Daniel Webster-Batchelder American Inn of Court

Table 8's Presentation of Municipal Law and Town Meetings

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Running off the Road Agent

Millington is a picturesque New Hampshire town located on the shores of Lake Winnipesaukee. The Town is governed by a five member Select Board, with day-to-day operations overseen by a Town Manger who is appointed by the Select Board.

Bob Frost is a life-long resident of Millington. About ten years ago, Bob was hired by the then-Town Manager to work part-time during the summer months to maintain the Town's parks, recreational fields, and commons. Since then, Bob has taken on other responsibilities in Town, including serving as Road Agent, for which he was elected at Town meeting two years ago, and serving as the Cemetery Sexton, which is an appointment given by the cemetery trustees.

Dan Brown is the newly appointed Town Manager. It turns out Dan and Bob have known each other for years and even attended high school together. Dan and Bob never much liked each other. Dan was a football star in high school while Bob spent most of his time alone writing poems. Bob used to get picked on in chemistry class by Dan and Dan's friend, Steve Tyler. Dan and Steve are still good friends today, with Steve running one of the largest landscape companies in the area.

Soon after starting on the job as Town Manager, Dan confronts Bob about Bob's job performance. Dan tells Bob that Town residents are complaining that the grass at the parks and commons are not looking great. Dan also tells Bob that the Town garage is in disarray, with equipment left strewn about and in disrepair. Dan gives Bob one month to organize the Town garage and pick up the pace with getting the mowing done around Town.

After six months, and repeatedly confronting Bob about his job performance, Dan decides Bob has got to go. Dan hauls Bob Frost into his office and fires him on the spot. Bob is told to clear his personal belongings from the Town garage and return the keys before the end of the day.

Bob Frost leaves Dan's office and drives directly to your office to get legal advice. What is your advice?

"[T]he machinery of government would not work

if it were not allowed a little play in its joints..."[1]

Background on New Hampshire Municipalities

New Hampshire's town government, annual town meetings, and regular town meetings are one of the great triumphs of our democracy. They provide an opportunity for New Hampshire's residents and governmental officials to directly interface and for the residents to be heard by those officials.

There are two general forms of town government: (1) traditional town government, with a selectboard and town meeting, and (2) town council/town manger form of government.

I. Traditional Town Government

The traditional town government can conduct its annual meeting in the traditional open meeting style. This form of meeting allows the town's registered voters to debate on the warrant articles and make changes to them during the actual meeting. The traditional meeting is sometimes criticized for the length of the meetings and is viewed as sometimes resulting in lowed participation due to the demands of attending the annual meeting. The municipality may also adopt one of three other ways to conducts its annual business: (1) Official Ballot Referendum Form of Meeting (SB-2 towns); (2) Official Ballot Town Meeting; and (3) Representative Town Meeting.

a. Official Ballot Referendum Form of Meeting (SB-2 Towns)

The official ballot/SB 2 form may be adopted only by a three – fifths majority of the voters voting on the question. RSA 40:14. Towns may adopt this "standardized" official ballot option by following the provisions of RSA 40:14. Under this form, warrant articles – either submitted by the board of selectmen or by petition - come before the voters, are debated, and may be amended at a "first session" (also known as the "deliberative session") of town meeting. RSA 40:13. The final vote on the warrant articles, as amended, occurs later, at the "second session" of the voters, at the polls, by means of an official ballot.

This second session is the official "election" date. This form of government is sometimes criticized as being vulnerable to a small group taking control of the deliberative session which can result in warrant articles that are inconsistent with the original warrant proposal. Due to the second "election" session being ballot based, there is not an ability to amend a warrant article in the way that there is in the traditional form of town meeting. This sometimes results in voters seeking court approval for a special town meeting.

b. Official Ballot Town Meeting

This is the "customized" official ballot option, as opposed to the "standard" SB 2 version. Under this form, enacted in 1995, the details of the official ballot are up to the community's discretion and must be adopted by following the charter process outlined in RSA 49-13. According to RSA 49-D:3, II-a, a charter must specify with precision the following information: what types

[1] *Bain Peanut Co. of Texas v. Pinson*, 282 U.S. 499, 501, 75 L. Ed. 482, 51 S. Ct. 228)

of questions will go on the official ballot (budgetary and non-budgetary); a finalization process for the budget in the event it is rejected by the ballot vote; the process for public hearing, debate, and amendment of questions to be placed on the official ballot; the procedure for transferring funds among various departments and accounts during the year; and the procedure for balloting at special town meetings.

General laws relative to town meeting apply to those utilizing this option, such as the warning of meetings, the right for petitioned warrant articles, the conduct of the meeting, and the type of majority required for bond issues. This process results in a unique form of government where voters are required to comply with the general laws regarding the meeting while also dealing with the additional layer of the charter's specifications and requirements.

c. Representative Town Meeting

This is the third variation on the traditional open town meeting form of government, and is the second of the three variations that must be adopted by means of the charter process. Instead of vesting legislative authority in a town meeting made up of all registered voters in the town, this option vests legislative authority in a group of people elected to represent districts within the town. RSA 49-D:3, III. The representative town meeting has all the powers of town meeting conferred by statute and the state constitution.

The charter must specify: the manner of district representation; how vacancies are filled; requirements of attendance and quorum; residency or eligibility requirements (up to one year in the town or district and continued residency during the term); specific procedures for annual budget adoption, including preparation, presentation and public hearing; designation of a fiscal year; an annual election date; and audit requirements. The charter may provide for referenda on certain issues to the registered voters of the town at large at special town meetings called for the purpose of deciding those issues. In addition to elected members of town meeting, the board of selectmen, the town clerk and the budget committee chairman are designated as members-at-large of the representative town meeting, with the same rights, privileges, and duties of the elected members. RSA 49-D:3, III.

II. Town Council/Town Manager

This second form of town government (with its three variations) allows a town to adopt a charter establishing a representative body - the town council - which has powers similar to those of a city council. The charter must provide for the appointment of a town manager by the council, who shall have all the powers of town managers as set out in RSA Chapter 37. The provisions of the charter adopting this form of government must comply with the requirements of RSA Chapter 49-B and RSA 49-D:2. The council may have as many as 15 members, and must have an odd number unless the vote of the chair is reserved for breaking ties. RSA 49-D:3, l(b). The adoption of a town council/ town manager charter abolishes the traditional board of selectmen/open town meeting form of government.

a. Legislative Body Options

Under the town council form of government, RSA 49-D: 2, ll(a) requires the establishment of a legislative body to replace the traditional open town meeting. However, the charter may reserve authority, by referendum, to the town voters over amendments to land use ordinances and

approval of bond issues. RSA 49-D:2, I. RSA 49-D:3 spells out three charter options for choosing the type of legislative body:

i. Town Council.

In this form of government, the Town Council functions as both the governing body and legislative body, as do city councils in cities. Where the town council is both the governing body and the legislative body, it generally has all the powers and duties of selectmen, city councils and boards of aldermen, and may address all matters that general law requires to be done at town meetings, all as provided by RSA 49-D:3, l(a). The charter may provide for voter referenda on certain issues at special town meetings called for the sole purpose of deciding those issues. RSA 49-D:3, l(e). (Some state statutes require that certain questions be decided by official ballot vote.)

ii. Official Ballot Town Council.

This variation of the town council form (enacted by the legislature in 1995) limits the power of the town council by authorizing the charter to specify certain matters on which the voters will vote by official ballot. These matters may be some or all such matters that the general laws require annual or special town meetings to vote on. Thus, the town council is vested only with authority to vote on such matters not voted on by official ballot. The charter must specify with precision the budgetary items to be included on the official ballot, a finalization process for the annual budget, and a process for public hearings, debate, discussion and amendment of questions to be placed on the ballot. RSA 49-D:3, I-a.

iii. Budgetary Town Meeting.

This form of town council has the limited authority to vote on the annual operating budget as presented by the town council. RSA 49-D:3, II. Under a charter providing for a budgetary town meeting, although the legally effective business to come before the town meeting is the budget, some towns use the annual meeting as an advisory session, where the voters may express concerns publicly.
three different ways.

III. Conducting a traditional town meeting.

Sometimes, challenges arise at traditional town meetings when motivated and passionate residents attend a meeting intent on expressing their position and with a desire to be heard. It is one of the triumphs of our great democracy that New Hampshire's residents can challenge, sometimes vigorously, their town officials and hold them accountable.

a. Municipalities are not required to follow any particular set of rules when they conduct their meetings.

At an annual meeting, "it is made the duty of the moderator to preside in and regulate the business of the meeting: he may prescribe rules of proceeding, which may be altered by the town; and he must decide all questions of order, and make a public declaration of all votes passed." NH RSA 40:4; *Hill v. Goodwin*, 56 N.H. 441, 447 (1876). This means that a Town need not follow "parliamentary rules in all their detail..." *Lamb v. Danville Sch. Bd.*, 102 N.H. 569, 571 (1960); *Leonard v. School Dist.*, 98 N.H. 296, 297-98 (1953). This is true whether the meeting is a town meeting or a

school district meeting. NH RSA 40:4; NH RSA 197:19 (stating that the "moderator [of a school district meeting] shall have the like power and duty as a moderator of a town meeting to conduct the business and to preserve order, and in the conduct of a school district meeting, all the statutory duties, powers and authority granted to town moderators…").

When a town faces unruliness or attendees disrupting the meeting, the Town is not without options. The most direct response is for the morderator or person conducting the meeting to attempt to regain order by voice and consent. If this does not work, ultimately disruptive attendees may be removed from the meeting and arrested. *See State v. Dominic*, 117 N.H. 573 (1977) (arrest of selectboard member at town meeting constitutional); *Lamb v. Danville Sch. Bd.*, 102 N.H. 569, 571(1960) (no requirement town follow particular rules in conducting its meeting other than those required by statute); *Baer v. Leach*, 2015 U.S. Dist. LEXIS 158774, *1, 2015 DNH 214 (finding arrest of attendee at town meeting constitutional). This is a drastic step though and should be used judiciously.

Municipal Immunity

> **"[E]ven those courts and legislatures which have abrogated the governmental immunity doctrine have for the most part retained governmental immunity for the performance of those functions variously called "discretionary", judicial, quasi-judicial, legislative or quasi-legislative."**

Hurley v. Hudson, 112 N.H. 365, 368, 296 A.2d 905, 907 (1972)

Immunity protects "governmental entities and public officials from liability for injury allegedly caused by official conduct." Everitt v. General Electric, 156 N.H. 202, 932 A.2d 831 (2007). Generally speaking, governmental entities are immune from suit unless they agree to give up their immunity. In New Hampshire, statutes codify the exceptions to immunity. Those statutes, for the most part[2], can be found in RSA Chapter 507-B. As made explicit by RSA 507-B:5 - Effect on Common Law: "No governmental unit shall be held liable in any action to recover for bodily injury, personal injury or property damage except as provided by this chapter or as is provided or may be provided by other statute."

While there are statutes within RSA Chapter 507-B that confer express grants of immunity, others may simply make it more difficult to prove liability by setting forth a heightened burden for a plaintiff. There are also statutes that reduce the amount of recoverable damages and/or restrict the type of redress available. Additionally, statutes in this chapter provide special parameters for suing government entities. Taken together, the statutory scheme set forth in RSA Chapter 507 makes it clear that suing a governmental unit in New Hampshire is significantly distinct from instituting legal action against a "regular" individual or entity.

STATUTES THAT PROVIDE FOR IMMUNITY OR ALTER BURDEN OF PROOF OR STANDARD OF CARE:

507-B:1 Definitions. – In this chapter:

I. "Governmental unit" means any political subdivision within the state including any county, city, town, precinct, school district, chartered public school, school administrative unit, or departments or agencies thereof, or any other body corporate and politic within the state, but does not include the state or any department or agency thereof.

II. "Action to recover for bodily injury" means an action arising out of bodily injury, including an action brought under RSA 556:9-14, whether brought by or on behalf of the person actually sustaining bodily injury or

[2] Despite the clear intent to have RSA Chapter 507-B be the sole or at least primary authority for liability claims against government entities, cities and towns have their own chapter, RSA Title XX, Ch. 231, Liability of Municipalities. The title of this chapter is obviously quite broad; however, it relates only to liability and immunity for municipal roads. Other immunity statues can be found in chapters that contain statutes with similar topics.

brought by any other person to whom rights may accrue arising out of such injury, regardless of the nature of the damages claimed.

III. "Personal injury'' means:

(a) Any injury to the feelings or reputation of a natural person, including but not limited to, false arrest, detention or imprisonment, malicious prosecution, libel, slander, or the publication or utterance of other defamatory or disparaging material, invasion of an individual's right of privacy, invasion of the right of private occupancy, wrongful entry or eviction, mental injury, mental anguish, shock, and, except when against the public policy or the laws of New Hampshire, or both, discrimination; and

(b) Any injury to intangible property sustained by any organization as a result of false eviction, malicious prosecution, libel, slander, or defamation.

The term "personal injury'' shall not include "bodily injury'' or "property damage.''

IV. "Property damage'' means a loss through injury to, or destruction of, tangible property.

V. "Pollutant incident'' means any emission, discharge, release, or escape of any irritants, noxious substances or radioactive materials, in any physical state, into or upon land, the atmosphere, or any watercourse or body of water, including but not limited to all wastes and materials as defined in RSA 146-A, 147-A, 147-B and 149-M.

507-B:2 Liability for Negligence.

A governmental unit may be held liable for damages in an action to recover for bodily injury, personal injury or property damage caused by its fault or by fault attributable to it, arising out of ownership, occupation, maintenance or operation of all motor vehicles, and all premises; provided, however, that the liability of any governmental unit with respect to its sidewalks, streets, and highways shall be limited as provided in RSA 231 and the liability of any governmental unit with respect to publicly owned airport runways and taxiways shall be limited as set forth in RSA 422.

507-B:2-b Snow, Ice, and Other Weather Hazards.

Notwithstanding RSA 507-B:2, a municipality or school district shall not be liable for damage arising from insufficiencies or hazards on any premises owned, occupied, maintained, or operated by it, even if it has actual notice of them, when such hazards are caused solely by snow, ice, or other inclement weather, and the municipality's or school district's failure or delay in removing or mitigating such hazards is the result of its implementation, absent gross negligence or reckless disregard of the hazard, of a winter or inclement weather maintenance policy or set of priorities with respect to such premises, adopted in good faith by the official responsible for such policy. All municipal or school district employees, officials, and agents shall

be presumed to be acting pursuant to such a policy or set of priorities in the absence of proof to the contrary.

507-B:9 Pollutant Liability Standard.

I. Notwithstanding any other provision of law, the liability of any governmental unit or public employee for any personal injury, bodily injury, or property damage caused by or resulting from pollutant incidents shall only be based upon a showing by a preponderance of the evidence that the acts or omissions of the governmental unit were unreasonable. The acts or omissions of a governmental unit or public employee shall be conclusively presumed to be reasonable if they are in accord with the generally prevailing state of the art, scientific knowledge, and technology available to the governmental unit at the time the acts or omissions were undertaken or made by the governmental unit or public employee.

II. If the fault of the governmental unit or public employee arising from a pollutant incident is 50 percent or greater, liability shall be joint and several. Otherwise, governmental units or public employees shall be liable only to the extent that their acts or omissions contributed to the causation of the personal injury, bodily injury, or property damage.

III. The doctrines of strict liability or absolute liability shall not be the basis of liability of a governmental unit or public employee for any personal injury, bodily injury, or property damage caused by pollutant incidents.

RSA 21-P:41. Immunity and Exemption (for Emergency Management)

I. All functions under this subdivision and all other activities relating to emergency management are hereby declared to be governmental functions. Neither the state nor any of its political subdivisions nor any agency of the state or political subdivision, nor any private corporations, organizations, or agencies, nor any emergency management worker complying with or reasonably attempting to comply with this subdivision, or any order or rule adopted or regulation promulgated pursuant to the provisions of this subdivision, or pursuant to any ordinance relating to precautionary measures enacted by any political subdivision of the state, shall be liable for the death of or injury to persons, or for damage to property, as a result of any such activity. The provisions of this section shall not affect the right of any person to receive benefits to which he or she would otherwise be entitled under this subdivision, under the workers' compensation law, or under any retirement law, nor the right of any such person to receive any benefits or compensation under any act of Congress.
II. Any requirement for a license to practice any professional, mechanical, or other skill shall not apply to any authorized emergency management worker who shall, in the course of performing his or her duties as such, practice such professional, mechanical, or other skill during an emergency.

III. As used in this section the term "emergency management worker" includes any full or part-time paid, volunteer, or auxiliary employee of this state, other states, territories, possessions, the District of Columbia, the federal government, any neighboring country, or of any political subdivision of such entities, or of any corporation, agency or organization, public or private, performing emergency management services at any place in this state subject to the order or control of, or pursuant to a request of, the state government or any of its political subdivisions.

IV. Dentists licensed in this state, nurses registered in this state, student nurses undergoing training at a licensed hospital in this state, or emergency medical care providers licensed under RSA 153-A, during any emergency, shall be regarded as authorized emergency management workers and while so engaged may practice, in addition to the authority granted them by other statutes, administration of anesthetics; minor surgery; intravenous, subcutaneous, and intramuscular procedures; and oral and topical medication under the general but not necessarily direct supervision of a member of the medical staff of a legally incorporated and licensed hospital of this state, and to assist such staff members in other medical and surgical procedures.

V. Any emergency management worker, performing emergency management services at any place in this state pursuant to agreements, compacts or arrangements for mutual aid and assistance, to which the state or one of its political subdivisions is a party, shall possess the same powers, duties, immunities, and privileges the worker would ordinarily possess if performing his or her duties in the state or political subdivision in which normally employed or rendering services.

VI. Any emergency management worker shall:

(a) If the worker is an employee of the state, have the powers, duties, rights, and privileges and receive the compensation incidental to his or her employment;

(b) If the worker is an employee of a political subdivision of the state, whether serving within or without such political subdivision, have the powers, duties, rights, privileges, and immunities and receive the compensation incidental to his or her employment; and

(c) If the worker is not an employee of the state or one of its political subdivisions, be entitled to the same rights as to compensation for injuries as are provided by law for the employees of this state. The emergency management personnel shall, while on duty, be subject to the operational control of the authority in charge of emergency management activities in the area in which they are serving, and shall be reimbursed for all actual travel and subsistence expenses incurred under orders issued by the director.

RSA 508:17. Volunteers; Nonprofit Organizations; Liability Limited.

I. Any person who is a volunteer of a nonprofit organization or government entity shall be immune from civil liability in any action brought on the basis of any act or omission resulting in damage or injury to any person if:
(a) The nonprofit organization or government entity has a record indicating that the person claiming to be a volunteer is a volunteer for such organization or entity; and
(b) The volunteer was acting in good faith and within the scope of his official functions and duties with the organization; and
(c) The damage or injury was not caused by willful, wanton, or grossly negligent misconduct by the volunteer.
I-a. [Repealed.]
II. Liability of a nonprofit organization for damage or injury sustained by any one person in actions brought against the organization alleging negligence on the part of an organization volunteer is limited to $250,000. Such limit applies in the aggregate to any and all actions to recover for damage or injury sustained by one person in a single incident or occurrence. Liability of a nonprofit organization for damage or injury sustained by any number of persons in a single incident or occurrence involving negligence on the part of an organization volunteer is limited to $1,000,000.
III. Nothing in this section shall be construed to affect any civil action brought by any nonprofit organization against any volunteer of such organization.
IV. Volunteer activity related to transportation or to care of the organization's premises shall be excepted from the provisions of paragraph I of this section.
V. In this section:
(a) "Damage or injury" includes physical, nonphysical, economic and noneconomic damage and property damage.
(b) "Nonprofit organization" shall include, but not be limited to, a not for profit organization, corporation, community chest, fund or foundation organized and operated exclusively for religious, cultural, charitable, scientific, recreational, literary, agricultural, or educational purposes, or to foster amateur competition in a sport formally recognized by the National Collegiate Athletic Association, and an organization exempt from taxation under section 501(c) of the Internal Revenue Code of 1986 organized or incorporated in this state or having a principal place of business in this state.
(c) "Volunteer" means an individual performing services for a nonprofit organization or government entity who does not receive compensation, other than reimbursement for expenses actually incurred for such services. In the case of volunteer athletic coaches or sports officials, such volunteers shall possess proper certification or validation of competence in the rules, procedures, practices, and programs of the athletic activity.

508:12-b. Liability Limited; Fire Department, Emergency Service, and Rescue Squad Members.

I. No person who is a volunteer, "part paid" or "call" member of a nonprofit fire department, emergency service or rescue squad operating in any political subdivision shall be held personally liable in any action to recover for personal injury or property damage arising out of any act performed or occurring in the furtherance of his official duties. Nothing in this section shall affect the liability of the political subdivision, department, service or squad served by such person. Nothing in this section shall affect the liability of such person for damages arising out of willful misconduct, gross negligence, or operation under the influence of drugs or alcohol.
II. In this section:
(a) "Call" member means any member other than a full-time paid employee who receives payment for each emergency response.
(b) "Official duties" mean emergency duties only.
(c) "Part paid" member means any member other than a full-time paid employee who receives an annual retainer or stipend of less than $5,000 for his services as a member.

RSA 154:1-d. Fire Department Liability; Public Duty Rule; Status of Firefighters.

I. Firefighting and other emergency service provided by a fire department shall not, in itself, be deemed to be the making of a promise, or the undertaking of a special duty, towards any person for such services, or any particular level of, or manner of providing, such services; nor shall the provision of, or failure to provide, such services be deemed to create a special relationship or duty towards any person, upon which an action in negligence or other tort might be founded. Specifically:
(a) The failure to respond to a fire or other emergency, or to undertake particular inspections or types of inspections, or to maintain any particular level of personnel, equipment or facilities, shall not be a breach of any duty to persons affected by any fire or other emergency.
(b) When a fire department does undertake to respond to a fire or other emergency, the failure to provide the same level or manner of service, or equivalent availability or allocation of resources as may or could be provided, shall not be a breach of any duty to persons affected by that fire or other emergency.
(c) A fire department shall not have or assume any duty towards any person to adopt, use, or avoid any particular strategy or tactic in responding to a fire or other emergency.
(d) A fire department, in undertaking fire prevention activities, including inspections, or in undertaking to respond to a fire or other emergency, shall not have voluntarily assumed any special duty with respect to any risks which were not created or caused by it, nor with respect to any risks which

might have existed even in the absence of such activity or response, nor shall any person have a right to rely on any such assumption of duty.
(e) In this section, "fire department" means any fire department of the state or its political subdivisions, including municipal fire departments organized under RSA 154:1, as well as private firefighting units which have been certified by the state fire marshal under RSA 153:4-a. For the purposes of this section and in addition to any other protections afforded to state agencies under law, the division of fire services, department of safety, shall be deemed a "fire department."
II. Any firefighter, paid or volunteer, who is acting in an official capacity under the direction or supervision of the elected or appointed fire chief, or designee, of a municipal fire department organized in accordance with RSA 154:1, or who is participating in a fire department activity sanctioned by the local governing body or its designee, shall be an agent of the municipality, enjoying the same privileges and immunities as the municipality or employees of the municipality. Such privileges and immunities include, but are not limited to, indemnification for civil rights damages to the extent set forth in RSA 31:106, and indemnification for any other accidental damages to the extent set forth in RSA 31:105, if the municipality has adopted that section.
III. Decisions of a fire chief or the chief's subordinates concerning the allocation and assignment of firefighters and equipment, and the strategies and tactics used, shall be the exercise of a discretionary, policy function for which neither the officer nor a municipality shall be held liable in the absence of malice or bad faith, even when such decisions are made rapidly in response to the exigencies of an emergency.
IV. This section shall not be construed to affect the application of common law immunities, or of other statutes which may pertain to the liability of municipalities or firefighters, including, but not limited to RSA 507-B and RSA 508:17.

507-B:11 Use of Municipal and School District Facilities for Skateboarding, Rollerblading, Stunt Biking, or Rollerskiing.

A municipality or school district, which without charge permits any person to use a facility operated by the municipality or school district for the purpose of skateboarding, rollerblading, stunt biking, or rollerskiing, shall not be liable for personal injury or property damage resulting from the person's participation in such activity, in the absence of gross and wanton negligence.

231:92. Liability of Municipalities; Standard of Care.

I. A municipality shall not be held liable for damages in an action to recover for personal injury or property damage arising out of its construction, maintenance, or repair of public highways and sidewalks constructed

thereupon unless such injury or damage was caused by an insufficiency, as defined by RSA 231:90, and:
(a) The municipality received a written notice of such insufficiency as set forth in RSA 231:90, but failed to act as provided by RSA 231:91; or
(b) The selectmen, mayor or other chief executive official of the municipality, the town or city clerk, any on-duty police or fire personnel, or municipal officers responsible for maintenance and repair of highways, bridges, or sidewalks thereon had actual notice or knowledge of such insufficiency, by means other than written notice pursuant to RSA 231:90, and were grossly negligent or exercised bad faith in responding or failing to respond to such actual knowledge; or
(c) The condition constituting the insufficiency was created by an intentional act of a municipal officer or employee acting in the scope of his official duty while in the course of his employment, acting with gross negligence, or with reckless disregard of the hazard.
II. Any action to recover damages for bodily injury, personal injury or property damage arising out of municipal construction, repair or maintenance of its public highways or sidewalks constructed on such highways shall be dismissed unless the complaint describes with particularity the means by which the municipality received actual notice of the alleged insufficiency, or the intentional act which created the alleged insufficiency.
III. The acceptance or layout of a private road as a public highway shall not be construed to confer upon the municipality any notice of, or liability for, insufficiencies or defects which arose or were created prior to such layout or acceptance.
IV. The setting of construction, repair, or maintenance standards of levels of service for highways and sidewalks by municipal officials with responsibility therefor, whether accomplished formally or informally, shall be deemed a discretionary, policy function for which the municipality shall not be held liable in the absence of malice or bad faith.

231:92-a. Snow, Ice and Other Weather Hazards.

Notwithstanding RSA 231:90–92, a municipality or school district shall not be held liable for damages arising from insufficiencies or hazards on public highways, bridges, or sidewalks, even if it has actual notice or knowledge of them, when such hazards are caused solely by snow, ice, or other inclement weather, and the municipality's or school district's failure or delay in removing or mitigating such hazards is the result of its implementation, absent gross negligence or reckless disregard of the hazard, of a winter or inclement weather maintenance policy or set of priorities adopted in good faith by the officials responsible for such policy; and all municipal or school district employees and officials shall be presumed to be acting pursuant to such a policy or set of priorities, in the absence of proof to the contrary.

231:93. When Municipalities not Liable.

Municipalities shall not be deemed to have any duty of care whatsoever with respect to the construction, maintenance or repair of class I, III, III-a or VI highways, or state maintained portions of class II highways. Upon any highway or other way with respect to which a municipality is found to have a duty of care of any kind, its liability shall be limited as set forth in this subdivision.

TAKEAWAYS:

- RSA 507-B:2 establishes a cause of action but only for claims arising out of the ownership, occupation, maintenance or operation of motor vehicles and premises. Farm Family Cas. Ins. Co. v. Rollinsford, 155 N.H. 669 (2007).
- The plaintiff must establish a causal nexus between the injury and the municipality's ownership, occupation, maintenance or operation of a motor vehicle of premises. Crosby v. Strafford County Correctional, U.S. District Court for New Hampshire, No. 2014 DNH 100 (June 2, 2015).
- "Property damage" does not to include real property. Cannata v. Deerfield, 132 N.H. 235 (1989).
- A fire department does not "occupy" premises when it is fighting a fire. Farm Family Cas. Ins. Co. v. Rollinsford, 155 N.H. 669 (2007).
    - A municipality has no liability for the condition of public highways, bridges, or sidewalks that causes injury absent an "insufficiency" of which it has received written notice. Bowden v. N.H. Dep't of Transportation, 144 N.H. 491 (1999)
        - "Insufficiency" means either not safely passable by those persons or vehicles or existence of a safety hazard not reasonably discoverable or reasonably avoidable by a person when using the highway or sidewalk in a reasonable, prudent and lawful manner.
        - Municipal officials can be found liable if they had actual notice or knowledge of the insufficiency and were grossly negligent or exercised bad faith in responding or failing to respond; or it was created by an intentional act of a municipal officer or employee acting in the scope of his official duty acting with gross negligence, or with reckless disregard of the hazard.
    - Municipality will not be liable if the insufficiency was caused by bad weather so long as the town had a written bad weather policy adopted in good faith prior to the storm and was following that policy without gross negligence or recklessness. Johnson v. Laconia, 141 N.H. 379 (1996); Ford v. N.H. Dep't of Transportation, 163 N.H. 284 (2012) (State not liable for car accident caused by failure to timey repair traffic signal rendered inoperable by ice storm because it was following its bad weather policy in good faith).
    - The presence or absence of liability insurance does not change the legal duty owed to users of the highway, but instead changes the amount of monetary damages that may be recovered from a municipality if it is found liable for the injuries caused by a highway defect. Cloutier v. Berlin, 154 N.H. 13 (2006).

STATUTES THAT REDUCE OR RESTRICT DAMAGES:

507-B:7-a. Insurance Policies Procured by Governmental Agency.

It shall be lawful for the state or any municipal subdivision thereof, including any county, city, town, school district, school administrative unit or other district, to procure the policies of insurance described in RSA 412. In any action against the state or any municipal subdivision thereof to enforce liability on account of a risk so insured against, the insuring company or state or municipal subdivision thereof shall not be allowed to plead as a defense immunity from liability for damages resulting from the performance of governmental functions, and its liability shall be determined as in the case of a private corporation except when a standard of care differing from that of a private corporation is set forth by statute; provided, however, that liability in any such case shall not exceed the limits of coverage specified in the policy of insurance or as to governmental units defined in RSA 507-B, liability shall not exceed the policy limit or the limit specified in RSA 507-B:4, if applicable, whichever is higher, and the court shall abate any verdict in any such action to the extent that it exceeds such limit.

507-B:4. Limit of Liability.

I. Liability of a governmental unit for bodily injury, personal injury or property damage sustained by any one person in actions brought under this chapter is limited to $325,000. Such limit applies in the aggregate to any and all actions to recover for bodily injury, personal injury or property damage sustained by one person in a single incident or occurrence. Liability of a governmental unit for bodily injury, personal injury, or property damage sustained by any number of persons in a single incident or occurrence is limited to $1,000,000. The limits applicable to any action shall be the limits in effect at the time of the judgment or settlement.

II. The court shall award no punitive damages against a governmental unit for bodily injury, personal injury or property damage.

III. The jury shall not be informed of the limits in paragraph I but the court shall abate any verdict to the extent it exceeds the limits prescribed in this section. In actions consolidated under RSA 507-B:3, in the event the verdicts exceed the limits prescribed in this section, the verdicts shall be abated pro rata. Interest and costs may be recovered as in any civil action, in addition to the limits prescribed in this section.

IV. If any claim is made or any civil action is commenced against a present or former employee, trustee, or official of a governmental unit seeking equitable relief or claiming damages, the liability of said employee or official shall be governed by the same principles and provisions of law and shall be subject to the same limits as those which govern governmental unit liability, so long as said employee or official was acting within the scope of his or her office and reasonably believed in the legality of his or her actions.

31:108. Attachment, Trustee Process Prohibited.

No attachment or trustee process shall be available or allowed where immunity has been granted pursuant to RSA 31:104 or where indemnification has been voted pursuant to RSA 31:105 or where indemnification is required pursuant to RSA 31:106.

507:15-a. Vexatious Litigants.

I. In this section, "vexatious litigant" means an individual who has been found by a judge to have filed 3 or more frivolous lawsuits which the judge finds, by clear and convincing evidence, were initiated for the primary purpose of harassment.
II. The court may require a vexatious litigant to:
(a) Retain an attorney or other person of good character to represent him or her in all actions; or
(b) Post a cash or surety bond sufficient to cover all attorney fees and anticipated damages.

TAKEAWAYS:

- Statutory cap limits the amount of money damages a municipality can be required to pay for claims for bodily injury, personal injury or property damage, arising out of the municipality's ownership, occupation, maintenance or operation of motor vehicles and premises.
- Limits of liability do not apply there is liability coverage higher than the cap. Marcotte v. Timberlane Regional School Dist., 143 N.H. 331 (1999).

PROCEDURAL REQUIREMENTS THAT APPLY WHEN A GOVERNMENT ENTITY IS SUED.

491:24. Civil Suits Against Municipal Officials.
I. Whenever a municipal official or individual member of a municipal board or agency, who is subject to good faith immunity under the provisions of RSA 31:104 or the common law of New Hampshire, is sued personally for money damages and the plaintiff alleges injury or damage resulting from action taken in bad faith or with malice on the part of the official or member when acting in his or her official capacity, the superior court shall hold a preliminary hearing within 90 days of the service date specified by the court on the summons.
II. At the hearing the plaintiff shall demonstrate that the allegation of bad faith or malice is based upon information and belief formed after reasonable inquiry and well grounded in fact and that there is a substantial likelihood that, following discovery, evidence shall be adduced sufficient to create an issue for determination by the finder of fact. If the plaintiff fails in such demonstration, the action against such official or member shall be dismissed.

III. If, upon all the evidence presented at the hearing, the court determines that the action is frivolous or intended to harass or to influence the official actions or decisions of the municipal official or board member, the plaintiff shall pay the court costs and reasonable attorneys' fees of the defendant.

507-B:3 Compulsory Consolidation of Actions.

All actions to recover for bodily injury, personal injury or property damage arising out of bodily injury, personal injury or property damage to one person shall be tried together, and not otherwise.

507-B:8 Appropriation to Satisfy Judgment.

Upon entry of final judgment against the governmental unit in any action brought under this chapter, the body charged with the appropriation of funds for the governmental unit shall provide funds through insurance or otherwise to satisfy said judgment within a reasonable time.

IMMUNITIES THAT ARE BASED ON COMMON LAW AND STATUTE (SOMETIMES):

Qualified immunity and **official immunity** provide immunity for wrongful acts committed within the scope of their government employment. Everitt v. General Electric Co., 156 N.H. 202, 209 (N.H. 2007); Richardson v. Chevrefils, 131 N.H. 227, 232 (1988). Qualified immunity applies to lawsuits alleging constitutional violations. Official immunity shields applies to torts cases. Id. **Discretionary function immunity** applies to conduct that involves a discretionary executive or planning function that as opposed to functions that are purely ministerial. Appeal of N.H. Dep't of Transp., 159 N.H. 72, 74 (2009).

99-D:1. Statement of Policy. [3]

It is the intent of this chapter to protect state officers, trustees, officials, employees, and members of the general court who are subject to claims and civil actions arising from acts committed within the scope of their official duty while in the course of their employment for the state and not in a wanton or reckless manner. It is not intended to create a new remedy for injured persons or to waive the state's sovereign immunity which is extended by law to state officers, trustees, officials, and employees. The doctrine of sovereign immunity of the state, and by the extension of that doctrine, the official immunity of officers, trustees, officials, or employees of the state or any agency thereof acting within the scope of official duty and not in a wanton or reckless manner, except as otherwise expressly provided by statute, is hereby adopted as the law of the state. The immunity of the state's officers, trustees, officials, and employees as set forth herein shall be applicable to all claims and civil actions, which claims or actions arise

[3] Discretionary Function Immunity for the State has been codified in RSA 541-B:19, I(c). as an exception to Sovereign Immunity and in RSA 99-D:1.

against such officers, trustees, officials, and employees in their personal capacity or official capacity, or both such capacities, from acts or omissions within the scope of their official duty while in the course of their employment for the state and not in a wanton or reckless manner.

31:104. Liability of Municipal Executives.

Notwithstanding any provisions of law to the contrary, no member of the governing board of any municipal corporation or political subdivision, no member of any other board, commission, or bureau of any municipal corporation or political subdivision created or existing pursuant to a statute or charter, and no chief executive officer of such municipal corporation or political subdivision, including but not limited to city councilors and aldermen, selectmen, county convention members, members of boards of adjustment, members of planning boards, school board members, mayors, city managers, town managers, county commissioners, regional planning commissioners, town and city health officers, overseers of public welfare, and school superintendents shall be held liable for civil damages for any vote, resolution, or decision made by said person acting in his or her official capacity in good faith and within the scope of his or her authority.

DISRETIONARY FUNCTION IMMUNITY:

Discretionary function immunity applies to "the exercise or performance or the failure to exercise or perform a discretionary executive or planning function or duty on the part of the state or any state agency or a state officer, employee, or official acting within the scope of his office or employment." It is immunity for conduct that involves a discretionary executive or planning function that as opposed to functions that are purely ministerial. Appeal of N.H. Dep't of Transp., 159 N.H. 72, 74 (2009). To be entitled to discretionary function immunity requires a high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning. Ford v. N.H. Dep't of Transportation, 163 N.H. 284 (2012) (a detour plan involved weighing alternatives and making choices with respect to public policy, such that it was protected by discretionary function immunity); DiFruscia v. N.H. Dept. of Public Works & Highways, 136 N.H. 202 (1992) (the decision to place or not to place a guardrail on a roadway is conduct characterized by the high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning). Negligent implementation or failure to follow an established policy, however, is ministerial and not subject to discretionary function immunity. Delaney v. State, 146 N.H. 173 (2001).

OFFICIAL IMMUNITY

Official immunity is a specific type of immunity that protects against personal liability for public officials and employees for wrongful acts committed within the scope of their government employment. Everitt v. General Electric, 156 N.H. 202, 932 A.2d 831 (2007). Criteria to assess: (1) the nature and importance of the function that the officer is performing; (2) the importance that the duty be performed to the best judgment of the officer, unhampered by extraneous matters; (3)

whether the function is performed by private individuals for which they could be held liable in tort or it is one performed solely by the government; (4) the extent of the responsibility involved and the extent to which the imposition of liability would impair the free exercise of discretion by the officer; (5) the likelihood that the official will be subjected to frequent accusations of wrongful motives; (6) the extent to which the threat of vexatious lawsuits will impact the exercise of discretion; (7) whether the official would be indemnified by the government or whether any damage award would be covered by insurance; (8) the likelihood that damage will result to members of the public in the absence of immunity; (9) the nature of the harm borne by the injured party should immunity attach; and (10) the availability of alternative remedies to the injured party. Whether municipal officers are entitled to the protection of official immunity remains a common law question. Everitt v. GE, 156 N.H. at 215, 932 A.2d at 842 (2007).

QUALIFIED IMMUNITY

"The doctrine of qualified immunity provides a safe harbor for public officials acting under the color of state law who would otherwise be liable under 42 U.S.C. § 1983 for infringing the constitutional rights of private parties." Conrad v. N.H. Dep't of Safety, 167 N.H. 59, 73, 104 A.3d 1029, 1040 (2014), *quoting* Whitfield v. Melendez-Rivera, 431 F.3d 1, 6 (1st Cir. 2005).

An official is not entitled to qualified immunity if a reasonable official would understand what he or she is doing was unlawful at the time, i.e., the legal principle violated was "settled law" and the unlawfulness of the conduct was "beyond debate." Id. (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)). Qualified immunity is a "demanding standard" that protects all but the "plainly incompetent" or those who "knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986).

QUASI-JUDICIAL IMMUNITY

Quasi-judicial immunity is seen by the Court as being either a type of or the same as official immunity, but applied in a different context. *See* Everitt v. GE, 156 N.H. at 215, 932 A.2d at 842. "The doctrine of quasi-judicial immunity has long been recognized in this State, and has been explained as the rule of public policy which protects judicial officers and those exercising judicial functions from liability in actions of tort for wrongs committed by them when acting in that capacity." Surprenant v. Mulcrone, 163 N.H. 529, 531, 44 A.3d 465, 467 (2012), *quoting* Gould v. Director, N.H. Div. of Motor Vehicles, 138 N.H. 343, 346, 639 A.2d 254 (1994). "It has been repeatedly decided in this state that when an officer or a board is called upon to pass upon evidence and decide, their conclusion cannot be collaterally attacked, and that they are not liable to answer in a suit for their action. The reason given in the cases is that such action is judicial." *Id.*

Quasi-judicial immunity extends beyond decision making in adversarial settings and included government boards called upon to make decisions within the scope of authorized duties. *See* Sweeney v. Young, 82 N.H. 159, 165-66, 131 A. 155 (1925) (immunity for members of school board for quasi-judicial decision dismissing student). Motives are irrelevant when deciding whether an official is immune, "the immunity applies even when the [official] is accused of acting maliciously and corruptly." Everitt v. GE, 156 N.H. at 215, 932 A.2d at 842. The only prerequisites for quasi-judicial immunity is that the officer had jurisdiction over the person and subject matter.

Id., *citing* Sargent v. Little, 72 N.H. 555, 556-57, 58 A. 44 (1904) (immunity for members of state board of license commissioners for granting state licenses).

The "Right to Know" What is Happening in your Town/Municipality

RSA 91-A, New Hampshire's Right to Know statute, is intended to "ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people." RSA 91-A:1. As a result, this statute applies to public agencies, bodies, and advisory committees, and to virtually any proceedings or records kept by these entities, including towns and municipal bodies. RSA 91-A:1-a, VI (d)(defining "public body" in part as "[a]ny legislative body, governing body, board, commission, committee, agency, or authority under any county, town, municipal corporation, school district, school administrative unit, chartered public school, or other political subdivision, or any committee, subcommittee, or subordinate body thereof, or advisory committee thereto."). One should also keep in mind that the term "advisory committee" is defined fairly broadly, and includes any committee like body "whose primary purpose if to consider an issue or issues designated by the appointing authority . . . to provide such authority with advice or recommendations concerning the formulation of any public policy or legislation . . . ." RSA 91-A:1-a, I.

The question for lawyers often is, what must be disclosed? The short answer is, virtually everything may be eligible for disclosure and protection is limited. Our Supreme Court has taken the position that this statute must be broadly construed in favor of disclosure, and further, that the statutory exemptions should be interpreted restrictively, applying in fairly narrow circumstances. American Civil Liberties Union of New Hampshire v. City of Concord, Case No. 2020-0036, Slip. Op. Dec. 7, 2021, *3. Statutory exemptions of governmental records are set forth in RSA 91-A:5. For purposes of a town or municipalities, perhaps the most pertinent exemptions are: (1) records pertaining to internal personnel practices; (2) confidential, commercial, or financial information; (3) notes or other materials made for personal use that do not have an official purposes (including notes made prior to, during or after governmental proceedings); and (4) records protected under the attorney-client privilege or the attorney work product doctrine. RSA 91-A:5. There also is a catch all category for disclosures that would be an invasion of privacy. Id. A refusal to disclose requires the application of a three step balancing test, judged by an objective standard. This balancing test was fairly recently discussed by our Supreme Court in Towle v. NH Dep't of Corrections, Case No. 2020-0221, Slip Op. February 26, 2021, *1,

RSA 91-A:2 details requirements for public meetings, specifying that "all meetings, whether held in person, by means of telephone or electronic communication, or in any other manner, shall be open to the public." This section also sets forth certain requirements to further ensure public access, including notice requirements and limitations on communications outside of a meeting. However, the statute recognized governing bodies' need to legitimately conduct confidential business out of the public eye. As a result, RSA 91-A:3 prescribes the circumstances under which a nonpublic meeting may be conducted. Just some of the appropriate nonpublic sessions include (1) dismissal, promotion, or compensation of any public employee or the disciplining of such employee; (2) consideration of legal advice provided by legal counsel; (3) consideration or negotiation of pending claims or litigation which has been threatened in

writing or filed by or against the public body; and (4) matters which, if discussed publicly, would likely affect adversely the reputation of any person other than a member of the public body itself, among others reasons. RSA 91-A:3(II). A public body must make a motion to enter nonpublic session and state specifically on the record the exemption from public meeting being relied upon. RSA 91-A:3 (I). Minutes still need to be maintained for a nonpublic session – and may eventually be made public, depending upon the exemption/subject matter. RSA 91-A:3 (III).

Upon receiving a request for records under RSA 91-A, the receiving party generally has five days to either make the records available, deny the request in writing (providing specific reasons for the denial), or acknowledge receipt of the request, but indicate additional time is necessary to determine whether the request will be granted or denied. If the requested records are not available upon the request, then the records must be disclosed immediately upon becoming available. RSA 91-A:4.

Settlements with Towns
or (Try To) KEEP IT SECRET, KEEP IT SAFE!

I. Settlement Agreements with Towns: can they be confidential?

Settlement agreements are, of course, contracts. Towns have authority to enter into contracts "which may be necessary and convenient for the transaction of public business of the town." RSA 31:3. *See also Specialized Loan Servicing, LLC v. Town of Bartlett*, 2021 DNH 153 (Sept 29, 2021). And the Supreme Court has confirmed that a town cannot assert sovereign immunity with respect to contracts. *See City of Rochester v. Marcel A. Payeur, Inc.*, 169 N.H. 502 (2016). So just like a private a party, towns can be bound to the terms of settlement agreements.

RSA 91-A:4, VI provides: "Every agreement to settle a lawsuit against a governmental unit, **threatened lawsuit**, or other claim, entered into by any political subdivision or its insurer**, shall be kept on file at the municipal clerk's office and made available for public inspection for a period of no less than 10 years from the date of settlement**." (emphasis added). *See also* RSA 507:17, II ("[i]n any action against a governmental unit where the governmental unit has agreed to a settlement of such action, **the complete terms of the settlement and the decree of the court judgment shall be available as a matter of public record pursuant to RSA 91-A.**") But, RSA 91-A:5, IV provides that certain government documents are exempt from disclosure, including "confidential, commercial, or financial information." Might this provision apply to the Town of Millington's desire to keep its settlement with Bob Frost confidential? Is it "confidential" because they agreed it was confidential? Probably not.

In examining whether disclosure is required under RSA 91-A, the Supreme Court "construe[s] provisions favoring disclosure broadly, while construing exemptions restrictively." *Provenza v. Town of Canaan*, __N.H. __ (Apr. 22, 2022); *ACLU v. City of Concord*, __ *N.H.* __ (Dec. 7, 2021). It has applied a balancing test to determine whether a document may be withheld because it contains confidential, commercial or financial information. It asks first if the information is truly confidential, commercial or financial information. Second, it asks if disclosure constitutes an invasion of privacy. *See Union Leader Corp. v. N.H. Housing Finance Auth.*, 142 N.H. 540, 554 (1997). The Court narrowly construes the first prong of this test to avoid the exemption swallowing the general rule of disclosure required under RSA 91-A. In particular, the confidentiality of the information is based on an objective review of the evidence. Just because the town and road agent agreed the settlement agreement should be confidential is not dispositive. *Id.* The Court will balance the benefits of disclosure to the public against the benefit to the town of non-disclosure. The town has the burden of proving that disclosure would impair its ability to get settlement agreements in the future, or cause substantial harm to the competitive advantage of its counterparty. *See Provenza*.

Given the public interest in disclosure of settlement agreements provided by RSA 91-A:4, VI and RSA 507:17, II, the town likely would have an insurmountable burden with trying to claim an exemption from disclosure of this agreement, particularly where it (and not the counterparty) insisted on the confidentiality provision. Further, in its recent decision in

Provenza, the Court determined that a document that contained information about a public official conducting his official duties does not create the type of "weighty" privacy interest that could place it within the RSA 91-A:5, IV exemption. The road agent scenario in question here does not appear to raise any more "weighty" privacy issues than those addressed in *Provenza*. The settlement agreement addresses the discharge of a public official, and the financial settlement paid to him by the town to settle his threatened action. Town counsel's advice will most likely be that the settlement agreement has to be made available for public inspection.