



Public Health Regionalization Initiative Meeting  
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*Regional Public Health Emergency Planning from a Legal Perspective  
Statutory and Regulatory Framework: Legal Basis for Local Authority  
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**[Preliminary Note: Part I of this handout provides a general overview and statutory reference for regulatory and emergency management functions involving local governments in New Hampshire. Part II discusses the powers that local governments have to prepare for and respond to emergencies using intergovernmental agreements. Part III contains a general discussion of the role of local government, not as a regulatory authority, but as a corporate entity governing its own affairs in the context of continuity of government operations.]**

**Part I. Statutory and Regulatory Framework**

Overall, it must be remembered that New Hampshire is not a home rule state. Therefore, local action, including emergency management authority:

- a. Must be premised upon delegation of authority by law/regulation or implied from such a delegation;
- b. Must be consistent with procedures and limitations imposed by law/regulation;
- c. Is subject to preemption.

New Hampshire statutes traditionally have not conveyed directly specific powers for regional actions. Counties, too, have limited powers. Since a pandemic or other public health emergency likely will require statewide or regional responses, local action, alone, might be seen as having the possibility of little impact. Yet, current planning and resources would indicate that local governments will be major players in the preparation for and response to a public health incident. Therefore, an analysis of existing local government authority is required to determine the actions that can be taken and to identify areas where legislative action might be of assistance.

The following is a listing of various statutes in effect on the date of this seminar which appear to have direct or indirect relationship to local authority to act with regard to public health emergency situations. While every reasonable effort has been made to identify relevant state statutes, no single listing can definitively list all statutes that may apply in any given situation. In addition, and as stated in the following important note, both federal and state laws are subject to change with virtually no notice, so any listing of laws necessarily must be viewed as a point of information only. Specific legal advice should be utilized in all instances before acting.

***Note: Caution in using this listing as a reference is imperative, as it necessarily refers to statutes in effect at the time of this seminar. Prior to taking action or adopting ordinances, it is imperative that the law be reviewed to ensure that the most current version of the statutory framework is being used.***

*RSA 4:45 – :47 Gubernatorial Emergency Management.* Although these statutes apply to state action, they might be considered as providing a basis for local action set forth in a local emergency management ordinance.

*RSA 21-P:34 – :48 Emergency Powers.* Local action in statewide emergency declared by governor are to be consistent with state directives/actions. In local emergency, local plan and organization control. [The most pertinent sections include: RSA 21-P:34, :39, :40, :41, :43, :44, :45.]

*RSA 31:1 Public Corporations.* This statute states that each town is a corporate and politic body. This rule also applies to other local government entities, including cities and school districts. To some extent, therefore, local governments will possess some degree of power to ensure their continued existence, as discussed in part III.

*RSA 31:39 General By-Law/Ordinance Powers.* This statute enables the legislative body of towns (and by extension cities) to adopt ordinances on numerous subjects that may relate to a public health emergency, including: collection, removal and destruction of waste; regulation of the operation of vehicles (governing boards also have powers to regulate the use of sidewalks, streets and commons under RSA 41:11 and 47:17); and “making and ordering prudential affairs.”

*RSA 31:43-a – :43-g Curfews.* These statutes authorize city councils and town meetings to adopt curfews but are intended for more general purposes. Curfew laws are reviewed very stringently by courts, and communities may be well-advised to consider use of emergency powers statutes, such as RSA 21-P, for imposition of pandemic related restrictions on public movement.

*RSA 105:13 Extended Police Authority.* Allows police chiefs to agree, in writing, to render or request assistance from other police agencies.

*RSA 106-C Emergency Police Assistance.* Emergencies as defined in this law include riots, floods, fires, hurricanes and the like, but presumably also could include a public health emergency. An important element of the law is that local government participation in inter-community police assistance is authorized by order of the county commissioners or by law or ordinance adopted by a municipality.

*RSA 108 Emergency Management Assistance Compact and Northeastern American/Canadian Emergency Management Assistance Compact.* Provides authority for mutual aid and for the state to cooperate with other states, the federal government, and Canada.

RSA 126-Q NH Vaccine Association. Created for the purpose of adopting operating plans for vaccination of children under the age of nineteen.

RSA 127 District Departments of Health. Effectively substitutes district health officer for local health officer with no change in powers, duties or responsibilities.

RSA 128 Health Officers. Statutory focus is on sanitation – not pandemic disease or public health emergency; however, authority to “enforce public health laws and rules” may prove useful in a public health emergency. This does not appear as broad authority for a local health officer to act under RSA 128 independent of state statute and rules.

RSA 141-C State Authority for Action Regarding Communicable Diseases. This chapter vests the state Commissioner of Health and Human Services with extensive powers to address communicable diseases. The role of local governments under this law is stated in RSA 141-C: 5 which says the health officers’ duties are to assist state Commissioner of HHS when requested to do so in establishment and maintenance of isolation and quarantine and enforce all rules adopted by HHS relative to isolation and quarantine.

It does not appear that health officers have independent authority to act under this chapter. However, the emergency preparedness statutes may vest authority for action in a similar vein to occur on a local level. Therefore, use of a local emergency management ordinance might authorize local action in a local emergency similar to that under RSA 141-C, provided that the local emergency management director is involved along with the local health officer and any other officials deemed appropriate.

RSA 141-G Notification of Emergency Response/Public Safety Workers After Exposure to Infectious Disease. Applies to infectious diseases that are listed in regulations adopted by HHS Commissioner.

RSA 147 Health Regulations and Sanitation. Similar focus as in RSA 128 – i.e., sanitation and premises. An attempt to expand powers under this statute may be subject to preemption by more specific emergency planning statutes. Yet, the ability to use health officers and their rule-making and investigatory/abatement powers, under any reading of the statute, does extend to dealing with public health nuisances. In any event, use of power to adopt regulations, particularly in conjunction with emergency planning and response functions under RSA 21-P and other laws, likely would improve chances of successful use of RSA 147 as opposed merely to trying to apply statutory language alone.

RSA 153-A:19 Emergency Medical Service Mutual Aid Agreements. Authorizes EMS systems to enter agreements for mutual aid.

RSA 154 Fire Official Authority. RSA 154:7 & :8 govern responsibilities for officials in charge at fires or “other” emergencies, which are undefined, but probably not intended for public health emergency related matters. RSA 154:24 –:30 and 154:30-a – :3-h guide the provision of fire services outside their normal jurisdiction and on a mutual aid basis.

RSA 436:36 Quarantine of Diseased Animals. State function vested in Commission of Agriculture.

RSA 642 Obstructing Governmental Operations. Part of the NH Criminal Code – includes various provisions regarding compliance and non-interference with government administration.

RSA 644 Breaches of the Peace and Related Offenses. Also a part of the NH Criminal Code – includes various provisions regarding disturbing the peace, riot, failure to obey lawful orders.

### ***Summary and Guidance.***

Until the Legislature enacts more specific guidance or authority, perhaps the best manner for local governments to prepare for and manage their affairs in a public health emergency situation would be to utilize a combination of the existing authorities including:

- Emergency Management Powers vested in them pursuant to RSA 21-P; and
- Emergency Intergovernmental Cooperation.

To exercise the emergency powers granted in RSA 21-P, local governments must have in place:

- a local emergency management plan; and
- a local emergency management organization.

To exercise local government emergency management powers in the face of a public health emergency (as opposed to local government carrying out state directives), the local emergency management plan should have components specifically addressing public health emergency preparation and response.

In addition, it is advisable to adopt a local emergency management ordinance that implements the powers granted by RSA 21-P. In the absence of such an ordinance, decision-making in an emergency can be uncertain, as the “Legislative Body” (e.g., Town Meeting, City Council) may not be able to convene and adopt an ordinance or otherwise take action in a timely manner. At a minimum, such an ordinance may lessen challenges to actions taken in the emergency.

### **Part II. Intergovernmental Agreements/Memoranda of Understandings.**

In the ordinary course of local government affairs, intergovernmental agreements (by which governmental units may agree to perform jointly various governmental functions) are authorized by RSA 53-A. The preferred manner of entering into such agreements is through authorization by the legislative body. In a town or school district whose legislative body is the meeting of voters, for example, the voters, acting at an annual or special meeting, would adopt a warrant article authorizing the governing board (board of selectmen or school board) to enter into an intergovernmental agreement under RSA 53-A for a specified purpose or purposes. The amount of detail in the article would vary on a case-by-case basis. Though somewhat cumbersome to create, these agreements benefit

from a fairly clear legislative statement of appropriate content and procedure that has been in existence since 1977.

In addition, emergency responders, including police and fire, may utilize their authority to enter mutual aid pacts. Police departments may exercise extraterritorial powers under RSA 105, but RSA chapter 106-C provides for emergency intercommunity police assistance that likely could include public health emergencies.

RSA 153-A:19 authorizes emergency medical service units to enter into mutual aid agreements, while RSA 154:24 – :30 and 154:30-a – :3-h guide the provision of fire services outside their normal jurisdiction and on a mutual aid basis.

Finally, some communities have banded together to form a public works mutual aid system. Those communities involved may benefit from joint efforts, particularly in natural disasters such as floods, snow events, or hurricanes. Consideration should be given as to how these joint public works agreements might be used in public health emergencies to provide for continuity of government and provision of services.

While the sharing of law enforcement, fire, and emergency medical service resources and authority can be of great assistance in an emergency, it must be remembered that this sharing authority does not expand authority, nor does it create new authority to act. To the extent, therefore, that additional authority to act in an emergency may be required, it may be more appropriate to rely on the powers established by, and granted to, local governments under the specific emergency planning statutes, including RSA 21-P.

### **PART III. Local Government Public Health Emergency Authority as a Function of Corporate Existence.**

One of the attributes of political subdivisions is their existence as a body both politic and corporate. (See RSA 31:1.) The New Hampshire Supreme Court has indicated that this statute is not intended to confer powers or duties beyond those conveyed by law, but it does confer powers implied from the general character and design of public corporations. Presumably, these implied powers should include actions necessary to preserve the integrity and functioning of the corporation in areas such as continuity of operations, communications, and personnel matters.

These inherent powers, together with the provisions of RSA 21-P:39 that permit actions in an emergency to combat a disaster, protect safety and health, and provide assistance to victims without regard to time-consuming procedure and formalities, should be construed to allow local government entities to take extraordinary actions to secure their ability to act. Those powers, though, cannot be presumed to be limitless. Instead, they are bounded in the first instance by constitutional limitations, such as rights of due process, protection of property, and the like. In addition, it is likely that the doctrine of preemption would be applied to those instances in which the legislature has acted or indicated an intent to act to the exclusion of local governmental action.

Applying these principles, one may conclude that attempts to designate substitutes for elected governing board members or statutory officers would not be proper, as the legislature has provided a means for declaring and filling vacancies. On the other hand, actions that seek to allow a board to act without a necessary quorum might be upheld, particularly if the action is taken with the intent to ratify action by a full board (or at least a quorum) as soon as practicable. In all likelihood, ratification would occur, but the use of a local emergency management plan or, better yet, a local emergency management ordinance to authorize such a procedure, could serve to insulate the procedure from later challenge.

Another example lies in the area of the location of governmental action. Once again, RSA 21-P:39 does provide a specific avenue for action so that a decision to meet outside the locality boundaries would be proper; but a decision to meet outside the state of New Hampshire would contravene the law.

In all likelihood, courts in New Hampshire can be expected to apply practical reasoning in reviewing local government actions in emergency response situations, including public health emergencies. Adopting an emergency management plan in accordance with RSA 21-P is one means of action that might facilitate more favorable court review. Another action, as noted above, would be the further step of adopting an emergency management ordinance.

#### **Part IV. Conclusion.**

The adoption of a local emergency management plan and ordinance will not serve as a magic bullet that will stop a public health incident or ensure that local government actions will be held valid. Certainly many powers to address public health emergencies already exist through the statutory measures identified in these materials. In addition, RSA 21-P, under the appropriate circumstances, can supply additional authority to act – provided the local government has adopted an emergency management plan and created an emergency management organization and both the plan and the organization can be utilized effectively to address the emergency that arises.

A further step that can be taken to prepare for the unexpected is to create an ordinance structure providing a basis for action, together with a measure of flexibility, designed to address the many emergency-related issues that local government undoubtedly will face.