

LEGISLATIVE BULLETIN

Amendments Would Eliminate State Aid Grants

On Tuesday Division I of the House Finance Committee voted Ought to Pass, 7-0, on amendments to eliminate the total amount of state aid grant appropriations from the governor’s budget for the biennium ending June 30, 2023. Without any discussion, the amendments to [HB 1](#) and [HB 2](#) were presented and approved at the [budget work session](#) (@ 2:17:00 in the YouTube recording of the session). The amendments would suspend state payments that are required under RSA 486 for existing infrastructure project grants for fiscal years 2022 and 2023. However, the amendments provide that if state revenues are above the state revenue plan on December 31, 2021, the commissioner of the Department of Environmental Services (DES) may, with the approval of the legislative fiscal committee and the governor, request general funds to make grant payments for existing projects and may make additional requests every 6 months. **We are concerned that this represents a return to the “delayed and deferred” project list that was created following the 2008-09 recession; it took 10 years before all those projects were finally “almost” funded, cut short by the advent of the current pandemic.** This does not honor the state and municipal partnership put into statute by the legislature to ensure clean water and pollution control for all our residents.

These amendments would affect town, city, and village district budgeted state aid grant revenue amounts for all previously approved projects. Unfortunately, when property tax rates are set in early fall 2021, it will be unknown whether there might be any possibility for the DES commissioner to request funds to pay these promised grant payments, leaving local governments to plan for alternative revenue sources (user fees or property tax increases) to fund the 20-30 percent annual infrastructure loan amounts. Also, the U.S. Treasury guidance regarding the newly passed American Rescue Plan has not yet been issued, and it is unknown whether any of these funds can be used to pay for previously approved, non-COVID-related, wastewater infrastructure project amortization payments.

To be clear, the amendments are not related to the additional appropriations contained in [HB 398](#) and [HB 412](#), **NHMA policy bills**, which the House Finance Committee retained in February, as we reported

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in [Legislative Bulletin #8](#). These separate bills would fund the 11 projects that were held back from funding in the current fiscal year and the additional 110 projects that DES has identified as eligible for state aid grant funding required under RSA 486 in fiscal years 2022 and 2023. The full Finance Committee will be meeting soon to act on these proposed amendments, and ***we urge members to contact their members who serve on the [House Finance Committee](#) and ask them to oppose the amendments.***

House to Vote on Hundreds of Bills

The next House session will be a three-day affair on April 7, 8, and 9. By our count, the body will be dealing with about 400 bills during those three days. It will be impossible to remember all the bills that are pending, but we are going to do our best to assist, by including reminders in the next three Bulletins about the most important (*i.e.*, the most troubling) bills that are on the table. We will also send a detailed and carefully organized list, shortly before April 7, of all the municipal bills that need attention.

Please read on for information on three of these bills.

Momentum Builds to Kill Anti-Immunity Bill

We have been hearing all week from organizations and local officials who are very concerned about **HB 111**, the bill that would eliminate most if not all municipal immunity from civil lawsuits. This is one of the many bills the House will take up on April 7-9. An article about the bill has been circulating widely, and several people have sent it to us and asked whether we are familiar with the bill.

Yes! We *have* been following the bill—that is what we do, after all—and [the article being circulated](#) is from our [March 5 Legislative Bulletin](#). And we are very pleased that it is getting people’s attention. If you haven’t read it, please do, then contact your representatives and urge them to ***kill this bill*** when the House meets in early April.

As local officials and others have talked to their legislators about **HB 111**, they have heard several rebuttals from the bill’s supporters. These are addressed below.

Eliminating qualified immunity. Supporters of the bill continue to talk about the need to eliminate “qualified immunity,” a controversial doctrine that applies in a very narrow class of lawsuits—those filed under federal law for violations of a person’s rights under the United States Constitution. We’ll say this one more time: our concern is ***not about qualified immunity.***

If the legislature wanted to pass a law that simply eliminates qualified immunity, it could do that. But as we have explained before, **HB 111** goes far, far beyond eliminating qualified immunity. It states that in a lawsuit against a governmental “agent,” it will be no defense that the agent “could not reasonably or otherwise have been expected to know whether the such [sic] agent’s conduct was lawful,” or that the agent “acted in good faith, or . . . believed, reasonably or otherwise, that his or her conduct was lawful at the time it was committed.”

The bill expressly preempts RSA 507-B, which shields municipalities from tort liability in some circumstances and provides damage limitations in cases where immunity does not apply. It implicitly repeals RSA 31:104, which protects local board members and other officials from liability for damages for decisions made in good faith and within the scope of their authority. In short, it makes municipalities liable for actions

by their employees and officials that are taken in good faith and in the reasonable belief that their conduct is lawful.

Passing **HB 111** to eliminate qualified immunity is like shutting down all bars to prevent alcohol sales to minors. It may achieve the stated goal, but it does a lot more.

A misunderstanding of the law. Some supporters have claimed that our concerns are based on “a misunderstanding of New Hampshire law.” Please, show **HB 111** to your town attorney, or to the attorney who represents your liability insurer, and ask for an opinion. We know what they will say, because we have already done that.

One of the problems with **HB 111** is that it was written by an out-of-state advocacy organization as a model to be used throughout the country. Although there are minor modifications to try to adapt it to New Hampshire, it does not account for the several statutes and judicial doctrines that are specific to the state.

No personal liability. It has also been suggested that municipal employees and officials do not need to worry because the bill states that individual “agents” will not be personally liable—only the municipality will be. Yes, that is an accurate statement of what the bill says. However:

- The bill also says the individual employee/official must be named as a defendant in the lawsuit. Being sued—with all the attendant publicity and stress—is no fun, regardless of the result.
- The bill contains a strange provision that, notwithstanding any other law or any contract, ***the municipality may terminate the employee*** if the employee is found to have violated the plaintiff’s rights.

So, yes, it’s true that a municipal employee will not be personally liable—he or she will just get sued, get plenty of negative publicity, and then get fired! That seems like small comfort.

But for many employees, all of that is probably academic, because when municipalities start facing lawsuits for everything their employees do, the likely response will be to eliminate any programs that are considered expendable and that expose them to significant risk of liability. Thus, many municipal employees will not need to worry about getting sued for actions they take in their jobs, because they won’t have jobs.

Many people are working to kill **HB 111**, and we are hearing positive responses from both sides of the aisle. It is an uphill battle to defeat a 19-2 committee report, but it is not impossible. ***Please contact your representatives and ask them to oppose the bill.***

Imposing Fines on Municipalities

HB 307 would impose a fine of at least \$500, plus liquidated damages of \$10,000, plus attorney fees, on any municipality that tries to regulate firearms in any manner, including restricting the discharge of firearms *on municipal property*. Adopting a policy that, for example, prohibits target shooting on a town-owned athletic field or in a town cemetery would subject the municipality to these financial penalties. The penalties would apply even though the legislative or governing body believed in good faith that it had the authority to enact the regulation, and even if the town attorney advised that it was legal to do so.

This is unprecedented. We know of no state law that punishes municipalities for innocently enacting an ordinance or regulation that happens to be preempted by state law. This is not how the state treats its political

subdivisions, which are governed by volunteers who are rarely legal experts. Nevertheless, the Criminal Justice and Public Safety Committee reported the bill as Ought to Pass by an 11-9 vote.

State law ([RSA 159:26](#)) already completely preempts municipal regulation of firearms; punishing municipalities for failing to recognize that their authority is preempted will do nothing except damage relations between the state and local governments. ***Please ask your representatives to defeat the committee recommendation of Ought to Pass and support a subsequent motion of Inexpedient to Legislate.***

Non-Disparagement Clauses

HB 83 would prohibit the inclusion, in any settlement agreement involving a governmental entity, 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.” NHMA and others have opposed the bill, but the House Judiciary Committee recommended it as Ought to Pass.

Supporters of the bill have 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.

Non-disparagement clauses are frequently an essential term in settlement agreements, and prohibiting them would take away an important incentive to settle. Removing this common settlement tool will likely lead to protracted litigation, additional legal expense, and ultimately more costs for taxpayers.

Further, 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—true or not—about the dispute, which the public entity has no ability to counter. That is why a non-disparagement clause may be necessary.

In addition, various state and federal laws prohibit government entities from disclosing information that would violate individual privacy. A perfect example from the school context is the federal Family Educational Rights and Privacy Act (FERPA), which prohibits a school district from disclosing personally identifiable information about a student. If a parent files a lawsuit claiming that a school district or school employee mistreated a child, **HB 83** would prevent the school district and the parent from entering into a settlement agreement that contains a non-disparagement clause. Thus, while the school district would be prohibited by federal law from saying anything publicly about the situation, the parent could make any public claims he or she wants, and the school district (and its employee) would have no recourse.

Finally, these clauses also protect not only the litigants, but others who have a legitimate privacy interest, such as fellow employees.

Despite these concerns, and with no public discussion, the Judiciary Committee voted 20-1 to recommend the bill as Ought to Pass. ***Please ask your representatives to defeat the committee recommendation of Ought to Pass and support a subsequent motion of Inexpedient to Legislate.***

Look for information in next week's Bulletin about other bills that will be going to the House floor during its April 7-9 session.

Retirement Contribution Bill in Trouble

On Tuesday the Senate Finance Committee voted 5-2 to report [SB 72](#) as “inexpedient to legislate,” significantly diminishing any hope in this legislative session of the state’s reinstating its previous commitment to contribute to a percentage of employer retirement contribution costs. As we reported in [Legislative Bulletin #5](#), this bill would require the state to contribute 15 percent of political subdivision employer contributions for teachers, police, and firefighters. The vote was taken before the bill sponsor was able to put forth an amendment, although we do not know the substance of that amendment. In discussion prior to the vote, committee members said the bill did not encourage savings, but increased burdens on the state government annually. Unfortunately, these employer contributions, now borne entirely by local governments absent the state’s previously established 35% contribution, will increase 20 percent beginning July 1, leaving towns, cities, counties, and village districts to fully fund the increase created by the long-standing unfunded liability.

American Rescue Plan Act of 2021

On March 11, the President signed the American Rescue Plan Act of 2021, which is projected to allocate \$194 million to New Hampshire towns (including village districts) and cities. Treasury guidance providing the specifics about use of funds, timeframes, reporting requirements, etc., is due out 60 days from passage. In the meantime, NHMA has established an [information page](#) which includes estimated allocation amounts, provisions of the act relating to state and local governments, and additional information about other key provisions, restrictions and information. The page will be updated immediately as new information is received.

HOUSE CALENDAR

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

TUESDAY, MARCH 23, 2021

COMMERCE AND CONSUMER AFFAIRS

9:45 a.m. **SB 17**, relative to brew pubs allowing customers to bring dogs to outdoor areas and enabling nano breweries and brew pubs to enter into contracts with contract brewers.

WEDNESDAY, MARCH 24, 2021

EXECUTIVE DEPARTMENTS AND ADMINISTRATION

10:45 a.m. **SB 15**, relative to ratification of amendments to the state building code.

11:15 a.m. **SB 106**, adopting omnibus legislation relative to codes.

1:15 p.m. **SB 42**, restricting public officers from engaging in certain private dealings.

THURSDAY, MARCH 25, 2021

LABOR, INDUSTRIAL AND REHABILITATIVE SERVICES

10:00 a.m. **SB 61**, prohibiting collective bargaining agreements that require employees to join a labor union.

TUESDAY, MARCH 30, 2021

COMMERCE AND CONSUMER AFFAIRS

- 10:00 a.m. **SB 68**, requiring an employer to provide reasonable accommodations for pregnant employees.
- 10:30 a.m. **SB 69-FN**, requiring employers to provide access to a sufficient space for nursing mothers and reasonable break time.

SENATE CALENDAR

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

MONDAY, MARCH 22, 2021

WAYS AND MEANS

- 9:00 a.m. **HB 354**, relative to the local option for sports betting.

TUESDAY, MARCH 23, 2021

COMMERCE

- 9:10 a.m. **HB 258**, permitting wage and hour records to be approved and retained electronically

JUDICIARY

- 2:00 p.m. **HB 375**, allowing the destruction of valueless contraband by the chief of police.
- 2:30 p.m. **HB 530**, relative to candidate background checks for law enforcement officers.

WEDNESDAY, MARCH 24, 2021

EXECUTIVE DEPARTMENTS AND ADMINISTRATION

- 9:15 a.m. **HB 377**, relative to the authority of the state fire marshal to grant an exemption from fire code requirements to recovery houses.
- 9:30 a.m. **HB 356**, relative to the city of Manchester employees' contributory retirement system.

WEDNESDAY, MARCH 31, 2021

EXECUTIVE DEPARTMENTS AND ADMINISTRATION

- 9:10 a.m. **HB 302**, relative to the creation and use of electronic records by government agencies.

SENATE FLOOR ACTION

Thursday, March 18, 2021

SB 39, exempting information and records contained in law enforcement personnel files from disclosure under the right-to-know law. **Re-referred.**

SB 47, modifying the absentee voter registration process, absentee ballot application, and absentee ballot voting process. **Inexpedient to Legislate, NHMA Policy.**

SB 52, relative to city charter provisions for tax caps. **Passed with Amendment.**

SB 83, adopting omnibus legislation relative to elections. **Passed with Amendment.**

SB 88, adopting omnibus legislation relative to broadband. **Passed with Amendment.**

SB 90, adopting omnibus legislation on redistricting. **Laid on Table.**

SB 91, adopting omnibus legislation on renewable energy, utilities, and net metering. **Passed with Amendment.**

SB 92-FN, relative to increasing the penalty for criminal mischief, the release of a defendant pending trial, and requiring law enforcement candidate background checks. **Passed with Amendment.**

SB 96-FN-A, requiring implicit bias training for judges; establishing a body-worn and dashboard camera fund and making an appropriation therefor; relative to race and ethnicity data on driver's licenses, and relative to juvenile delinquency. **Passed with Amendment; referred to Finance.**

SB 126-FN, adopting omnibus legislation on landlord tenant proceedings. **Passed with Amendment.**

SB 131-FN, adopting omnibus legislation relative to vehicles, municipal water maintenance certificates, safety certificates, nondrivers's picture I.D.s, decals, and private roads. **Passed with Amendment.**

SB 134-FN, adopting omnibus legislation relative to civil actions and criminal liability. **Passed with Amendment.**

SB 136-FN, relative to the state minimum hourly rate. **Inexpedient to Legislate.**

SB 143-FN, adopting omnibus legislation relative to certain agency requests. **Passed with Amendment.**

SB 146-FN, adopting omnibus legislation relative to the environment. **Passed with Amendment.**

SB 153-FN, relative to retirement benefits for a police officer or firefighter disabled as a result of a violent injury. **Re-referred.**

SB 155-FN, codifying provisions included in select emergency orders issued by the governor in response to the COVID-19 pandemic. **Passed with Amendment.**

SB 158-FN-L, relative to the formula for funding an adequate education. **Inexpedient to Legislate.**

2021 NHMA UPCOMING MEMBER <u>VIRTUAL</u> EVENTS	
Weekly	Friday Membership call (1:00 – 2:00)
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>
Apr. 6	2021 Local Officials Workshop (9:00 – 4:00) Includes the <i>Knowing the Territory</i> publication, 2021 Edition.
Apr. 13	Webinar: ZBA Basics (12:00 – 2:00)
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.	