



27th Annual Spring Planning & Zoning Conference

Welcome to the Planning Board Track!

The conference will begin shortly. Please mute your microphone and turn off camera.

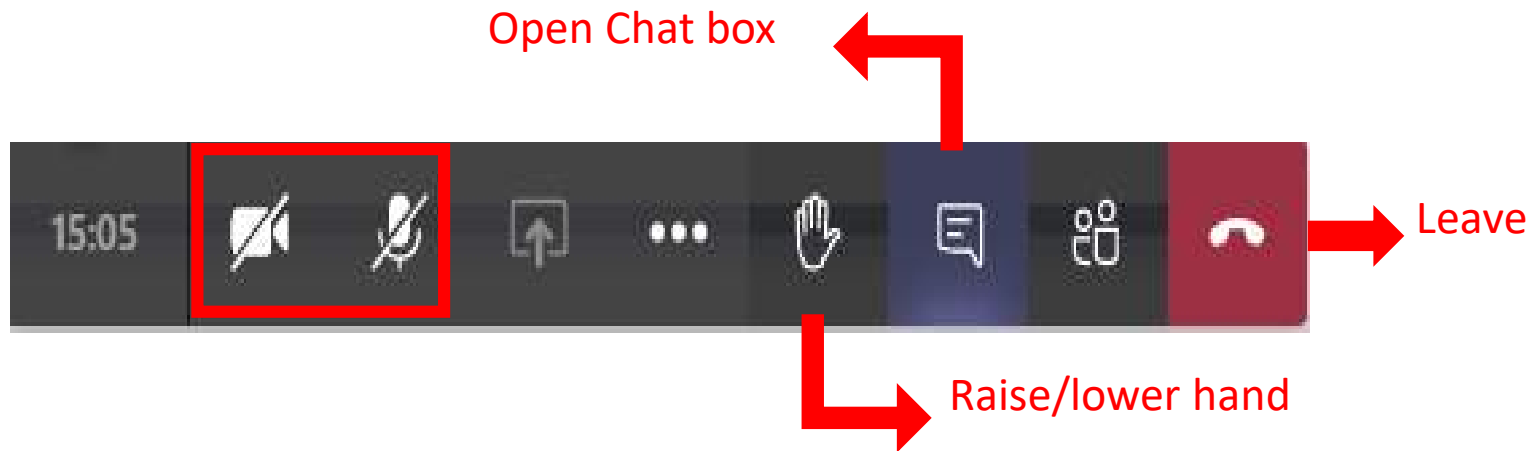
Check out OSI's Planning and Zoning Training website page for:

- Link to Conference page
- OSI's Planning Lunches at Noon (PLAN) monthly webinar series – schedule, slides, and recordings
- A short, anonymous online survey to gather feedback on webinars and conference

www.nh.gov/osi/planning/planning-training.htm

Conference Logistics

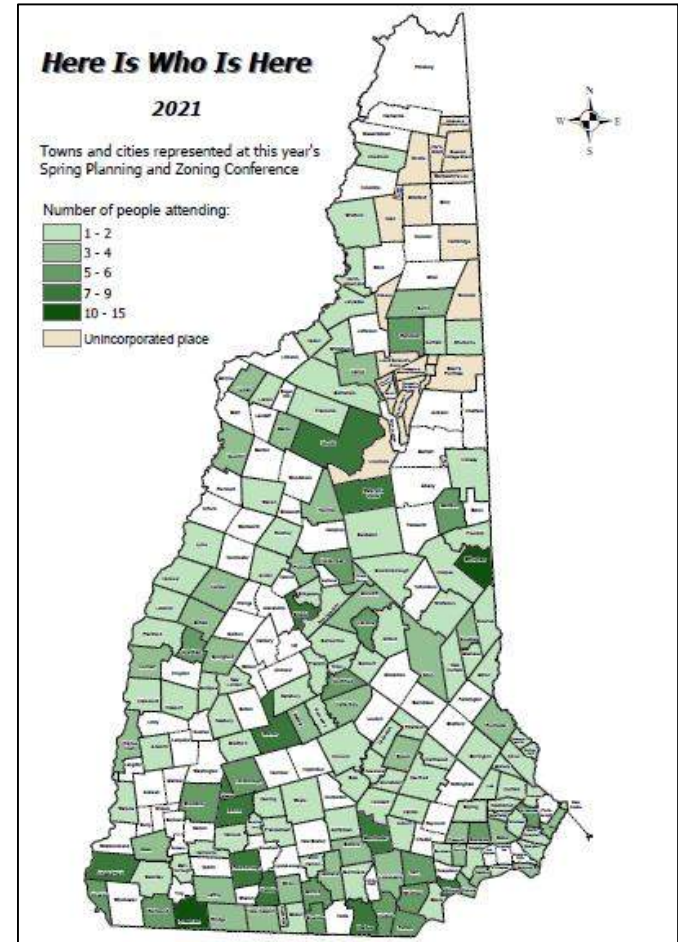
- Please be sure to **turn off** your camera and mute your microphone now.
- We will be **recording** the conference sessions. Any camera videos that are on may become part of the recording.



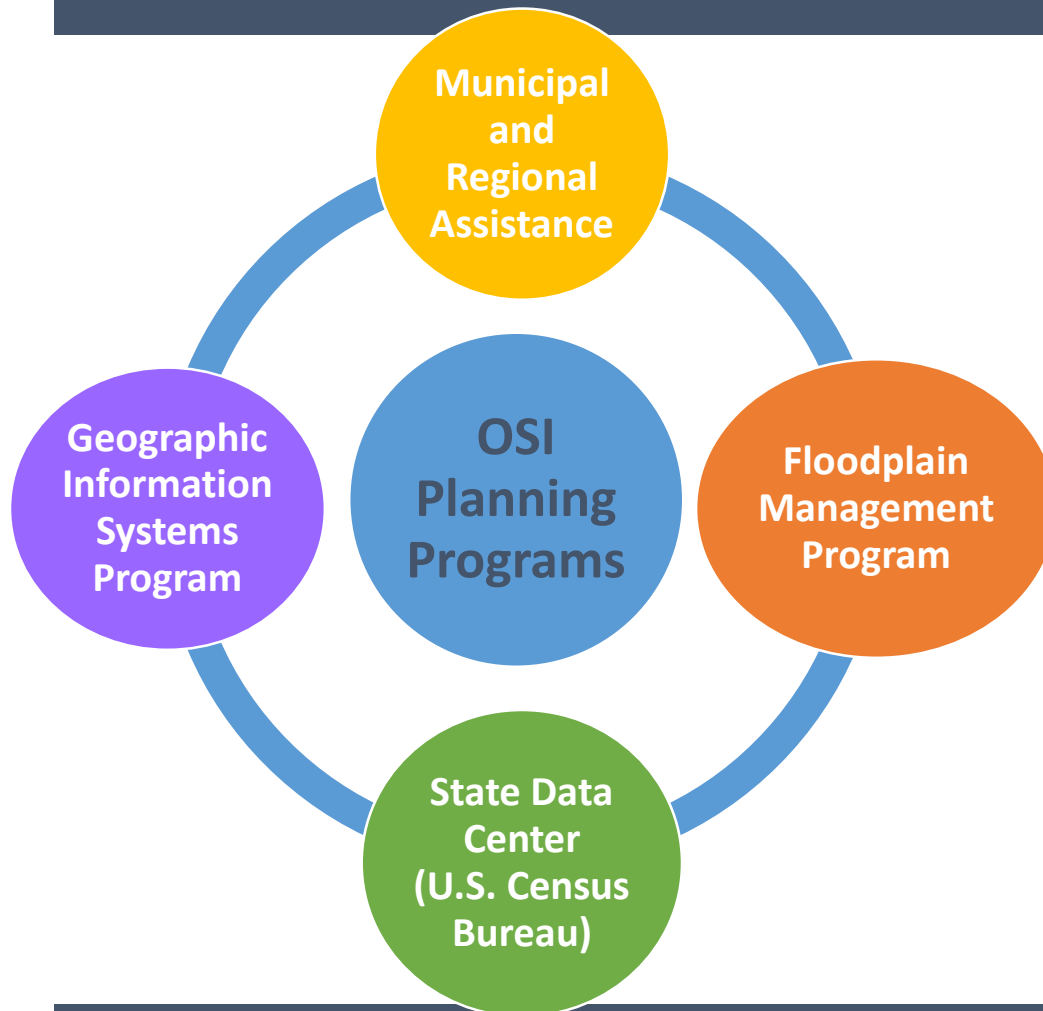
Welcome



- Moderator:
 - Jennifer Gilbert, Senior Planner at OSI
- Conference tracks:
 - Planning Board
 - Zoning Board
- All sessions will be recorded and available online



OSI Planning Division



Training
Data
Technical Assistance
Maps
Resources

Coordination

Planning Lunches at Noon (PLAN) Monthly Webinar Series

AVAILABLE NOW:

- Dec 2020 Municipal Land Use Regulations Survey Results
- Jan 2021 2019 NH Housing Supply Report
- Feb 2021 Digging into RSA 155-E – Earth Excavations Law
- March 2021 Regional Housing Initiatives Roundtable
- April 2021 Welcome to the Board: Intro to Land Use Boards

UPCOMING:

- May 20 Broadband for Your Community
- June 17 Technical Review Committees
- July 15 Meeting Mechanics

Registration info, slides, and recordings of all webinars available [online](#)

Floodplain Training

- Floodplain Management Basics:
 - June 8 - 10 to 11:30 am
 - To register: email Samara.Ebinger@osi.nh.gov
- Recordings Available:
 - Making Substantial Improvement Determinations
 - Making Substantial Damage Determinations
 - FEMA Flood Mapping Basics for NH Community Officials

Today's Agenda

| Time | Planning Board Track | Zoning Board Track |
|-------------------|--|--|
| 9:00 to 9:10 AM | Welcome and Introductory Remarks | |
| 9:10 to 10:30 AM | Planning Board Basics | Roles and Responsibilities of the Zoning Board |
| 10:30 to 10:40 AM | Break | |
| 10:40 to 12:00 PM | Roles and Responsibilities of the Planning Board | Zoning Board of Adjustment Decision Making Process |

OSI - Spring Planning & Zoning Conference



Planning Board Basics

Presented by:

Stephen Buckley, NHMA Legal Services Counsel

May 15, 2021

The Presenter



Stephen Buckley

*New Hampshire Municipal Association
Legal Services Counsel*



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Today's Presentation

Statutory Duties

Subdivisions & Site Plans, Master Plan, Workforce Housing, CIP, Zoning Amendments, Innovative Land Use, Streets, Driveways, Merged lots

Planning Board Procedures

Preliminary review, Applications, Timeline for Review, 3rd Party consultants, 2nd Applications, Public Hearing, Deliberations, Making the decision, Conditional approvals, Vesting, Superior Court Appeal, Developments of Regional Impact, Innovative Land Use Control

Planning Board - Statutory Duties



- ✓ Master Plan - RSA 674:2
- ✓ Capital Improvements Program 674:5
- ✓ Recommend Zoning Ordinance & Amendments 675:3
- ✓ Subdivision Regulation 674:36
- ✓ Site Plan Regulation 674:44
- ✓ Excavation Regulation 155-E:1 (III) (a)
- ✓ Driveway Regulation - 236:13

Subdivision & Site Plan Approval

SUBDIVISION:

- ✓ Require preliminary review of subdivisions.
- ✓ Approve plats and plans.
- ✓ Approval showing streets.
- ✓ Approval showing utility facilities & services.

SITE PLAN:

- ✓ Municipality must have zoning.
- ✓ Planning board has adopted subdivision regulations.
- ✓ Board may approve site plans for the *development or change or expansion of use* for nonresidential uses or for multi-family dwelling units (structures with > 2 dwelling units).

Master Plan:

RSA 674:1 - :4

Mandatory Section:

- “Vision” (goals and objectives): statements to “articulate the desires of the citizens,” including set of “guiding principles and priorities.”
- Land use: studies of population, economic activity, resources, shows existing conditions and proposed future land uses.
- Prerequisites for zoning ordinance, RSA 674:18.

Optional Sections: 14
optional elements

Workforce Housing Statute

RSA 674:58-:61

- ✓ Allow workforce housing in a majority of the land area zoned residential.
- ✓ Does municipality have its fair share of workforce housing?
- ✓ Housing for sale - affordable to a household with an income of no more than 100 percent of the median income for a 4-person household for County in which the housing is located.
- ✓ Rental housing - affordable to a household with an income of no more than 60 percent of the median income for a 3-person household for County in which the housing is located.

Capital Improvements Program

- ▶ Aid with budgeting decisions.
- ▶ Not a basis to deny subdivision application
Zukis v. Fitzwilliam, 135 N.H. 384 (1992).
- ▶ Prerequisite for:
 - ▶ Impact fees
 - ▶ Growth Management



Zoning Amendments

RSA 675:3

- ▶ Planning Board proposes initial zoning adoption.
- ▶ Planning Board & Select Board may propose amendments.
- ▶ At least one public hearing by Planning Board.
- ▶ Another hearing 14 days later if proposal substantively modified.
- ▶ Deliver final proposal to town clerk 5th Tuesday before town meeting.
- ▶ Petitioned Amendments RSA 675:4, Planning Board states approval or disapproval on ballot.

Innovative Land Use

RSA 674:21



- ▶ An innovative land use control when supported by the master plan.
- ▶ Administration through conditional or special use permits, by the planning board, board of selectmen, zoning board of adjustment, or such other person or board as the ordinance may designate.
- ▶ If planning board does not administer permits, planning board shall review prior to final consideration by the administrator.

Planning Board & Public Streets

- ▶ Approves Subdivision Roads 674:36, II (e)
- ▶ Approves Site Plan Roads RSA 674:44, II, (d) (e) (f)
- ▶ Establishes Road Construction Standards
- ▶ Establishes minimum completion before occupancy 676:12, V
- ▶ Imposes performance bonding, 674:36, III

Driveways – RSA 236:13



- **Planning Board authorized to approve driveway permits on town roads.**
- **Must adopt driveway regulations.**
- **Delegate permit issuance and enforcement to Road Agent or other designee.**
- **Continuing authority over any driveway even if no permit issued.**
- **Property owner can be ordered to fix driveway that is hazard to traveling public or threat to road integrity.**

Merged Lots – RSA 674:39-a

Merger of 2 or more *contiguous* preexisting approved or subdivided lots or parcels.

No public hearing or notice shall be required.

No new survey plat need be recorded.

Notice of the merger endorsed by the planning board recorded at registry of deeds.

If any lot is under a mortgage, lender must consent.

Off-site Exactions

RSA 674:21, V (j)



- ▶ No impact fee ordinance adoption necessary to impose exactions as condition of Planning Board approval.
- ▶ Improvements that are necessitated by a development located outside the project boundaries.
- ▶ Subject to rational nexus test.
- ▶ Limited to highway, drainage, and sewer and water upgrades pertinent to that development.



Planning Board Procedures



NHMA
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Formal Application, RSA 676:4, I

Completed application.

Regulations specify what is completed application.

Checklist can specify types of plans, studies, designs, etc. to minimize review and revisions.

Fees for costs & consultants' studies; detailed accounting. RSA 676:4-b

Application accepted by vote at meeting, with abutter and published notice.

Timeline for Decision, RSA 676:4, I



Preliminary Consultation No Set Time Limit



Application submitted 21 days before acceptance at meeting.



Notice to Abutters and public 10 days before meeting for plan acceptance.



Hold at least one public hearing and make decision within 65 days of plan acceptance.



Issue written decision within 5 business days.

Alternative Site Plan Approval and Review Procedures



- ▶ The town meeting or town or city council may authorize the planning board to delegate its site review powers for minor site plans to a committee of technically qualified administrators. RSA 674:43, III.
- ▶ Establish Technical Review Group to provide advice to planning board applicants on their proposed projects.
- ▶ City Council or planning board establish thresholds based on the size of a project or a tract below which site plan review shall not be required. RSA 674:43, IV

DEVELOPMENTS OF REGIONAL IMPACT DRI DECISION PROCESS – RSA 36:54 - :57



Is it a DRI? Use RSA 36:55.I-VI (may include but not limited to):

- Relative size or number of dwelling units as compared with existing stock.
- Proximity to the borders of a neighboring community.*
- Transportation networks.
- Anticipated emissions such as light, noise, smoke, odors, or particles.
- Proximity to aquifers or surface waters which transcend municipal boundaries.
- Shared facilities such as schools and solid waste disposal facilities

If voted NO, not a DRI, proceed with application

If voted YES, considered a DRI then:

- ✓ Stop reviewing application, continue acceptance to next meeting
- ✓ Notice RPC and abutting town by certified mail, send minutes
- ✓ Resume consideration at next meeting with RPC and abutting Towns deemed to be abutters

Acceptance Vesting

RSA 676:12, VI



No proposed subdivision or site plan review or zoning ordinance or amendment thereto shall affect a plat or application which has been the subject of notice by the planning board pursuant to RSA 676:4, I(d) so long as said plat or application was the subject of notice prior to the first legal notice of said change or amendment. The provisions of this paragraph shall also apply to proposals submitted to a planning board for design review pursuant to RSA 676:4, II(b), provided that a formal application is filed with the planning board within 12 months of the end of the design review process.



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Only One Bite of the Apple

Third Party Consultants – RSA 676:4-b



► May require applicant to pay for third party consultant review and construction monitoring.

► Cannot substantially duplicate same review at ZBA.



Public Hearing Procedures

- ▶ 676:4, I (e) hear from applicant, abutters, others with direct interest, and others as permitted by board.
- ▶ Impartially follow rules of procedure.
- ▶ Site visits are public meetings.
- ▶ Riggins Rules.



Conflicts of Interest



RSA 673:14 Disqualification of Member.

I. No member of a zoning board of adjustment, building code board of appeals, planning board, heritage commission, historic district commission, agricultural commission, or housing commission shall participate in deciding or shall sit upon the hearing of any question which the board is to decide in a judicial capacity if that member has a direct personal or pecuniary interest in the outcome which differs from the interest of other citizens, or if that member would be disqualified for any cause to act as a juror upon the trial of the same matter in any action at law.

Reasons for disqualification do not include exemption from service as a juror or knowledge of the facts involved gained in the performance of the member's official duties.

Case Study: W. Robert Foley, Trustee v. Enfield (2017)

- ▶ ZBA chair e-mailed a “list serve” asking, "Should the board members consider precedents when deciding their position on a case?" The chair received replies from municipal employees and zoning board members in other communities.
- ▶ The ZBA denied the rehearing request the day after the chair's e-mail on the ground that granting the requested variance would violate the spirit of the ordinance by promoting overcrowding.
- ▶ Applicant learned of email after he appealed to superior court, and argued that ex parte communications violated his right to a fair hearing and he might have asked for a recusal.
- ▶ The Court noted that plaintiff failed to appropriately preserve issue for appeal and concluded that the plaintiff failed to demonstrate prejudice as a result of the communications.

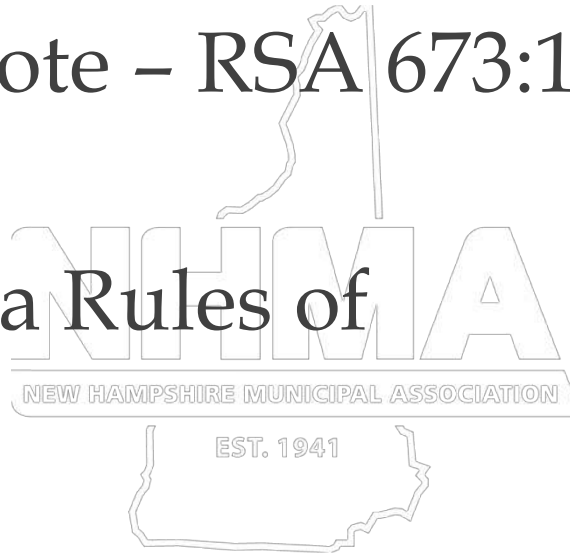
Case Study: Z-1 Express v. Manchester (2019)

- ▶ CUP application before planning board.
- ▶ After the public hearing portion, but before deliberations, two members voiced opposition to the project on a social media site established by residents opposing the project.
- ▶ One of the members who voiced opposition on social media was asked to recuse himself, he refused and he later voted to deny the application.
- ▶ Superior Court remanded the case after finding that the member's failure to enter into and participate in deliberations with an open mind "threaten[ed] the integrity of the deliberative process" undermining public trust in the overall function of the planning board.

Conflicts of Interest



- ▶ Advisory Vote – RSA 673:14, II.
- ▶ Social Media Rules of Procedure?
- ▶ Takeaway: Err on the Side of Caution!



Deliberation & Weighing the Evidence



- Get all necessary information before closing public hearing.
- Board can deliberate and vote at later meeting.
- Avoid ex parte contacts with parties or deliberation among members outside meeting.
- Board may rely on personal knowledge of the area; and not bound to accept conclusions of experts, *Vannah v. Bedford*, 111 N.H. 105 (1971), only if some evidence and explained in written decision. *Malachy Glen Associates, Inc. v. Chichester*, 155 N.H. 102 (2007)
- Cannot ignore uncontradicted expert testimony, unless board can adequately explain in written decision. *Condos East Corp. v. Conway*, 132 N.H. 431 (1989)

Dartmouth v. Hanover

New Hampshire Supreme Court

November 6, 2018

- ▶ Planning Boards cannot rely upon lay opinions and anecdotes refuted by uncontroverted expert evidence.
- ▶ Planning Boards cannot supplant the specific regulations and ordinances that control the site plan review process with their own personal feelings.

Written Notice of Decision



- ✓ Written decision is required, and written reasons in event of disapproval. RSA 676:3, I.
- ✓ RSA 676:4, I (c) (1) also requires decision to approve, approve with conditions or disapprove.
- ✓ Decision and meeting minutes must be on file for public inspection within 5 business days of vote. RSA 676:3, II.
- ✓ A tie vote is not a decision.

Conditional Approval

- ▶ Representations by applicant are not binding unless clearly made a condition of approval.
- ▶ Conditions must reasonably relate to ensuring compliance with relevant criteria.
- ▶ Standard conditions.
- ▶ Conditions precedent.
- ▶ Conditions subsequent.
- ▶ Compliance hearing.

“Grandfather Rights”



- Planning Board Regulations may define “substantial completion of improvements etc.” and “active and substantial development etc.” RSA 674:39, III.
- Failure to define “active and substantial development” awards 5-year exemption automatically.

Housing Appeals Board



- Went into effect July 1, 2020; Legislation to Repeal 2021.
- Three members, appointed by the supreme court.
- Will hear appeals of final decisions of municipal boards regarding “questions of housing and housing development.”
- Party has option of appealing to superior court or HAB; appealing to one waives right to appeal to the other.
- Hearing procedure is identical to procedure in superior court.
- Standard of review is identical to that in superior court.
- Board must hold hearing on the merits within 90 days after receipt of notice of appeal and must make decision within 60 days after hearing.
- Decisions may be appealed to N.H. Supreme Court.



Superior Court Appeal

RSA 677:15



*For attending our
Workshop!*

NHMA'S MISSION

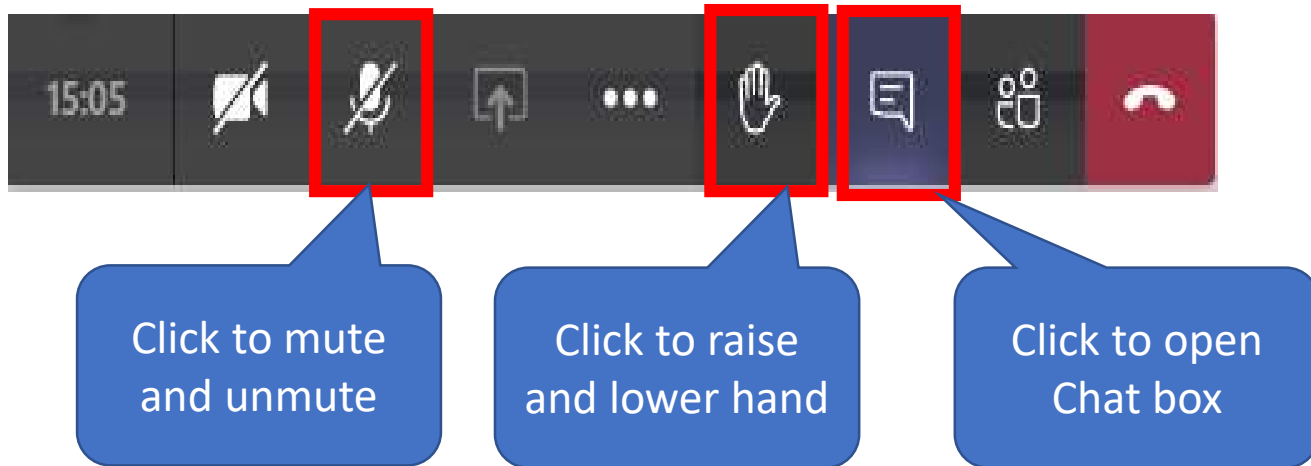
Through the collective power of cities and towns, NHMA promotes effective municipal government by providing education, training, advocacy and legal services.

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Question and Answer Session

- If you would like to ask a question, please either raise your hand and unmute yourself or type your question in the Chat box. If on the phone, lines have been unmuted.



Thank you!

- All Conference Session slides and recordings will be available next week
- Feedback Encouraged!
 - See chat box for link to brief survey, which also can be found at link below

[Click Here for Feedback Survey](#)

Short Break

Next Up:

10:40 A.M. - Roles and Responsibilities of the Planning Board