to Legislate.**

HB 614-FN, exempting the state and political subdivisions from payment of the costs of compliance with the renewable portfolio standard. **Passed with amendment; referred to Ways and Means.**

SB 30, permitting the towns of Tilton and Northfield to redraw their boundary lines. **Passed.**

2021 NHMA UPCOMING MEMBER <u>VIRTUAL</u> EVENTS	
Weekly	Friday Membership call (1:00 – 2:00)
Mar. 2	Managing Cybersecurity Risk to Local Government (2:00 – 4:30)
Mar. 23	Webinar: The Workings of a Planning Board (12:00 – 2:00)
Mar. 24	2021 NHDOL/USDOL Labor Law (9:00 – 12:00) - <i>free to members</i>
Please visit www.nhmunicipal.org for the most up-to-date information regarding our upcoming virtual events. Click on the Events and Training tab to view the calendar. For more information, please call NHMA's Workshop registration line: (603) 230-3350.	