



## TOWN OF DURHAM

8 Newmarket Road  
Durham, NH 03824  
Tel: 603-868-5571  
Fax: 603-868-1858  
[www.ci.durham.nh.us](http://www.ci.durham.nh.us)

**6:30 PM**

**(91-A:2 I (b) CONSULTATION WITH LEGAL COUNSEL**

**NOTE: *This meeting is not open to the public***

**NOTICE: Although members of the Town Council will be meeting in the Council chambers, the Council meetings are still available for members of the public to participate via Zoom or in person.**

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## **AGENDA**

**DURHAM TOWN COUNCIL  
MONDAY, SEPTEMBER 13, 2021  
DURHAM TOWN HALL – COUNCIL CHAMBERS  
7:00 PM**

**NOTE: *The Town of Durham requires 48 hours notice if special communication aids are needed.***

- I. Call to Order**
- II. Approval of Agenda**
- III. Special Announcements**
- IV. Public Comments (\*) - Please state your name and address before speaking**
- V. Approval of Minutes - August 16, 2021**
- VI. Councilor and Town Administrator Roundtable**
- VII. Report from the UNH Student Senate External Affairs Chair or Designee**
- VIII. Unanimous Consent Agenda** (*Requires unanimous approval. Individual items may be removed by any councilor for separate discussion and vote*)
  - A. Shall the Town Council schedule a Public Hearing for Monday, September 27, 2021 on a resolution authorizing the acceptance and expenditure of \$1,705,708.44 in unanticipated revenue for Local Fiscal Recovery Funds (LFRF) from the State of New Hampshire under the American Rescue Plan Act of 2021 (ARP) associated with the COVID-19 pandemic?**

- B. Shall the Town Council, upon recommendation of the Administrator, award the bid and authorize the purchase of a 2022 GMC AT4 Yukon XL for the amount of \$64,432.00 with options for a vehicle trade-in at the time of delivery to be paid from Capital Fund account # 07-2005-701-36-000 and authorize the Administrator to sign all associated documents?
- C. Shall the Town Council authorize the Administrator to sign a contract in the amount of \$1,142,898 with Vanasse, Hangen and Brustlin Inc. (VHB) of Bedford, NH to provide Engineer Design Services for the Town of Durham Madbury Road Reconstruction Project subject to available funding?
- D. Shall the Town Council accept the Administrator's quarterly progress report (as of 8/30/2021) on the list of adopted 2021-22 Town Council Goals adopted April 19, 2021?

**IX. Committee Appointments - None**

**X. Presentation Item - None**

**XI. Unfinished Business**

- A. **PUBLIC HEARING AND ACTION** on the revised final proposal for competitive cable television Franchise Agreement between the Town of Durham and Atlantic Broadband (NH-ME), LLC
- B. **PUBLIC HEARING AND ACTION ON RESOLUTION #2021-10** authorizing the raising, appropriating, and expenditure of an additional \$120,831.00, including interest, within the FY 2021 Unassigned Fund Balance to fund property tax abatements for Alpha Gamma Rho, Gamma Mu Alumni Association, and NH Beta Housing, LLC fraternities for Tax Years 2018, 2019, and 2020?
- C. Continued discussion and possible action regarding the Mill Pond Dam over the Oyster River

**XII. New Business**

Other Business

**XIII. Nonpublic Session (if required)**

**XIV. Extended Councilor and Town Administrator Roundtable (if required)**

**XV. Adjourn (NLT 10:30 PM)**

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*(\*) The public comment portion of the Council meeting is to allow members of the public to address matters of public concern regarding town government for up to 5 minutes. Obscene, violent, disruptive, disorderly comments, or those likely to induce violence, disruption or disorder, are not permitted and will not be tolerated. Complaints regarding Town staff should be directed to the Administrator.*



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# **8A**

AGENDA ITEM: **DATE: September 13, 2021**

## COUNCIL COMMUNICATION

**INITIATED BY:** American Rescue Plan Act of 2021

**AGENDA ITEM:** SHALL THE TOWN COUNCIL SCHEDULE A PUBLIC HEARING FOR MONDAY, SEPTEMBER 27, 2021 ON A RESOLUTION AUTHORIZING THE ACCEPTANCE AND EXPENDITURE OF LOCAL FISCAL RECOVERY FUNDS (LFRF) FROM THE STATE OF NH UNDER THE FEDERAL AMERICAN RESCUE PLAN ACT OF 2021 IN AN AMOUNT UP TO \$1,705,709 AND AUTHORIZING THE ADMINISTRATOR TO SIGN AND SUBMIT ALL NECESSARY PAPERWORK ON BEHALF OF THE TOWN OF DURHAM?

**CC PREPARED BY:** Gail Jablonski, Business Manager

**PRESENTED BY:** Gail Jablonski, Business Manager

**AGENDA DESCRIPTION:**

Established by Section 603 of the American Rescue Plan Act (ARPA) funds were appropriated to offer aid to eligible county and city/town governments to respond to the COVID-19 emergency and bring back jobs.

The Town of Durham is eligible for up to \$1,705,709. This amount was determined through a formula based on the population of the municipality divided by the population of all municipalities within the state. The State will be distributing the funds in two payments. We received the first payment in August of 2021. The second payment is to be expected in August of 2022. Municipalities are required to have made a commitment to pay a third party based on a contract, grant, loan or through other arrangements no later than December 31, 2024. The funds must be actually spent no later than December 31, 2026.

The use of Local Fiscal Recovery Funds is intended to provide eligible local governments with a substantial infusion of resources to meet pandemic response needs and rebuild a stronger, and more equitable economy as the county recovers. Recipients may use these funds to:

- *Support public health expenditures:* For example, funding COVID-19 mitigation efforts, medical expenses, behavioral healthcare, and certain public health and safety staff.
- *Address negative economic impacts caused by the public health emergency,* included economic harms to workers, households, small businesses, impacted industries, and the public sector.
- *Replace lost public sector revenue,* using this funding to provide government services to the extent of the reduction in revenue experienced due to the pandemic.
- *Provide premium pay for essential workers,* offering additional support to those who have and will bear the greatest health risks because of their service in critical infrastructure sectors.
- *Invest in water, sewer and broadband infrastructure,* making necessary investments to improve access to clean drinking water, support vital wastewater and stormwater infrastructure, and to expand access to broadband internet.

After review and discussion of the various ways the funds can be used, we have determined that applying them to water, wastewater and stormwater infrastructure projects is of the most benefit. Richard Reine, Public Works Director has provided projects which he is recommending and are outlined on the following page. With the exception of the \$70,000 requested in 2021 for the Emerson Road Water Main survey, design and bidding the projects will be proposed through the 2022-2031 Capital Improvements Program during the normal budget process.

New Hampshire Revised Statutes Annotated (RSA) 31:95-b permits municipalities to authorize acceptance and expenditure of funds from the state, federal or other governmental unit, or a private source, which becomes available during the fiscal year if they first adopt an article authorizing this authority indefinitely until specific rescission of such authority. On July 12, 1999, the Town Council adopted Resolution #99-19 granting this authority to the Town Council. Once authorized, a grant in the amount of \$10,000 or more must be approved by the governing body at a public hearing, with notice of the hearing published in a newspaper of general circulation in the relevant municipality at least 7 days before the hearing is held.

Project Description	Proposed Timing of American Rescue Plan Expenditures			Subtotal
	2021	2022	2023	
Emerson Road Water Main - Survey, Design, Bidding	\$70,000			\$70,000
Emerson Road Water Main - Construction with Temp. Patch - <i>Roadway and sidewalk scheduled for 2023 - funded through Road Program</i>		\$430,000		\$430,000
Ross Road Culvert Construction ( <i>Survey, Design, Bidding funded through existing FY 2021 capital funding</i> )		\$250,000		\$250,000
Bennett Road Culverts/Drainage (3 Total) LaRoche Brook, Woodman Brook and Corset Brook - Survey, Design, Permitting, Bidding		\$150,000		\$150,000
Bennett Road Culverts/Drainage - Laroche Brook, Woodman Brook and Corset Brook - Construction			\$500,000	\$500,000
WWTP Odor Control Supplemental Construction Funding (total construction estimated at \$1.0-1.5M to be funded by existing (FY20/21) and proposed (FY22) capital)		\$100,000		\$100,000
Water Main/Drainage Replacement - Dennison to Woodman - Survey, Design, Bidding		\$70,000		\$70,000
Water Main/Drainage Replacement - Dennison to Woodman - Construction ( <i>will require supplemental funding</i> ) Roadway and Sidewalk Scheduled for 2024 - funded through 2024 Road Program			\$130,000	\$130,000
<b>Sub-total</b>	<b>\$70,000</b>	<b>\$1,000,000</b>	<b>\$630,000</b>	
<b>Total</b>				<b>\$1,700,000</b>

\*Any remaining funding due to underages to be used for TBD culverts and town water/wastewater system improvements.  
 Project timing may shift forward or out based on funding availability and resources.  
 All federal funding proposed to be expended by December 2024.

**LEGAL AUTHORITY:**

N/A

**LEGAL OPINION:**

N/A

**FINANCIAL DETAILS:**

\$1,705,709 in Local Fiscal Recovery Funds to be received from the State of New Hampshire under the American Rescue Plan Act of 2021.

**SUGGESTED ACTION OR RECOMMENDATIONS:**

**MOTION:**

*The Durham Town Council does hereby, upon recommendation of the Administrator, schedule a Public Hearing for Monday, September 27, 2021 on a resolution authorizing the acceptance and expenditure of Local Fiscal Recovery Funds (LFRF) from the State of NH under the Federal American Rescue Plan Act of 2021 in an amount up to \$1,705,709 and authorizing the Administrator to sign and submit all necessary paperwork on behalf of the Town of Durham.*

## **RESOLUTION #2021-XX OF DURHAM, NEW HAMPSHIRE**

**AUTHORIZING THE ACCEPTANCE AND EXPENDITURE OF LOCAL FISCAL RECOVERY FUNDS (LFRF) FROM THE STATE UNDER THE FEDERAL AMERICAN RESCUE PLAN ACT OF 2021 (ARPA) IN AN AMOUNT UP TO \$1,705,709 AND AUTHORIZING THE ADMINISTRATOR TO SIGN AND SUBMIT ALL NECESSARY PAPERWORK**

**WHEREAS**, the Town of Durham submitted an application dated July 14, 2021 to the Governor's Office for Emergency Relief & Recovery (GOFERR) for American Rescue Plan Act Funds; and

**WHEREAS**, on August 2, 2021 Durham was informed that it had been allocated up to \$1,705,709; and

**WHEREAS**, eligible uses of these funds include the support of public health expenditures; address negative economic impact caused by the public health emergency, replace lost public sector revenue, provide premium pay for essential workers and/or investing in water, sewer, and broadband infrastructure; and

**WHEREAS**, the Town has determined these funds will be used for water, sewer and infrastructure improvements throughout the Town; and

**WHEREAS**, New Hampshire Revised Statutes Annotated (RSA) 31:95-b permits municipalities to authorize acceptance and expenditure of funds from the state, federal or other governmental unit, or a private source, which becomes available during the fiscal year if they first adopt an article authorizing this authority indefinitely until specific rescission of such authority; and

**WHEREAS**, Resolution #99-19 adopting the provisions of RSA 31:95-b authorizing the Town Council to apply for, accept, and expend unanticipated funds from a Federal, state, or other governmental unit or a private source which becomes available during the Fiscal Year; and

**WHEREAS**, Council approval is required for the acceptance and expenditure of these funds; and

**WHEREAS**, RSA 31:95-b III(a) requires that a Public Hearing be held on unanticipated funds in excess of \$10,000; and

**WHEREAS**, on \_\_\_\_\_, a duly posted and published Public Hearing was held by the Durham Town Council on the \$1,705,709 LRF monies in accordance with RSA 31:95-b;

**NOW, THEREFORE, BE IT RESOLVED**, that the Durham Town Council, the governing and legislative body of the Town of Durham, New Hampshire does hereby approve **Resolution #2021-XX** authorizing the acceptance and expenditure of Local Fiscal Recovery Funds from the State of NH under the American Rescue Plan Act of 2021 in an amount up to \$1,705,709 and authorizes the Administrator to sign and submit appropriate paperwork on behalf of the Town of Durham.

**PASSED AND ADOPTED** this \_\_\_\_\_ day of \_\_\_\_\_, 2021 by a majority vote of the Durham Town Council with \_\_\_\_\_ affirmative votes, \_\_\_\_\_ negative votes, and \_\_\_\_\_ abstentions.

\_\_\_\_\_  
Katherine Marple, Chair  
Durham Town Council

**ATTEST:**

\_\_\_\_\_  
Lorrie Pitt, Town Clerk-Tax Collector





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# **8B**

**AGENDA ITEM:**  
**DATE: September 13, 2021**

## COUNCIL COMMUNICATION

**INITIATED BY:** David F. Emanuel, Fire Chief

**AGENDA ITEM:** SHALL THE TOWN COUNCIL, UPON RECOMMENDATION OF THE ADMINISTRATOR, AWARD THE BID AND AUTHORIZE THE PURCHASE OF A 2022 GMC AT4 YUKON XL FOR THE AMOUNT OF \$64,432.00 WITH OPTIONS FOR A VEHICLE TRADE-IN AT THE TIME OF DELIVERY TO BE PAID FROM CAPITAL FUND ACCOUNT # 07-2005-701-36-000 AND AUTHORIZE THE ADMINISTRATOR TO SIGN ALL ASSOCIATED DOCUMENTS?

**CC PREPARED BY:** David F. Emanuel, Fire Chief

**PRESENTED BY:** David F. Emanuel, Fire Chief

**AGENDA DESCRIPTION:**

In accordance with the Town of Durham Approved 2020 Capital Improvements Program, the Town Council authorized \$70,000 for the purchase of a staff vehicle to replace the Fire Department's 2009 Chevrolet Tahoe (identified as the Deputy Chief Vehicle, Car 3) with a comparable vehicle.

Holloway Buick - GMC - Cadillac in Portsmouth, NH provided a municipal pricing proposal to the Town of Durham on September 2, 2021 for a 2022 GMC AT4 Yukon XL at the price of \$64,432.00 with options for a vehicle trade in at the time of delivery.

The Fire Department seeks Council authorization to expend \$64,432.00 of the allocated CIP funding to purchase the sport utility vehicle (SUV) through the State of New Hampshire Municipal Purchasing Program.

**LEGAL AUTHORITY:**

Article 4-20 of the Administrative Code of the Town of Durham requires all purchases or contracts in excess of \$55,000.00 shall require Town Council approval by affirmative vote.

Re: Request Town Council Authorization to Purchase Fire Department Staff Vehicle

Purchases made through existing State of New Hampshire or other state/ government contracts, Strafford County or Oyster River School District contracts shall be deemed to meet the bid requirements of the above paragraphs.

**LEGAL OPINION:**

N/A

**FINANCIAL DETAILS:**

\$70,000 was approved in the FY 2020 Capital Improvement Plan.

**SUGGESTED ACTION OR RECOMMENDATIONS:**

**MOTION:**

*The Durham Town Council does hereby, upon recommendation of the Administrator, award the bid and authorizes the purchase of a 2022 GMC AT4 Yukon XL at in the amount of \$64,432.00 with options for a vehicle trade-in at the time of delivery to be paid from Capital Fund account # 07-2005-701-36-000 and authorizes the Administrator to sign all associated documents.*



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# **8C**

AGENDA ITEM:

DATE: September 13, 2021

## COUNCIL COMMUNICATION

**INITIATED BY:** Richard Reine, Public Works Director

**AGENDA ITEM:** SHALL THE TOWN COUNCIL AUTHORIZE THE ADMINISTRATOR TO SIGN A CONTRACT IN THE AMOUNT OF \$1,142,898 WITH VANASSE, HANGEN AND BRUSTLIN INC. (VHB) OF BEDFORD, NH TO PROVIDE ENGINEERING DESIGN SERVICES FOR THE TOWN OF DURHAM, MADBURY ROAD RECONSTRUCTION PROJECT, SUBJECT TO AVAILABLE FUNDING ?

**CC PREPARED BY:** Richard Reine, Public Works Director  
April Talon, PE, Town Engineer

**PRESENTED BY:** Richard Reine, Public Works Director

### **AGENDA DESCRIPTION:**

This request for approval to award a contract to Vanasse Hangen and Brustlin, Inc. (VHB) in the amount of \$1,142,898 will allow the Town to begin the design process for construction improvements to the Madbury Road corridor as well as additional associated critical infrastructure projects. The design process will involve the traditional steps included within a roadway and infrastructure design scope including data collection, alternatives analysis, public involvement, conceptual and preliminary design, permitting, final design and right-of-way. Accordingly, the project is structured to include the following development phases:

- Phase 1: Engineering Study (Alternatives Analysis and 30% Design)
- Phase 2: Preliminary Design (60% Design)
- Phase 3: Final Design and Bidding (90% and 100% Design)
- Phase 4: Construction Engineering and Inspection Services (Not in Contract)

The engineering consultant selection process began when Durham Public Works advertised a Request for Qualifications (RFQ) for Engineering Design Services to complete the Madbury Road Reconstruction Project, along with additional roadway, drainage and utility projects. A qualifications-based selection process was used that scored each firm which submitted qualification packages independently, relative to specific criteria. Each of these firms were interviewed in March 2021 by a panel comprised of Town Council Chair, Katherine Marple, Public Works Director, Rich

Reine and Town Engineer April Talon. Following these interviews, the panel reached consensus that VHB was the most advantageous firm to enter into scope and fee negotiations with.

The Madbury Road project limits include the main corridor which is approximately 6,500 feet in length connecting Main Street in downtown Durham with US Route 4 and Pendexter Road. Although the roadway is considered rural in character, with densely populated abutting homes, the roadway serves as a major corridor in Durham with traffic counts exceeding 5,600 vehicles per day (VPD). Madbury Road provides pedestrian and transit access to the public and UNH students along with middle school aged walkers attending the Oyster River Middle School, located just one block away on Coe Drive, and serving the students of Durham, Madbury, and Lee.

Madbury Road was transferred to Town ownership from the State of New Hampshire when Route 4 was upgraded many years ago. The roadway was last paved in 2009 at which time it received an overlay treatment. Currently the roadway is in very poor condition with significant pavement raveling, delamination, longitudinal and alligator cracking, rutting, settlement, and road base failure. The sidewalks and curb ramps are non-compliant relative to ADA requirements and curb reveal is minimal or non-existent in some areas creating an unpleasant and precarious experience for pedestrians and cyclists. Traffic calming measures have been installed, which include elevated speed tables, and have shown to be effective in slowing traffic, but this approach has resulted in other perceived negative consequences. The stormwater system is undersized with drainage structures and drainage pipeline in an excessively deteriorated condition. Water main replacement along Madbury Road (from Garrison Ave to US Route 4), is also necessary based on pipe age and watermain break history and sewer rehabilitation has been identified in select areas. Due to the current condition of the roadway and sidewalk infrastructure along Madbury Road, along with anticipated impacts from the utility replacement project, a complete roadway and sidewalk reconstruction will be required.

The timing of this local infrastructure project will align nicely with the proposed NHDOT project No. 42523, US Route 4 at Madbury Road Safety Improvements. This state project is currently in the preliminary design phase with project limits extending approximately 1,000 feet from the US Route 4 at Madbury Road intersection along all four approaches.

The Madbury Road design is proposed to take a “Complete Streets” approach evaluating and constructing multi-modal transportation improvements where possible, including traffic calming and pedestrian and bicycle accommodations. The project will include a sustainable environmental approach to construction of public infrastructure, and the design will incorporate low impact development stormwater features, and environmentally conscious construction techniques and materials. In

addition, the project scope includes a robust public involvement component to ensure all stakeholder's perspectives are considered within the design and incorporated where possible. The Town is seeking TAP and other funding for eligible project components which will include sidewalks, ADA compliant ramps and crossings, improved signalization, lighting, pavement markings, traffic calming, and pedestrian and cyclist accommodations. An initial step in the public outreach process will include an early public outreach meeting to gather concerns and suggestions from the public around design considerations.

In July 2021, Durham Public Works and VHB conducted a conditions assessment of five culverts as part of the drainage master plan development and identified the need for extensive construction improvements at all locations. The design of these improvements to four of these stormwater culverts is included within this scope at the following locations and as noted on the location maps below within and outside the Madbury Road project area. The proximity of these culverts to the main Madbury Road project area allows for design and permitting efficiencies while realizing cost savings. Inclusion of the culvert rehabilitation scope will also expedite these much-needed drainage system construction improvements before failure occurs.

- Littlehale Creek passing under Madbury Road and Edgewood Road
- Pettee Brook passing under Edgewood Road and Madbury Road
- Ellison Brook under Ross Road (*included within a future separate contract and scope*)



Culvert Locations Map

Issues identified include fractured, shifting, and failing stones and pipe, blocked inlets and outlets, failing headwalls and slopes, spalling concrete with exposed rebar and heavily corroded, collapsed pipe and undermined headwalls. Photographs illustrating these conditions encountered during the inspections are shown below.

*Madbury Road over Pettee Brook Inlet - Spalled Top Slab with Exposed Reinforcing Steel*





*Collapsed Pipe at Ross Road over Ellison Brook Culvert Outlet*

*Snapped Stone at Outlet headwall – (Left) and Fallen Stones from Sidewall and Ceiling (Right)  
Littlehale Brook at Edgewood Road Stone Box Culvert*



Finally, the project is planned to take a phased construction approach over a minimum of 2.5 construction seasons with culvert and utility improvements planned for 2023 followed by roadway, sidewalk and streetscape improvements in 2024. Design efforts are scheduled to commence immediately following contract execution. A preliminary design and permitting schedule is shown below.

This schedule does not include time for unexpected delays due to permitting, right-of-way coordination, right of access permitting, or for any other reason, including delays by third parties such as NHDOT, NHDES, or utility companies. Specific estimated interim dates include:

- Notice to Proceed September 2021
- Madbury Road Field Survey Complete November 2021
- Engineering Study Phase (30%) (Entire Project) February 2022

Madbury Road Utility Contract:

- Preliminary Plans Submission (60%) April 2022
- Final Plans Submission (90%) July 2022
- 100% plans and Bid Documents Complete for advertising September 2022

Madbury Road Roadway/Streetscape Contract:

- Preliminary Plans (60%) & NEPA Documentation (if required) May 2022
- NEPA Approved (as required) August 2022
- Wetlands Permits Approved September 2022
- Final Plans Submission (90%) November 2022
- 100% plans and Bid Documents Complete for advertising February 2023

Following each phase of design (study phase, preliminary and final design), cost estimates will be developed based on quantities and current bid pricing that will allow Durham Public Works to develop a comprehensive construction cost estimate and request for funding during the fiscal year 2023 and 2024 budget cycles.

**LEGAL AUTHORITY:**

Article VI, Section 4-20 of the Administrative Code of the Town of Durham states: Professional services contracts (architecture, engineering, construction management, risk management, financial and auditing and other professional services or consulting work) of thirty thousand (\$30,000) dollars or more may be entered into after receiving proposals from various interested firms, evaluating those proposals and anticipated quality of service to be rendered, and Town Administrator recommendation to and approval by the Town Council. Such services of less than fifteen thousand (\$10,000) dollars may be procured in a manner deemed responsible and prudent by the Town Administrator.

**LEGAL OPINION:**

N/A

**FINANCIAL DETAILS:**

Funding sources:

PROJECT	ACCOUNT	BUDGETED	EXPENDED/ ENCUMBERED TO DATE	REQUESTED	BALANCE
Madbury Road Water Line Replacement	07-2122-221-36-000	\$500,000	\$0	\$500,000	\$0



Design					
Madbury Roadway, Sidewalk, Drainage Design	07-2190- 801-36-000	\$640,000	\$17,102	\$622,898	\$0
Madbury Road Booster Pump Station	07-1882- 221-36-000	\$20,000	\$0	\$20,000	\$0
TOTAL REQUESTED				\$1,142,898	

**SUGGESTED ACTION OR RECOMMENDATIONS:**

**MOTION:**

*The Durham Town Council does hereby authorize the Administrator to sign a contract in the amount of \$1,142,898 with Vanasse, Hangen and Brustlin Inc. (VHB) of Bedford, NH to provide engineering design services for the Town of Durham Madbury Road Reconstruction Project, with the monies to come from Account #07-2122-221-36-000, Account #07-2190-801-36-000 and Account #07-1882-221-36-000.*



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# **8D**

AGENDA ITEM:

DATE: September 13, 2021

## COUNCIL COMMUNICATION

**INITIATED BY:** Todd I. Selig, Administrator

**AGENDA ITEM:** SHALL THE TOWN COUNCIL ACCEPT THE ADMINISTRATOR'S QUARTERLY PROGRESS REPORT (AS OF 8/30/2021) ON THE LIST OF APPROVED 2021/22 TOWN COUNCIL GOALS ADOPTED APRIL 19, 2021?

**CC PREPARED BY:** Jennie Berry, Administrative Assistant

**CC PRESENTED BY:** Todd I. Selig, Administrator

**AGENDA DESCRIPTION:**

On Monday, April 19, 2021, the Council adopted its goals for 2021/22. In order to measure the progress of the goals adopted by Council, the Administrator believes it is important to provide the Council with periodic status/progress reports.

Attached for the Council's information is an updated progress report prepared by the Administrator which outlines the status of each of the goals as of August 30, 2021 adopted in April 2021.

**LEGAL AUTHORITY:**

N/A

**LEGAL OPINION:**

N/A

**FINANCIAL DETAILS:**

N/A

**SUGGESTED ACTION OR RECOMMENDATIONS:**

No formal motion is required. Review and discuss the progress report of the 2021/22 Town Council goals updated by the Administrator and provide direction, if needed.



**2021-2022 Council Goals \***  
**Adopted April 19, 2021**  
**Quarterly Update – August 30, 2021**

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**Note: These goals are intended to convey 1-3 year time horizon.**

### **Core Values**

- Embrace openness in the transaction of public business while conducting Town affairs in a manner that is just and best demonstrates a genuine respect for different ideas, opinions, and perspectives.
  1. Inform Councilors of Right to Know Law rules regarding email use and electronic communications shortly following March election. **COMPLETE**
  2. Hold orientation for incoming Councilors following 2nd Tuesday in March. **COMPLETE**
  3. Hold orientation for new board chairs/officers/interested members on RSA 91-A and good board practices. Due to Covid-19 we recirculated video of past orientation session. **CONSIDERED COMPLETE**
  4. Hold orientation session for public and staff on Right to Know Law annually. Reaching out to Town Counsel Laura Spector to organize for this fall. **We're working to set up a forum in Durham for fall 2021. Ongoing.**
  5. Production of weekly "Friday Updates" & use of various forms of social media (Facebook/Twitter) to communicate effectively with the public. We have over 3,400 active subscribers. **Ongoing.**
  6. Air public meetings & events on DCAT as widely as possible during the pandemic. DCAT staff has really stepped up here and have provided state of the art technology allowing for the use of Zoom as an option now that board meetings are back to in-person session. **Ongoing.**
  7. Share Council goals with all boards and commissions, the public via the "Friday Updates," and post in Council chambers. **COMPLETE**
  8. Councilors assigned to boards provide update at each Council/board meeting as needs require. **Ongoing.**
  9. Human Rights Commission studying the topic of reparations and how to celebrate the new national holiday called Juneteenth. **Ongoing.**
  10. Working to resolve outstanding abatement appeals with utilities (Consolidated Communications, Unitil, Eversource, fraternities) to ensure equity in assessments – Unitil & Eversource resolved. Consolidated & fraternity BTLA cases to be addressed by Council in August. **All of these classes of appeals have demanded significant time in 2020/2021. The last grouping and fraternity appeals have been resolved and are scheduled to be resolved by Council on Sept. 13, 2021 meeting. Ongoing.**
  11. Developed Bi-Weekly DPW Director's report for Town Administrator providing rolling project and program updates to share with the Council/community. **Ongoing.**

- Honesty and integrity.
- Excellence in all endeavors.
  1. Successfully transitioned to new leadership at DPW & DPD upon retirement of several long-time senior staff members. **COMPLETE.**
  2. DFD has instituted a new Cancer Risk Reduction initiative to protect staff after a fire. **COMPLETE.**
  3. Following a fall 2020 public forum, DFD working to update the department’s strategic plan. **Ongoing.**
  4. Staff is continuing to do their best to maintain operations despite many staffing challenges. Examples: The P&R Director needs additional support/staffing; with Master Patrol Officer Holly Malasky’s retirement in July 2021 we will have 2 police officer vacancies (out of 21 total officers); two fire inspector vacancies in the Fire Prevention Bureau (currently advertising for an asst. fire marshal in lieu of one inspector -- second inspector not budgeted in 2021); the need for a training/safety officer at DFD (not budgeted) and additional staffing coverage for the Captains; have been actively hiring/interviewing for a GIS vacancy (just filled in end of August 2021); the need for a second IT staffer (not budgeted) to keep up with ongoing requests for service across all departments; second budgeted (asst.) engineer at DPW (currently advertising/interviewing) – first round did not result in a hiring; approx. 3 full time line position vacancies at DPW; contracting out some buildings & grounds maintenance due to inability to hire summer help. **Ongoing.**
  5. Development of GIS tax map base layer and orthographic imagery in Assessing Office using contractor Cartographic Associates is well into the development process. We expect initial delivery of draft layer shortly with public hearings scheduled for fall 2021. **Ongoing.**

### ***Standards of Performance***

**Continue taking steps as needed locally to respond to the COVID-19 pandemic,** including a multitude of potential impacts to include public health, social economic, budgetary, personnel, and more.

The pandemic has been a primary focus of Durham municipal operations since March 2020. Efforts have focused on: A) Continuity of operations & ongoing operational modifications during *the unending* ebb and flow of the pandemic; B) Safety/health of staff; C) Safety/well-being of community members; D) Financial impacts for taxpayers and on Town operations – maximizing opportunities to attract eligible Federal stimulus monies for Durham; E) Coordination with State/Federal Ops/Governor’s Office; F) Communication with community; G) Pandemic impact on downtown businesses and associated business practice modifications to support them; H) UNH Reopening Efforts (the Sept. 2021 fall opening has been a success); I) Remaining up to date on latest information/science/practices/postings; J) Public meeting continuity as needed (in-person & Zoom); K) Facial coverings ordinance development, implementation, and 61-day cycle readoptions (sunset as of 6/21), encouraging CDC guidelines within municipal buildings as of September 1, 2021. **Ongoing.**

**Finalize the Update of Durham’s Emergency Management Plan (EMP) and the Continuity of Operations Plan (COOP).**

The EMP is basically complete. COOP Plan in draft form, has been reviewed by staff, and was executed in mid-August. We await delivery of hard copies from our contractor (M.A.P.S) at Town Hall – expected September 2021. Due to a lot of effort, the process was in fact completed by the end of August 2021 per state grant requirements. **Ongoing.**

**Pursue long-term economic and environmental sustainability and resiliency,** anticipating the community’s and the region’s future needs by considering multiple elements including society, ecology, economics, transportation, agriculture, food and drinking water, and energy resources, specifically taking into account existing and predicted impacts of climate change.

1. Grant application via SRPC to fund/develop a Climate Change chapter of the Master Plan secured. Kickoff meeting completed in June 2020, consultants began to work with Durham Leadership Team and other identified board reps. in summer/fall/winter 2020. Work continues into 2021. Grant extended due to Pandemic impacts. Integrating in with Global Covenant of Mayors for Climate Action Commitment. **Ongoing**
2. Working with scientific partners at UNH and staff at SRPC on \$75,000 principal forgiveness loan Durham has secured from state to evaluate impact of sea level rise on freshwater resources along coastal areas within the community. **Ongoing.**
3. DPMMA (Durham Professional Middle Manager Agreement) and AFSCME (Public Works) contract negotiations for a successor bargaining agreements. AFSCME ratified in early 2020. DPMMA ratified in October 2020. DPFFA negotiations have reached tentative agreement as of 7/23/21. Finalizing DPFFA tentative agreement language with ratification scheduled for September 2021. DPOA (Durham Police Officers) CBA negotiations to commence fall 2021. Contract negotiations are an important, yet time consuming process that largely occurs quietly in the background of other ops – but with significant financial implications for the community, the effective operation of our departments, and the fair treatment of Durham’s valued staff members. **Ongoing.**
4. Continue with Traffic Safety Committee involvement on matters concerning residents’ questions, problems perceived and/or anticipated with recommendation to the Administrator. Meetings occur as needed. **Ongoing.**
5. We closed on the Orchard Drive Woods/Stevens Woods parcel with the ORCSD in October 2019. We closed in December 2019 on extinguishing the ghost easement by working with Stevens family heirs/assigns. We secured an \$80,000 Recreation Trails Grant through the assistance of resident Dennis Meadows, which ran through 12/31/20. Contract award to Hansen Bridge Completed – Construction now complete with formal dedication of the Kenny Rotner pedestrian bridge occurring on August 24, 202. The new bridge span now in place. Final fencing installation on Thompson Road side of bridge remains outstanding. **Ongoing.**
6. Scenic Road Tree Cutting Modification – Staff proposed modification to language to incorporate an administrative process to allow any tree on a designated scenic road which is determined to be dead or in poor condition and significantly declining or to present an imminent hazard to life or property to be removed without further review where such determination is made by the Durham Tree Warden in consultation with the

Town Administrator and a qualified arborist or forester. Approved by the Council in late-2020. **COMPLETE**

7. A solar ordinance to more strictly regulate the placement of solar panels due to aesthetic concerns is currently tabled before the Town Council. Councilor Lawson discussed extensive revisions with illustrated examples with Energy Committee in October 2020 and in early summer 2021. An update presentation to the Council on the status of the effort was made in summer 2021. **Ongoing.**
  8. DPW began development of Standard Details for drainage, roadway, sidewalk and utility infrastructure to provide consistent design standards and guidance for new development and redevelopment and are on track for having the standard details completed in 4th quarter of 2021. **Ongoing.**
  9. Began development of Drainage Connection Policy establishing standards and requirements for connection to Town's stormwater conveyance and treatment systems. Estimate the drainage connection policy is at 75% completion or greater. It is currently being reviewed by a few engineering firms that work in Durham along with our proposed road and drainage standards and general provisions to determine if they identify any fatal flaws before we complete and adopt. (MS4 System). **Ongoing.**
  10. DPW implemented StreetScan town-wide road and sidewalk evaluation and management tool to further improve strategy and approach around roadway construction alternatives and project prioritization. In addition, implemented Geotechnical evaluation program for candidate roadways planned for construction in 2022 to ensure proper roadway repair treatment is selected. Both measures will allow for a more scientific and we believe efficient approach to evaluating roadway treatments. Integrating into CIP plan for road program. **COMPLETE.**
  11. Submitted Year 3 Annual NPDES MS4 Stormwater Annual report to meet Federal compliance requirements for MS4 stormwater collection and treatment systems. **COMPLETE.**
  12. Coordinated with Riverwoods Engineering consultant, Altus Engineers, for review, submittal, and approval by NHDOT of Dover Road sidewalk extension project. Currently under construction. **Ongoing.**
  13. Coordinated with NHDOT for review and input on Route 4 at Route 108 Westbound ramp and intersection improvements including addition of signalized intersection, crosswalks, and curb ramps. Initial construction has begun as of June 2021. **Ongoing.**
  14. Completed emergency wetland authorization and construction improvements of failed culvert pipe on Bennett Road. NHDES wetland permitting changes in process requirements had caused delays. **COMPLETE.**
- Evaluate how to market Durham as a destination.  
While we made some very minor inroads here in 2019/2020, efforts have been limited in 2021 with the pandemic. Unfortunately, there has been very little traction here (and this has been the case for several years despite our efforts). This seems to be more an aspiration amongst specific groups who care about the topics versus an economically marketable/viable opportunity. Durham is just not known for historical properties/agriculture (versus historic downtown Portsmouth, for example) and we don't seem to have the economies of scale in place to attract meaningful numbers of visitors (beyond the few who may come for that purpose and eat/shop downtown. Durham is

clearly recognized as a UNH-related destination, however. More opportunity probably exists there should we choose to more widely market/embrace the UNH connection and the underlying drivers of our local Durham economy. **Ongoing.**

- Take steps as appropriate to promote the long-term health of Great Bay.
  1. EPA issued final Federal permit in late-2020 and Durham/UNH have signed on to the permit as is. **Durham has been an advocate of protecting the Great Bay throughout. COMPLETE**
  2. Durham continues to financially support the Piscataqua Region Estuaries Partnership (PREP) for the Critical Advances for our Estuary (CArE) Initiative utilizing \$525,000 in financial support from the Eversource Seacoast Reliability project. We were very pleased with the following stakeholder statement, which demonstrates that this has been a good investment on Durham’s part. *“PREP’s development of the integrated Research and Monitoring Plan (RAMP) is the single most important step forward in establishing a scientific baseline for the Great Bay. The RAMP is and will continue to provide a basis for significant municipal and state investments, and the work would not have been done without funding through CArE.” – Sherry Young, Rath, Young and Pignatelli* **Ongoing.**
  3. Mr. Selig serves as a member of the Piscataqua Region Estuaries Partnership’s (PREP) Management Committee (board of directors). **Ongoing.**
  4. We worked with The Nature Conservancy to establish an Oyster Garden public project at Durham’s Old Landing. Training was undertaken in August 2019. Cages put in place. Interpretive signage was fabricated/installed in spring 2020 to explain the project and the benefits of oysters to the Estuary. Due to pandemic, no oyster cages in 2020, but they have indeed been installed once more in July 2021! **COMPLETE.**
  5. Applied for several grants including National Fish and Wildlife Foundation and Moose Plate Grant to leverage Seacoast Reliability Funding in an effort to improve Wagon Hill Farm bridge and trail network along with shoreline restoration. Both grants received! Must now administer the grants, plan the projects, and implement them. **Ongoing.**
  
- Continue to support the Town’s efforts and investments around MS-4 stormwater program implementation to support water resources in collaboration with UNH. **We are right on track on this goal and have been working with UNH on the outfall sampling plan which is requirement for the year-three reporting period that ended on June 30th. In fact, UNH was behind schedule on their sampling and we connected them with our consultant Environmental Partners to catch them up. The budget which has been included in the capital plan of \$30,000 to implement the requirements of this program was integral in achieving compliance. We are now developing the year-three annual report which is due to the EPA at the end of this month. Please let me know if you would like any further details. Ongoing.**
  
- Finalize process of closing out construction of the Eversource Seacoast Reliability Project to ensure local infrastructure, environmental, scenic, cultural, and historic resources are protected consistent with appropriate conditions of approval from the NH Site Evaluation

Committee and relevant agreements with the Town of Durham.

Public Works evaluated post construction roadway condition reports and Eversource provided mitigation funds that were accepted by the Town Council. Impacts to historic stone walls were carefully evaluated and based on advice from the NH Division of Historic Resources, no further actions were recommended nor will be taken. **COMPLETE**

- Enable continuation of current land stewardship activities through a seamless transition of duties of the Land Stewardship Coordinator position in spring 2021. This will preserve and protect the environmental well-being of town- owned lands and other lands held in conservation and easement with nonprofit organizations while improving public access and use of those lands.
  1. Land Stewardship Coordinator Ellen Snyder’s service concluded April 1, 2021, at which time Tom Brightman assumed her responsibilities. The transition was seamless. **COMPLETE**
  2. To help promote the public use of town-owned lands, a user-friendly trail map (both printed and online) was created by Economic Development Director Christine Soutter with assistance from Ellen Snyder and Parks and Recreation Director Rachel Gasowski. The cost of the map was funded in part by the Land Stewardship Committee and the Economic Development Department. **COMPLETED IN FALL 2020.**
  3. Support the work of the Land Stewardship Subcommittee to increase the utilization and responsible management of Durham Town lands by residents and visitors in a substantial and sustainable manner is actively under way. We have doubled down on this during the pandemic as a wonderful resource for citizens! A great success! Ongoing.
  
- Work toward a final determination concerning the future of the Mill Pond Dam on the Oyster River and initiate engineering/design in 2021 with construction in 2022 dependent upon permit/funding availability. **Finalized \$300,000 Mill Pond Dam VHB Feasibility Report in preparation for presentation to Town Council during 4<sup>th</sup> quarter 2020. Council discussed issue again in February 2021, and reviewed additional analysis to questions from VHB on August 16, 2021. The Council is scheduled to resolve the issue on September 13, 2021. Ongoing.**
  
- Take proactive steps as a new member of Global Covenant of Mayors for Climate and Energy initiative.
  1. See description above concerning updates to the Town’s solar ordinance -- “Pursue long-term economic and environmental sustainability and resiliency,” #9. **Ongoing.**
  2. UNH Sustainability fellow Mary Potts evaluated the impact of carbon sequestration effectuated by Town-owned lands/easements this past summer. This data informed our sustainability efforts including an amendment to our Acquisition of Open Space policy, which was recommended by the DCC and adopted by the Council in summer 2021. Sustainability Fellow Emily Mello undertook a GGI for the entire Town and the final draft is nearly complete as of September 1, 2021. We worked with the Energy Committee to join the Global Covenant of Mayors Climate Action initiative utilizing this information and our Sustainability Fellows have served as the research engines to



keep this important initiative going. **Sustainability Fellow Cathy Fletcher is now working with the Town on evaluating best practices concerning carbon sequestration on undeveloped forest land in Durham. Ongoing.**

- Work toward redesign of Madbury Road corridor as part of a complete streets framework in 2021/22 with construction planned for 2023. **VHB selected as engineering firm in summer 2021 to design improvements. DPW is working with VHB to negotiate a full scope of services to bring to Town Council for contract award in fall 2021. Ongoing.**
- Examine/act upon potential reconfiguration of roadways around Oyster River Middle School as part of new middle school construction project process. **Roadway reconfiguration designed, reviewed, and partially implemented in August 2021 in advance of start of 2021-2022 school year for ORCSD. It's functioning well so far. Final installation to occur in summer 2022. Ongoing.**

**Review, discuss, and develop a more sustainable solid waste and recycling management program for the community.**

- Develop a long-range plan for improvements to the Transfer Station to address effective and efficient handling of waste and recyclable materials.
  1. DPW negotiations with Waste Management for new 5-year contract with 5-year renewal option – which received endorsement from IWMAC with Town Council contract approval in November 2020, has been functioning very well and has provided advantageous pricing for recyclables for the Town. **COMPLETE.**
  2. **The Swap Shop was closed due to pandemic concerns in 2020 but reopened in spring with Covid-19 best practices in place. We continue to monitor operations during pandemic. Ongoing.**
  3. Annual curbside bulky waste pickup was eliminated in 2020 and again in 2021 due to pandemic. DPW arranged specific days for residents/multi-units to bring materials to Transfer Station for processing. **COMPLETE.**
  4. **The IWMAC has provided a weekly “Did you know?” column in the “Friday Updates” to help inform/educate the community concerning waste-related issues. We’ve also moved the section higher up in the publication to maximize exposure. Ongoing.**
- Support combined efforts of IWMAC, DPW, the Agriculture Commission, and ORCSD Sustainability committee in the development of a curbside composting initiative to reduce MSW landfill use.

**Durham Parks & Recreation, IWMAC and Durham Public Works teamed up to create the Durham Compost Challenge, beginning in October 2020. 25 households registered for the Challenge and for 6 weeks they removed all organic waste from normal household waste using Biobucket & BioBags (included in the registration), measured the weight of compost vs. household waste using a household scale or the scale at the Transfer Station when bucket was full, recorded weight of compostable bag using provided tracking chart, and brought compost to the compost totes at the Durham Transfer Station, or disposed of it in personal household composting bin. This initiative was extended into early 2021 and provided some nice data. The committee continues to evaluate with DPW how a more comprehensive composting program might be initiated in Durham. Ongoing.**

**Strengthen the community by supporting the needs of residents, families, and other stakeholders** by offering a wide array of active and passive recreational opportunities, programming and events celebrating Durham’s history, and encouraging community walkability and bikeability.

1. Numerous activities, programs, and community opportunities have been offered by the Parks & Rec. Department to date over the last year and these have been well attended despite the pandemic. The Durham/ORCSD REACH Camp was a real success in summer 2021. Our Rink Manager has also been able to successfully operate the Churchill Rink despite ever-changing Covid-19 challenges. Having a full time position there has been essential as without it, the rink would not have operated in 2020 or 2021. Potential additional upgrades for FY 2022 and FY 2023 at the rink will be dependent on future rink financial performance. The pandemic has posed significant challenges for the P&R department, with ever-changing Covid requirements, limited staffing, and the need for social distancing. Dir. Rachel Gasowski has undertaken outstanding work and deserves our gratitude for her creativity, diligence, and grace under pressure while striving to meet the needs of the community. She needs additional full time support, however, in the form of an assistant director. We are not meeting our sustainability/resiliency goal with the status quo in this department. We hope to remedy as part of the FY 2022 budget development process. **Ongoing.**
  2. We continue to support initiatives as appropriate that promote public transportation options and ensure safe walking and biking. **COMPLETE.**
  3. Durham has engaged with NHDOT on taking steps to evaluate and improve the safety of the Route 4/Madbury Road intersection. The project is now in the NHDOT’s hands in active design so I will list as **COMPLETE** for now.
  4. DPW re-ditched Dame Road and undertook roadside trimming in spring 2020. Some residents desire the road to be paved, some do not. With drought conditions in spring 2021 and 2020’s improvements, the roadway performed well and we have not received complaints. **COMPLETE.**
  5. Provided programming to coincide with Indigenous Peoples’ Day in Oct. 2021 – a flag ceremony is in the planning phase by the Durham Human Rights Commission. Also looking at Indigenous acknowledgement language, the topic of reparations, and Durham’s scoring as part of the Human Rights Commission Municipal Equity Index (As noted above, Durham scored a 96 this year (2021), up from 90 in 2020, which is excellent!). **Ongoing.**
- Develop scope of work, firm pricing, and a funding plan for the rehabilitation of both the Old Town Hall/Courthouse and the Wagon Hill Farmhouse (Captain John Bickford House), taking into consideration the anticipated use of the Wagon Hill Farm barn and ell will be for recreational purposes, educational programming, and special events; and use of the Captain John Bickford House will be for small public meetings, permitted gatherings and events, exhibits (historical, environmental, and art), and a Resident Caretaker’s apartment. Evaluating capital needs of Wagon Hill Farm farmhouse and Courthouse based on Sturgis report and integrating with available information into 2021/2022 CIP planning. A new working group with representation from the HDC/Heritage Commission, DHA, and DPW was formed to advise the Administrator/Town. Engineering monies have been budgeted for 2021, an LCHIP grant has been submitted for farmhouse improvement

design work, with farmhouse evaluation and TBD subsequent construction scheduled for the 2022-2024 timeframe, depending upon grant progress, funding, and steps needed. **Ongoing.**

6. Assess and document interior environmental conditions and exterior fabric of the Smith Memorial Chapel. Take action as needed to plan for, and address, deficiencies found. Challenges have been identified at the Smith Chapel with excess humidity due to moisture infiltration from the outside and mortar joint failures, primarily on the buttresses. Currently under review. **Ongoing.**

**Continue cooperative and collaborative efforts with UNH** to enhance mutual intellectual, cultural, environmental, social, and economic benefits associated with hosting New Hampshire's flagship state university, including redevelopment of 66 Main St., Hetzel/Alexander Halls, and the creation of a West Edge Innovation District.

1. Durham/UNH continue to communicate and work toward the redevelopment of 66 Main St. (commercial/office/residential/public space) with Elliott Sidewalk Communities. Durham purchased the site this summer from UNH. Near term parking/green park space is being developed by DPW at breakneck speed with estimated completion in mid-September 2021. Discussions with Elliott Sidewalk Communities and UNH scheduled for fall 2021 on redevelopment of site. **Ongoing.**
  2. The Water Works Road site is feasible and has been identified as the future Durham Fire Department location as part of a combined public safety complex potentially involving Durham Fire, UNH Police, and McGregor EMS. See below under Facilities goal for more information. With the pandemic, this item is dormant for the time being. **Ongoing.**
  3. Construction is scheduled to commence in fall 2021 for the Lee Circle water line extension to bring potable water from Continuing to manage the design and permitting for the approximately 8,000' Lee Water Line extension to the Lee Circle. We anticipate completion in December 2021. **Ongoing.**
- Review zoning for West-end Research Park initiative and consider modifications as needed in conjunction with our UNH partners.  
On August 14, 2019, Town Planner Michael Behrendt gave a presentation to the Planning Board about the PUD. The project has been on hold with UNH due to the pandemic. **Ongoing.**

**Continue revitalizing Durham's commercial core and neighborhoods** in ways that enhance our sense of community; better provide for the needs of our residents and businesses, strengthen the fiscal health of the Town and University, and align with the Master Plan.

1. Code Officer Initiative focusing on trash/zoning. This has provided positive results preliminarily to date for downtown neighborhoods. **Ongoing.**
2. Mill Plaza redevelopment application. Colonial Durham is currently before the Planning Board to as part of the application process. We anticipate the Planning Board making a decision regarding the application sometime in fall 2021. **Ongoing.**

3. Implemented PILOT project at Newmarket Road (Town Hall) crosswalk using hand-held flags and signage to improve pedestrian visibility in summer 2019. It has proven a success; endorsed by the Traffic Safety Committee **for potential expansion of program – potentially at crosswalk on Church Hill. Must confer with HDC. Ongoing.**
  4. Gerrish Drive development project before the Planning Board has also generated significant public input and engagement, requiring considerable staffing resources. **The application process is Ongoing.**
  5. Our Problem Oriented Policing (POP) Officer program continues to be a very successful effort to quickly and proactively address issues associated with students living within the downtown core. **Ongoing.**
- Continue to pursue and reevaluate the development/redevelopment needs of the CBD and align our zoning to meet the requirements as needed. **See next item. Ongoing.**
  - Continue to investigate the needs of the downtown business owners and the post pandemic challenges they have to be successful in town and to develop strategies to help Durham be more business friendly. **The Admin. organized a working group and a proposal for several CBD zoning changes that were reviewed by the Town Council on August 3, 2020 and referred to the Planning Board for public hearing and feedback. These were ultimately amended following public feedback and approved by the Council in spring 2021. Complete.**
  - Continue to pursue a relationship with the downtown property owners that provides open and informed communication, including working with the Durham Business Association and Celebrate Durham. **Ongoing.**
  - Continue to work toward addressing downtown parking challenges for both today and the future, and explore potential partnerships, funding sources, and opportunities that will result in either enhanced surface or new structured parking controlled by the Town. **The development of the 66 Main Street site as municipal surface parking is a major near-term accomplishment for Durham. Ongoing.**
  - Support the new Work Force Housing Subcommittee to investigate opportunities, challenges, and options for affordable quality housing in Durham. **Working to promote additional housing options for Durham’s aging population as opportunities become available. EDC has established a Housing Subcommittee, where productive work can occur on this topic. Discussions The subcommittee began to meet in 2020 and its efforts continue into fall 2021. The Planning Board approved a significant addition/expansion at Bagdad Woods. Construction at Bagdad Woods is Ongoing.**

**Task the administrator with meeting the following budget goals for 2022.** Hold the municipal tax rate at the 2021 level or less. For the medium and long-term, the Town will continue to make an effort to control its spending, broaden the tax base, and explore innovative ways to stabilize or reduce the municipal tax rate. **FY 2022 budget process**

underway. Because little new taxable value is projected to be coming on line in 2022, this goal may need to be discussed further during the budget process. **Ongoing.**

**Pursue opportunities to broaden the tax base** that are consistent with Council goals and be mindful of the economic impact they may have on the Town’s operational and long-term fiscal health. **The Town has had little success in this area. Ongoing.**

**Encourage residents to explore joining one of the Town's boards, committees or commissions.** We continue to periodically publicize board/committee vacancy opportunities through the weekly “Friday Updates” and have had some success in meeting this goal. Many vacancies have been filled. **COMPLETE**

**As part of scheduled 4-year cycle, pursue successful reaccreditation for the Durham Police Department with the Commission on Accreditation for Law Enforcement Agencies (CALEA).** Accreditation granted in summer 2021. **Complete.**

**Encourage all Town boards, committees, commissions, and Durham’s legislative delegation to align their efforts with the Council goals** and the Master Plan, actively collaborate and communicate with each other, and communicate with the community at large. We are actively working with ORCSD to facilitate the construction for the ORMS site. Admin. Selig participates in weekly construction meetings on site. Code, Fire, and DPW are all involved as well. The Council invited members of the legislative delegation to meet with it in 2021. Council goals are shared with all boards, committees, commissions, departments, and with our legislative delegation to align efforts. **COMPLETE**

**Refine plans for new or existing public facilities/infrastructure,** including, among others, downtown surface or structured parking, a replacement building for the Fire Department, and public safety radio communication improvements, to meet the present and future needs of the community.

1. Although we had planned to build a new radio tower at Beech Hill in summer 2019 and then 2020, staffing time limitations (2019) followed by above anticipated bid results in 2019/2020 (\$100,000+ over-estimates) have pushed this out to 2022. **We have included a Federal funding earmark request for \$900,000 for this project – it is pending. Ongoing.**
2. In conjunction with UNH, we need to develop support over the long-term for funding a new fire station at the Water Works Road location. **Capital funding limitations at UNH and the pandemic have hampered progress in 2019 and again in 2020 and 2021. It’s quite frustrating for the DFD but beyond their control. In the meantime, we’re looking to incrementally improve existing accommodations for the DFD within the General Services Building in which the DFD is housed at UNH. See next item. Ongoing.**
3. Acquire approximately 900+ SF of additional space from UNH that is contiguous to the existing fire station to provide temporary relief to space constraints of the existing building. **This was approved as part of FY 2019 budget -- a \$320,00, 5-yr. bond, after which new station would be constructed. Still under design/discussion/bid with UNH and DFD. Build out should occur in late-2021/early**

2022, pending bid results, which have been substantially slowed down at UNH due to pandemic. **Ongoing.**

4. Work to develop solution to address impact of human and dogs use at Wagon Hill Farm (exacerbated by pandemic). **Sign refresh still in process – Ongoing.**

*\* Note that the order of the goals does not imply priority.*



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# **11A**

AGENDA ITEM: **DATE: September 13, 2021**

## COUNCIL COMMUNICATION

**INITIATED BY:** Atlantic Broadband (NH-ME), LLC

**AGENDA ITEM:** PUBLIC HEARING AND ACTION ON THE REVISED FINAL PROPOSAL FOR COMPETITIVE CABLE TELEVISION FRANCHISE AGREEMENT BETWEEN THE TOWN OF DURHAM AND ATLANTIC BROADBAND (NH-ME), LLC

**CC PREPARED BY:** Jennie Berry, Administrative Assistant

**PRESENTED BY:** Todd I. Selig, Administrator

### **AGENDA DESCRIPTION:**

The purpose of this Public Hearing is to receive public input on the proposal for a competitive cable television franchise with an additional cable operator in our community: Atlantic Broadband. Comcast already has a franchise to provide cable TV services in Durham. The proposed franchise for Atlantic Broadband would give Durham residents a choice of cable TV providers.

The Town Council is the franchising authority under New Hampshire law. The Administrator and Town staff worked with the Town's special counsel, Donahue Tucker & Ciandella Lawyers, to negotiate a franchise with Atlantic to meet the future cable related needs and interests of the community. The proposed cable TV franchise agreement that is the subject of this hearing is the product of that work.

The public was invited to attend this hearing through a Public Notice, which was posted two weeks before the hearing. The proposed franchise agreement has been available during that time for public review. Any resident or representative of a local organization who wishes to speak will have that opportunity tonight. Please note that some topics are not included in the proposed cable TV franchise agreement, such as cable rates and channel selection, as the Town has no jurisdiction over those items. Likewise, the cable TV franchise agreement does not deal with telephone services or internet services provided by Atlantic Broadband, as those are also outside the jurisdiction of the Town.

**LEGAL AUTHORITY:**

Cable Communications Policy Act of 1984. This was an act of Congress passed on October 30, 1984 to promote competition and deregulate the cable television industry. The act established a national policy for the regulation of cable television communications by federal, state, and local authorities.

New Hampshire Revised Statutes Annotated (RSA) 53-C:3-a.

**LEGAL OPINION:**

The Town has engaged the services of Attorney Katherine Miller of Donahue, Tucker, and Ciandella Law Offices (DTC Lawyers) to assist in the negotiation process for a new proposal from Atlantic Broadband to provide cable and internet services to Durham.

**FINANCIAL DETAILS:**

N/A

**SUGGESTED ACTION OR RECOMMENDATIONS:**

**MOTION 1:**

*The Durham Town Council does hereby OPEN the Public Hearing to provide input relative to the revised final Cable Television Franchise Agreement between the Town of Durham and Atlantic Broadband (NH-ME), LLC to provide cable and internet services to Durham.*

**MOTION 2:**

*The Durham Town Council does hereby CLOSE the Public Hearing relative to the revised final Cable Television Franchise Agreement between the Town of Durham and Atlantic Broadband (NH-ME), LLC to provide cable and internet services to Durham.*

**MOTION 3:**

*The Durham Town Council does hereby APPROVE (as presented) the revised final Cable Television Franchise Agreement between the Town of Durham and Atlantic Broadband (NH-ME), LLC to provide cable and internet services to Durham and authorizes the Administrator to sign said Franchise Agreement on behalf of the Town.*





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MEMORANDUM

To: Town Council and Town Administrator, Town of Durham  
From: Katherine B. Miller, Esq.  
Re: Key Terms of Proposal for Atlantic Broadband Cable TV Franchise  
Date: August 6, 2021

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The following is a summary of Atlantic Broadband’s proposed competitive Franchise Agreement, which will be on the Agenda for the Council’s Meeting on August 16, 2021. It will be a boon to the Town and its residents to have a choice for cable TV providers in Durham. For too long, Comcast has had an economic monopoly for cable TV in the Town. The franchise proposal is parallel to the current Comcast Cable Television Franchise, unless otherwise noted. After the discussion at the Meeting on August 16, the next step will be to schedule a public hearing on the proposal, which is tentatively scheduled for September 13, 2021. I look forward to speaking with you on August 16.

- Section 2.6 (b) Taxation for use of the Public Right-of-Way. This complies with RSA 72:23, I (b), which requires that all users of the Public Right-of-Way pay real property tax to the Town. This is the subject of much litigation with FairPoint (now Consolidated Communications Inc.).
- Section 3.1(b): Density. This section requires Atlantic to construct the cable system to reach areas that have at least twenty (20) homes per mile for aerial installation and forty (40) homes per mile for underground installations. The so-called standard installation, which qualifies for a flat rate for installation of the cable service, is two hundred twenty five feet (225’).
- Section 3.1(d) Optional Cost-Sharing Buildout Formula for areas that do not meet the density levels above.
- Section 3.6 Cable TV Service to municipal and school locations. This section requires that Atlantic provide cable TV services at the Basic Tier level to the municipal and school locations listed on Exhibit A, either at no cost to the Town, or at Atlantic’s marginal cost to provide those in-kind services. If the value of the cable TV services, combined with the Franchise Fees paid to the Town, at the rate of 4% of Atlantic’s annual revenue from the operation of the cable TV system in Durham, exceeds 5% of

Atlantic's annual revenue from the cable TV system in Durham, then Atlantic will either charge for the cable TV services, at its marginal cost to provide them, or reduce the Franchise fees paid to the Town to keep within the 5% "cap" imposed by law.

- Section 4.6 Plant Maps. Atlantic will provide a map showing the constructed cable system to the Town, and a written request may be made for updated franchise area maps annually. **I recommend that the Town calendar this along with the request for the annual report pursuant to Section 9.13 and Exhibit D.**
- Section 4.11 Emergency Power. The new Franchise Agreement requires that Atlantic have stand-by power at the head-end for a minimum of seventy-two (72) hours of failure of power furnished by the electric company, which is better than Comcast's forty-eight (48) hour requirement. This will be helpful in times when the head-end is without power, but locations in Durham are still receiving power or are on generators. This would allow for better connectivity for residents in the event of an emergency.
- Section 6.2 PEG Access Channels. Within ninety (90) days of a written request from the Town (**which I recommend the Town make as soon as the Franchise Agreement is in effect**), Atlantic will provide two PEG access channels, one for the Town (in High Definition, "HD") and one for the schools (in standard definition "SD"). The option for a third channel, in SD, is included, but the cost to set up that and to create a new return line to the head-end, if there is a new location for live programming, will be borne by the Town. The current locations for live programming are listed on Exhibit D. The Town has "swapped out" the fiber link between the Police and Fire Station and the Town studio (which is already provided by Comcast, pursuant to the First Amendment to the Comcast Franchise), for a new fiber link provided by Atlantic, from the DPW to the Town studio. **There is no additional charge to the Town for the one HD channel or the fiber link from DPW to the studio, unlike Comcast's positions on those issues.**
- Not in this proposal: Technology Funding. Atlantic offered \$25,800, which the Town paid to Comcast for the fiber link to the Police and Fire Station. I recommended the Town decline it, as it would be passed through to Atlantic's cable TV subscribers over the ten (10) year term, with interest at eleven percent (11%), and it is not needed, as Atlantic will not charge the Town to construct the fiber link to the Police and Fire Station.
- Section 7.6 Employee Identification Cards. Any Atlantic employees or its contractors must carry ID cards issued by Atlantic. Their vehicles must be placarded for identification. In addition, if Atlantic (or its contractors) expect to perform "any substantial work on the cable system in the Town," they are required to inform the Town Police Department of the general work location and provide relevant vehicle identification, prior to beginning such work.
- Section 9.1 Franchise Fee Payments. The Franchise Fee will be four percent (4%) of Atlantic's gross annual revenue from the operation of the cable system in Durham, but not on its revenue from internet services or voice services. The cost of cable services continues to go up, and the franchise fees may go up for some time. On the other hand, more and more viewers are "cutting the cord" with cable TV and moving to purely online streaming services for their video content. This has been accelerated now that some sports channels are available on You-Tube and other locations. Over time, I anticipate that the Franchise Fees from both cable companies in Town will decline. As we have discussed, Atlantic and the other cable companies are looking to a time in the future when

there is no business reason to continue to provide cable TV service because they can make more money by just being internet service providers. **For this reason, I recommend that we do a ten (10) year term for this Franchise to hold Atlantic to the obligation of providing cable service for at least the next ten (10) years.** There are still a number of residents who rely on cable television. At this time it is hard to predict what the situation will be in 2031 when this (new) Franchise Agreement will expire.

- Further on the Franchise Fee. As noted above, some in-kind services that Atlantic offers to provide will now be included in the cap on Franchise Fees of five percent (5%) of Atlantic's gross annual revenue in the Town. These services may include the position and maintenance of the local access channels on the Atlantic lineup and the in-kind TV services that Atlantic offers to school and municipal locations at the "Digital Starter Service" level under Section 3.6 and Exhibit A. Because the Franchise Fee is at four percent (4%), there is "headroom" for those in-kind services. Importantly, the Sixth Circuit Court of Appeals ruled at the end of May that the proper method for valuing those in-kind services is the marginal cost for the cable TV company to provide them, not the retail rate. The Court noted that the federal Cable Act does not permit cable companies to make a profit on franchise fees if they bill the subscribers for the retail costs for the in-kind services, but only pay the marginal costs to provide them.
- Section 9.3 Insurance. Atlantic will be carrying the maximum amount of insurance in Durham that it carries in any community, namely One Million Dollar (\$1,000,000.00) policy for damage to property, One Million Dollar (\$1,000,000.00) policy for injury or death to one person, Two Million Dollar (\$2,000,000.00) policy for injury or death to any number of persons per occurrence, and Five Million Dollar (\$5,000,000.00) umbrella policy. Atlantic will also maintain a One Million Dollars (\$1,000,000.00) general tort and contract liability policy, and maintain Workers' Compensation insurance.
- Section 9.4 Performance Bond. Atlantic will maintain a Fifty Thousand Dollar (\$50,000.00) performance bond for the duration of the Franchise. This is important to cover any damage to public property in the course of any of Atlantic's cable system construction or repair work and to insure compliance with all the material terms of the Franchise Agreement. We have been in touch with Mr. Reine to be sure Atlantic's plans for the construction in Durham are acceptable. Additionally, recalling the bond is a very effective way of getting Atlantic's attention in the event of non-compliance.
- Section 9.13 Annual Town Review and Report. This proposal requires Atlantic to provide an annual report and attend annual meetings with the Town Council or its designee to discuss any issues, upon written request. The form for the Annual Report is in Exhibit D. If questions arise at any point, the Town can always contact Francis Bradley, your Atlantic representative. Fran can also assist customers with service problems where he can often get matters escalated within the company for a swifter resolution.
- Not In the Proposal: Outside the jurisdiction of the Town, and therefore not part of this proposal are Prices, Channel selections (tiers of channels, rather than à la carte available), Internet service, and phone services.



## CABLE TELEVISION FRANCHISE AGREEMENT

Between

TOWN OF DURHAM, NEW HAMPSHIRE

and

ATLANTIC BROADBAND (NH-ME), LLC

## TABLE OF CONTENTS

<b>INTRODUCTION .....</b>	<b>4</b>
<b>ARTICLE 1 – DEFINITIONS .....</b>	<b>5</b>
SECTION 1.1 - DEFINITIONS.....	5
<b>ARTICLE 2 – GRANT OF FRANCHISE .....</b>	<b>9</b>
SECTION 2.1 - GRANT OF FRANCHISE.....	9
SECTION 2.2 - TERM: NON-EXCLUSIVITY .....	9
SECTION 2.3 – RENEWAL OF FRANCHISE .....	10
SECTION 2.4 - NON-EXCLUSIVITY OF FRANCHISE .....	10
SECTION 2.5 - RESERVATION OF AUTHORITY .....	10
SECTION 2.6 - POLE AND CONDUIT ATTACHMENT RIGHTS .....	10
<b>ARTICLE 3 – SYSTEM SPECIFICATIONS &amp; CONSTRUCTION .....</b>	<b>12</b>
SECTION 3.1 - AREA TO BE SERVED .....	12
SECTION 3.2 - SUBSCRIBER NETWORK .....	14
SECTION 3.3 - PARENTAL CONTROL CAPABILITY .....	14
SECTION 3.4 - EMERGENCY OVERRIDE.....	14
SECTION 3.5 - DELIVERY OF SIGNALS .....	15
SECTION 3.6 - SUBSCRIBER NETWORK CABLE DROPS .....	15
<b>ARTICLE 4 - TECHNOLOGICAL &amp; SAFETY STANDARDS.....</b>	<b>15</b>
SECTION 4.1 - SYSTEM MAINTENANCE .....	15
SECTION 4.2 - REPAIRS AND RESTORATION .....	17
SECTION 4.3 - CABLE LOCATION.....	18
SECTION 4.4 - TREE TRIMMING.....	19
SECTION 4.5 - BUILDING MOVES.....	19
SECTION 4.6 - PLANT MAPS .....	20
SECTION 4.7 - DIG SAFE .....	20
SECTION 4.8 - DISCONNECTION AND RELOCATION .....	20
SECTION 4.9 - PROHIBITION AGAINST RESELLING OF SERVICE .....	20
SECTION 4.10 - EMERGENCY REMOVAL OF PLANT .....	21
SECTION 4.11 - EMERGENCY POWER.....	21
<b>ARTICLE 5 - PROGRAMMING.....</b>	<b>21</b>
SECTION 5.1 - BASIC CABLE SERVICE .....	21
SECTION 5.2 - PROGRAMMING .....	21
SECTION 5.3 - REMOTE CONTROLS .....	22
SECTION 5.4 - STEREO TV TRANSMISSIONS .....	22
SECTION 5.5 - CABLE CHANNELS FOR COMMERCIAL USE .....	22
<b>ARTICLE 6 - PEG ACCESS CHANNELS .....</b>	<b>22</b>
SECTION 6.1 - PEG ACCESS PROGRAMMING.....	22
SECTION 6.2 - PEG ACCESS CHANNELS .....	22
SECTION 6.3 - EQUIPMENT OWNERSHIP AND MAINTENANCE .....	24
SECTION 6.4 - PEG ACCESS CHANNEL(S) MAINTENANCE .....	25
SECTION 6.5 - CENSORSHIP.....	25
SECTION 6.6 - PEG ACCESS CABLECASTING .....	25

<b>ARTICLE 7 - CUSTOMER SERVICE &amp; CONSUMER PROTECTION</b> .....	<b>26</b>
SECTION 7.1 - CUSTOMER SERVICE .....	26
SECTION 7.2 - CONSUMER COMPLAINT .....	26
SECTION 7.3 - SERVICE INTERRUPTIONS .....	26
SECTION 7.4 - PROTECTION OF SUBSCRIBER PRIVACY .....	27
SECTION 7.5 - PROPRIETARY INFORMATION .....	27
SECTION 7.6 - EMPLOYEE IDENTIFICATION CARDS .....	27
SECTION 7.7 - TERMINATION OF SERVICE .....	28
<b>ARTICLE 8 - PRICES &amp; CHARGES</b> .....	<b>28</b>
SECTION 8.1 - PRICES AND CHARGES .....	28
<b>ARTICLE 9 - REGULATORY OVERSIGHT</b> .....	<b>29</b>
SECTION 9.1-FRANCHISE FEE PAYMENTS .....	29
SECTION 9.2 - INDEMNIFICATION .....	30
SECTION 9.3 - INSURANCE .....	30
SECTION 9.4 - PERFORMANCE BOND .....	31
SECTION 9.5 - REPORTS.....	32
SECTION 9.6 - EQUAL EMPLOYMENT OPPORTUNITY .....	32
SECTION 9.7 - REVOCATION OF FRANCHISE.....	32
SECTION 9.8 - NOTICE AND OPPORTUNITY TO CURE .....	33
SECTION 9.9 - TRANSFER OR ASSIGNMENT.....	35
SECTION 9.10 - REMOVAL OF SYSTEM .....	35
SECTION 9.11 - INCORPORATION BY REFERENCE .....	35
SECTION 9.12- NO THIRD PARTY BENEFICIARIES.....	36
SECTION 9.13 - ANNUAL TOWN REVIEW AND REPORT .....	36
<b>ARTICLE 10 - MISCELLANEOUS</b> .....	<b>37</b>
SECTION 10.1 - SEVERABILITY .....	37
SECTION 10.2 - FORCE MAJEURE .....	37
SECTION 10.3 - NOTICES .....	37
SECTION 10.4 - ENTIRE AGREEMENT .....	38
SECTION 10.5 - CAPTIONS .....	38
SECTION 10.6 - APPLICABILITY OF FRANCHISE .....	39
SECTION 10.7 - WARRANTIES.....	39
<b>SIGNATURE PAGE</b> .....	<b>40</b>
<b>EXHIBIT A – PUBLIC BUILDINGS ON THE CABLE SYSTEM</b> .....	<b>41</b>
<b>EXHIBIT B - PROGRAMMING</b> .....	<b>42</b>
<b>EXHIBIT C – VIDEO RETURN ORIGINATION LOCATIONS</b> .....	<b>43</b>
<b>EXHIBIT D - ANNUAL REPORT –TOWN OF DURHAM</b> .....	<b>44</b>

## **TOWN OF DURHAM, NH FRANCHISE**

### **INTRODUCTION**

WHEREAS, the Franchising Authority of the Town of Durham, New Hampshire, pursuant to RSA Chapter 53-C and the Cable Act, is authorized to grant one or more nonexclusive, revocable cable television franchises to construct, upgrade, operate and maintain a cable television system within the Town of Durham; and

WHEREAS, On September 13, 2021 the Franchising Authority conducted a public hearing and there has been opportunity for public comment, pursuant to Section 626(a) of the Cable Act, to ascertain the future cable-related community needs and interests of the Town; and

WHEREAS, the Franchising Authority has determined that the financial, legal, and technical ability of Franchisee is reasonably sufficient to provide services, facilities, and equipment necessary to meet the future cable-related needs of the community, and desires to enter into this Franchise with Franchisee for the construction and operation of a cable system on the terms and conditions set forth herein; and

WHEREAS, insofar as the State of New Hampshire has delegated to the Town the authority to grant a Franchise for cable system operation within the Town's territorial boundaries, the Town hereby exercises its authority to grant a non-exclusive Franchise permitting the operation of a cable communications system within the Town of Durham.

NOW THEREFORE, after due and full consideration, the Franchising Authority and Franchisee agree that this Franchise is issued upon the following terms and conditions:

## ARTICLE 1

### DEFINITIONS

#### SECTION 1.1 - DEFINITIONS

For the purpose of this Franchise, capitalized terms, phrases, words, and abbreviations shall have the meanings ascribed to them in the Cable Communications Policy Act of 1984, as amended from time to time, 47 U.S.C. §§521 et seq. (the “Cable Act”), and the Revised Statutes Annotated of New Hampshire, as amended from time to time, unless otherwise defined herein.

(a) Basic Cable Service – means the lowest tier of service which includes the retransmission of local television broadcast signals, PEG Access Programming channels and other signals or services required by the FCC or the Cable Act.

(b) Cable Act – means the Cable Communications Policy Act of 1984, Public Law No. 98-549, 98 Stat. 2779 (1984), 47 U.S.C. § 521 et. seq., amending the Communications Act of 1934, as further amended by the 1992 Cable Consumer Protection and Competition Act, Public Law No. 102-385 and the Telecommunications Act of 1996, Public Law No. 104-458, 110 Stat. 56 (1996) and as may be further amended.

(c) Cable Television System or Cable System – means the facility owned, constructed, installed, operated and maintained by Franchisee in the Town of Durham, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (a) a facility that serves only to retransmit the television signals of one or more television broadcast stations; (b) a facility that serves subscribers without using any Public Way; (c) a facility of a common carrier which is subject, in whole or in part, to the provisions of Title II of the Cable Act, except



that such facility shall be considered a cable system (other than for purposes of section 621(c) of the Cable Act) to the extent such facility is used in the transmission of video programming directly to subscribers unless the extent of such use is solely to provide interactive on-demand services; or (d) an open video system that complies with Section 653 of the Cable Act, or (e) any facilities of any electric utility used solely for operating its electric utility systems.

(d) Cable Service – means the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

(e) Drop – means the coaxial cable that connects a home or building to the Subscriber Network or Video Return Line.

(f) Digital Starter Service – means the tier of service which currently includes Basic Cable Service and expanded basic programming.

(g) Effective Date – sixty (60) days following the execution by Franchising Authority and the Franchisee.

(h) FCC – means the Federal Communications Commission or any successor governmental entity.

(i) Franchising Authority – means the Town Council of the Town of Durham, New Hampshire, or the lawful designee thereof.

(j) Franchise – means this Agreement and any amendments or modifications in accordance with the terms herein.

(k) Franchise Fee – has the meaning set forth in Section 622(g) of the Cable Act, 47 U.S.C. Section 542(g).

(l) Franchisee – means Atlantic Broadband (NH-ME), LLC, or any successor or transferee in accordance with the terms and conditions in this Franchise.

(m) Gross Annual Revenue – means the subscriber revenue received by the Franchisee from the operation of the Cable System in the Town of Durham to provide Cable Services, calculated in accordance with generally accepted accounting principles, including but not limited

to monthly Basic & expanded basic Cable Service, premium and pay-per-view fees, installation fees, equipment rental fees, late fees, net bad debt, music, franchise fees, leased access fees and net advertising (less agency fees) on a pro rata basis and home shopping revenue on a pro rata basis. Gross Annual Revenue shall not include refundable deposits, actual bad debt, other subscriber revenue, wire maintenance, investment income, or any taxes, fees or assessments imposed or assessed by any governmental authority and collected by Franchisee on behalf of such entity.

(n) Multichannel Video Programming Distributor – means a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, Internet Protocol video service (“IPTV”) or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.

(o) Outlet – means an interior receptacle that connects a television set to the Cable Television System.

(p) PEG Access Programming or Access Programming – means (i) “Educational”: Non-commercial programming produced by the Town of Durham Public Schools, or other educational organizations as designated by the Franchising Authority, and other non-commercial educational programming offered by them which is not ordinarily offered by operators of cable systems; (ii) “Governmental”: Non-commercial programming produced by Town of Durham departments or agencies and other non-commercial programming offered by them or a duly authorized designee which is not ordinarily offered by operators of cable systems; (iii) “Public”: non-commercial programming produced by the residents of the Town of Durham, or produced by an access corporation or non-profit corporation operating within the Town of Durham, and other non-commercial programming not ordinarily offered by operators of cable systems.

(q) Person - means any natural person or any association, firm, partnership, joint venture, corporation, or other legally recognized entity, whether for-profit or not-for profit, but shall not mean the Franchising Authority.

(r) Public Buildings – means those buildings owned or leased by the Franchising Authority for government administrative purposes or a public school district, for educational or administrative purposes, and shall not include buildings owned by Franchising Authority or a school district but leased to third parties or buildings such as storage facilities at which government or school employees are not regularly stationed.

(s) Public Way – means the surface of, and the space above and below, any public street, highway, freeway, bridge, land path, alley, court, boulevard, sidewalk, way, lane, public way, drive, circle or other public right-of-way, including, but not limited to, public utility easements, dedicated utility strips, or rights-of-way dedicated for compatible uses and any temporary or permanent fixtures or improvements located thereon now or hereafter held by the Franchising Authority in the Town of Durham, which shall entitle Franchisee to the use thereof for the purpose of installing, operating, repairing, and maintaining the Cable System. Public Way shall also mean any easement now or hereafter held by the Franchising Authority within the Town of Durham for the purpose of public travel, or for utility or public service use dedicated for compatible uses, and shall include other easements or rights-of-way as shall within their proper use and meaning entitle Franchisee to the use thereof for the purposes of installing, operating, and maintaining Franchisee’s Cable System over poles, wires, cables, conductors, ducts, conduits, vaults, manholes, amplifiers, appliances, attachments, and other property as may be ordinarily necessary and pertinent to the Cable System.

(t) Signal – mean any transmission which carries Programming from one location to another.

(u) Standard Installation – means the standard two hundred twenty-five feet (225) aerial Drop connection to the existing distribution system.

(v) Subscriber – means a Person or user of the Cable System who lawfully receives Cable Service with Franchisee’s express permission.

(w) Subscriber Network – means the trunk and feeder signal distribution network over which video and audio signals are transmitted to Subscribers.

(x) Town – means the Town of Durham, New Hampshire.

(y) Video Programming or Programming – means the Programming provided by, or generally considered comparable to programming provided by, a television broadcast station.

## **ARTICLE 2**

### **GRANT OF FRANCHISE**

#### **SECTION 2.1 - GRANT OF FRANCHISE**

(a) Pursuant to the authority of RSA Chapter 53-C and the Cable Act, the Franchising Authority hereby grants a non-exclusive Franchise to Atlantic Broadband, authorizing and permitting Franchisee to construct, operate and maintain a Cable Television System in the Public Way within the municipal limits of the Town of Durham. Nothing in this Franchise shall be construed to prohibit Franchisee from offering any service over its Cable System that is not prohibited by federal or state law.

(b) This Franchise is granted under and in compliance with the Cable Act and RSA Chapter 53-C of the Laws of New Hampshire, and in compliance with all rules and regulations of the FCC and other applicable rules and regulations in force and effect during the period for which this Franchise is granted.

(c) Subject to the terms and conditions herein, the Franchising Authority hereby grants to Franchisee the right to construct, upgrade, install, operate and maintain a Cable Television System within the Public Way.

#### **SECTION 2.2 - TERM: NON-EXCLUSIVITY**

The term of this non-exclusive Franchise shall be for a period of ten (10) years and shall commence on the effective date. The effective date will be sixty days (60) following the execution of this Agreement by the Town and the Franchisee. The term of this Franchise is

subject to all provisions of New Hampshire law and applicable federal laws, as such laws may be from time to time amended.

### **SECTION 2.3 – RENEWAL OF FRANCHISE**

The renewal of this Franchise shall be governed by applicable federal law and regulations promulgated thereunder and by applicable New Hampshire law as such laws may be from time to time amended.

### **SECTION 2.4 - NON-EXCLUSIVITY OF FRANCHISE**

Franchisee acknowledges and agrees that the Franchising Authority reserves the right to grant one or more additional franchises to other Cable Service providers within the Town for the right to use and occupy the Public Way; provided, however, that in accordance with RSA Chapter 53-C as it may be amended, no such franchise agreement shall contain terms or conditions more favorable or less burdensome than those in any existing Franchise within the Town, when such terms are taken as a whole.

### **SECTION 2.5 - RESERVATION OF AUTHORITY**

Nothing in this Franchise shall (i) abrogate the right of the Franchising Authority to perform any public works or public improvements of any description, (ii) be construed as a waiver of any codes or bylaws/ordinances of general applicability and not specific to the Cable Television System, Franchisee, or this Franchise, or (iii) be construed as a waiver or release of the rights of the Franchising Authority in and to the Public Way. Any conflict between the terms of this Franchise and any present or future exercise of the municipality's police and regulatory powers shall be resolved by a court of appropriate jurisdiction.

### **SECTION 2.6 - POLE AND CONDUIT ATTACHMENT RIGHTS**

(a) Franchisee must comply, if applicable, with all the requirements of RSA 231:160, et seq. for obtaining conduit or pole licenses for any conduits or poles that Franchisee wishes to

install. Pursuant to RSA 231:161, permission is hereby granted to Franchisee to attach or otherwise affix including, but not limited to cables, wire, or optical fibers comprising the Cable Television System to the existing poles and conduits on and under public streets and ways, provided Franchisee secures the permission and consent of the public utility companies to affix the cables and/or wires to their pole and conduit facilities. By virtue of this Franchise, the Franchising Authority grants Franchisee equal standing with power and telephone utilities in the manner of placement of facilities on Public Ways, subject to the lawful exercise of the authority of the Town to approve the location of all installations in the Public Ways, and subject to the Town's lawful use of the Public Ways.

(b) To the extent permitted by applicable law and to the extent Franchisee is not already subject to tax assessment in the Town under RSA 72:23, I(b), Franchisee using or occupying property of the state or of a Town, school district or village district pursuant to this Franchise shall be responsible for the payment of, and shall pay, all properly assessed current and potential personal and real property taxes, if any, for such use or occupation and all properly assessed current and potential personal and real property taxes, if any, on structures or improvements made by Franchisee pursuant to this franchise. Pursuant to the provisions of this section and subject to the provisions of Section 9.8 herein, failure of the Franchisee to pay the duly assessed personal and real estate taxes when due shall be cause to terminate this Cable Television Franchise Agreement by the Franchising Authority. Accordingly, this is a material term of the franchise and failure to pay duly assessed personal and real property taxes when due shall be cause for Franchising Authority to provide a written notice to Franchisee, pursuant to Section 9.8, to show cause by a date certain specified in the notice as to why this Franchise should not be revoked pursuant to Section 9.7 of the Franchise. To the extent applicable law provides authority for the Franchising Authority to assess taxes on Franchisee, pursuant to RSA 72:23, I(b), 72:8-a, 73:10 and/or 48-B:4 or otherwise, the Franchising Authority shall be authorized to impose such taxes and Franchisee shall be obligated to pay such properly assessed

taxes. However, Franchisee reserves all rights to appeal any assessment of personal or real property taxes.

(c) Nothing in this Franchise shall be deemed a waiver or relinquishment of any rights, defenses or claims that Franchisee may have with respect to the application of any law referenced in this Section 2.6 to Franchisee's services or the operation of its Cable System. Franchisee shall have the right to pass through to Subscribers and to itemize separately on Subscribers' monthly bills any tax imposed on Franchisee by the Franchising Authority.

### **ARTICLE 3**

#### **SYSTEM SPECIFICATIONS & CONSTRUCTION**

##### **SECTION 3.1 - AREA TO BE SERVED**

(a) The Franchisee shall make Cable Service available to every residential dwelling unit in the Town in accordance with Section 3.1 (b) and (c) below, provided that the Franchisee is able to obtain any necessary easements and/or permits and subject to the completion of make-ready work. The Franchisee shall make every reasonable effort to obtain private rights-of-way and Multiple Dwelling Unit ("MDU") access agreements and will comply with applicable State laws and regulations.

(b) The Cable System shall be extended upon request, at the Franchisee's sole cost and expense, to any and all remaining areas of the Town containing twenty (20) dwelling units or more per aerial mile or forty (40) dwelling units or more per underground mile of Cable System plant or fractional proportion thereof, both as measured from termination of the existing Trunk and Distribution System from which a usable Signal can be obtained. For purposes of this section, a home shall only be counted as a "dwelling unit", if such home is within two hundred twenty-five (225') feet of the Public Way.

(c) Installation charges shall be non-discriminatory. A standard aerial installation charge shall be established by the Franchisee which shall apply to any residence located not more than

two hundred twenty-five feet (225') from the existing aerial trunk and distribution system and additions thereto. The Franchisee may charge residents located more than two hundred twenty-five (225') feet from the existing aerial trunk and distribution system, and additions thereto, time and materials charges including a rate of return in accordance with applicable law in addition to the standard installation charge. The Franchisee shall have ninety (90) days to survey, design and install non-standard installations that are more than two hundred twenty-five (225') feet from the existing Trunk and Distribution System, subject to Force Majeure. Underground installations are considered non-standard installations and may be subject to additional charge(s).

(d) The Cable Television System shall be further extended to all remaining areas in the Town that do not meet the requirements of Section 3.1(b) above upon the request of dwelling unit owners in such areas and based upon the following cost calculation:

$$(C/LE) - (CA/P) = SC$$

\* C equals the cost of construction of new plant measured from termination of the existing Cable System plant;

\* LE equals the number of dwelling units requesting Service in the line extension area and who subsequently pay a contribution in aid;

\* CA equals the average cost of construction per mile in the Town;

\* P equals the twenty (20) dwelling units per aerial or forty (40) dwelling units per underground mile of aerial plant; and

\* SC equals the per dwelling unit contribution in aid of construction in the line extension area.

(e) Any dwelling unit owner located in an area of the Town without Cable Service may request such Service from the Franchisee. In areas meeting the requirements of Section 3.1 (b) and (d) above, the Franchisee shall extend Service to the area subject to Force Majeure and the performance of make ready. In those areas with less than twenty (20) dwelling units per aerial or forty (40) dwelling units per underground mile, both as measured from termination of the existing Trunk and Distribution System, the Franchisee shall, within thirty (30) days following a request for Service, conduct a survey to determine the number of dwelling units in the area and



shall inform the requesting dwelling unit owner of the contribution in aid of construction (see Section 3.1 (c) above) that will be charged. The Franchisee shall apply for all necessary permits and pole attachment licenses within thirty (30) days of receiving the contribution in aid of construction from all participating dwelling units. Cable Service(s) shall be made available and fully activated to all requesting dwelling units who made a contribution in aid of construction within ninety (90) days of receipt of all necessary permits and pole attachment licenses by the Franchisee, subject to Force Majeure (including the performance of make-ready work).

### **SECTION 3.2 - SUBSCRIBER NETWORK**

(a) Franchisee shall maintain a Cable Television System, fully capable of carrying a minimum bandwidth of 860MHz.

(b) Notifications to Subscribers and the Franchising Authority regarding changes in rates, Programming services or channel positions shall be made in accordance with applicable FCC regulations, currently 47 C.F.R. Part 76, at §§ 76.1601, 76.1602, 76.1603 and 76.1619, as they may be amended.

(c) Franchisee shall also comply with the requirements of N.H. RSA 53-C:3-d, as it may be amended, regarding annual notices to Subscribers and the Franchising Authority.

### **SECTION 3.3 - PARENTAL CONTROL CAPABILITY**

(a) Pursuant to federal law and upon request, and at no separate additional charge (except as authorized by federal law), the Franchisee shall provide Subscribers with the capability to control the reception of any channels on the Cable System.

(b) The Franchising Authority acknowledges that the parental control capability may be part of a converter box and Franchisee may charge Subscriber for use of said box.

### **SECTION 3.4 - EMERGENCY OVERRIDE**

The Cable System shall comply with the FCC Emergency Alert System (“EAS”) regulations.

### **SECTION 3.5 - DELIVERY OF SIGNALS**

The Franchisee will abide by the applicable provisions of the Consumer Electronics Equipment Compatibility provision of federal law (currently 47 U.S.C. § 544a), as such provisions may apply from time to time.

### **SECTION 3.6 - SUBSCRIBER NETWORK CABLE DROPS**

(a) As outlined in 9.1 (b), the Franchisee shall, within six (6) months of a written request, provide and maintain one (1) Standard aerial Installation Drop, Outlet and Digital Starter Service at no charge to the Town, to each Public Building located along the existing cable route, as designated by the Franchising Authority within the Town, listed in **Exhibit A** attached hereto, provided such are considered to be a Standard Installation and absent any other unusual installation conditions or requirements. The Franchising Authority or its designee shall consult with a representative of Franchisee to determine the appropriate location for each Outlet prior to requesting that Franchisee install the free service.

(b) Nothing in this Section shall require Franchisee to install additional Drops or Outlets at no charge to those buildings included in Exhibit A.

(c) It is understood that Franchisee shall not be responsible for any internal wiring of such Public Buildings.

## **ARTICLE 4**

### **TECHNOLOGICAL & SAFETY STANDARDS**

#### **SECTION 4.1 - SYSTEM MAINTENANCE**

(a) In installing, operating and maintaining equipment, cable and wires, Franchisee shall avoid damage and injury to trees, structures and improvements in and along the routes authorized by the Franchising Authority, except as may be approved by the Franchising Authority if required for the proper installation, operation and maintenance of such equipment, cable and wires.

(b) The construction, maintenance and operation of the Cable Television System for which this Franchise is granted shall be done in conformance with all applicable laws, bylaws/ordinances of general applicability, codes and regulations, including but not limited to OSHA, the National Electrical Safety Code, and the rules and regulations of the FCC as the same exist or as same may be hereafter changed or amended.

(c) Operating and maintenance personnel shall be trained in the use of all safety equipment and the safe operation of vehicles and equipment. Franchisee shall install and maintain its equipment, cable and wires in such a manner as shall not interfere with any installations of the Town or any public utility serving the Town.

(d) All structures and all equipment, cable and wires in, over, under, and upon streets, sidewalks, alleys, and Public Way of the Town, wherever situated or located shall at all times be kept and maintained in a safe and suitable condition and in good order and repair.

(e) The Signal of any broadcast station carried on the Cable Television System shall be carried without material degradation in quality at all subscribing locations within the limits imposed by the technical specifications of the Cable System and as set forth by the FCC. The Cable System shall be operated and maintained so as to comply with the technical standards set forth in the FCC's rules and regulations as they apply to cable television systems.

(f) The Town reserves the right to reasonably inspect all construction and installation work for compliance with applicable laws, codes, ordinances and regulations and with provisions of the Franchise. The Franchising Authority or its designee(s) shall have the right to inspect the plant or equipment of the Franchisee in the Town at reasonable times and under reasonable circumstances in order to verify compliance with the terms and conditions of this Franchise. The Franchisee shall fully cooperate in such inspections; provided, however, that such inspections are reasonable and do not interfere with the operation or the performance of the Cable System or Franchisee's interconnected network, and that such inspections are conducted after reasonable written notice to the Franchisee. The Franchisee shall be provided prior written notice of said

inspections and shall be entitled to have a representative present during such inspections. All inspections shall be at the expense of the Town.

(g) All lines, cables and distribution structures and equipment, including poles and towers, constructed by Franchisee for use as a Cable System within the Town shall be located so as not to obstruct or interfere with the proper use of the Public Way, as defined herein, and not to interfere with the existing public utility installation. Franchisee shall have no vested right in a location except as granted herein by the franchise, and such construction shall be removed by Franchisee at its own cost and expense whenever the same restricts or obstructs or interferes with the operation or location of said Public Way, provided, however, that this standard shall apply to all Persons or entities owning lines, cables, and distribution structures, and equipment located in the Public Way, and provided further that the Franchisee shall not be required to remove any such construction solely to accommodate needs of competing Cable Systems or other providers of Cable Services.

(h) Upon written notice from the Franchising Authority, Franchisee shall remedy a general deficiency with respect to the technical standards described herein within sixty (60) days of receipt of notice and a safety deficiency within forty-eight (48) hours of receipt of notice and shall notify the Franchising Authority when the deficiency has been corrected.

#### **SECTION 4.2 - REPAIRS AND RESTORATION**

(a) Franchisee shall adhere to the applicable performance standard set by the FCC.

(b) Whenever the Franchisee takes up or disturbs any pavement, sidewalk or other improvement of any Public Way or public place, the same shall be replaced and the surface restored in as good condition as reasonably possible as before entry as soon as practicable, subject to all permitting and code specifications of general applicability. If not so repaired or restored, the Franchising Authority shall notify the Franchisee in writing and such repair or restoration shall be made within thirty (30) days, unless delayed by weather or events beyond the reasonable control of Franchisee, unless otherwise agreed by Franchisee and the Franchising

Authority. Upon failure of the Franchisee to comply within the time specified (unless the Franchising Authority sets an extended time period for such restoration and repairs) or if such damage presents an emergency situation presenting a threat to public safety, the Franchising Authority may cause proper restoration and repairs to be made and the reasonable expense of such work shall be paid by the Franchisee upon demand by the Franchising Authority.

(c) The Franchisee shall be subject to all laws of general applicability regarding private property in the course of constructing, installing, operating and maintaining the Cable System in the Town. The Franchisee shall, at its sole cost and expense, promptly repair or replace all private property, real and personal, damaged or destroyed as a result of the construction, installation, operation or maintenance of the Cable System.

#### **SECTION 4.3 - CABLE LOCATION**

(a) In all areas of the Town where all of the transmission and distribution facilities of all public or municipal utilities are installed underground, Franchisee shall install its Cable System underground provided that such facilities are actually capable of receiving Franchisee's cable and other equipment without technical degradation of the Cable System's Signal quality.

(b) In all areas of the Town where public utility lines are aurally placed, if subsequently during the term of the Franchise such public utility lines are required by local ordinance or State law to be relocated aurally or underground, Franchisee shall similarly relocate its Cable System if it is given reasonable notice and access to the public and municipal utilities facilities at the time that such are placed underground. Franchisee shall be entitled to reimbursement on a pro rata basis for any costs incurred by Franchisee for relocating utility poles or trenching for the placement of underground conduits, in the event that such reimbursement from public or private funds are made available to other users of the Public Ways.

(c) In any area of the Town where the transmission or distribution facilities of the respective public or municipal utilities are both aerial and underground, the Franchisee shall

have the discretion to construct, operate, and maintain all of its transmission and distribution facilities or any part thereof, aerially or underground.

(d) Nothing in this Section 4.3 shall be construed to require Franchisee to construct, operate, or maintain underground any ground-mounted appurtenances such as customer taps, line extenders, system passive devices, amplifiers, power supplies, pedestals, or other related equipment.

(e) The Franchising Authority shall make its best efforts to provide the Franchisee with written notice of the issuance of building permits for planned housing developments in the Town.

#### **SECTION 4.4 - TREE TRIMMING**

Franchisee shall have authority to trim trees upon and overhanging public streets, alleys, sidewalks and ways and places of the Town so as to prevent the branches of such trees from coming in contact with the wires, cables and equipment of Franchisee, in accordance with applicable state law and any Town bylaws/ordinances and regulations. Notwithstanding the foregoing, the authority granted herein to trim trees is subject to state law, including, but not limited to, state laws governing scenic roads, including but not limited to New Hampshire RSA 231:157 and 158. In addition, Franchisee shall comply with all ordinances, laws or regulations of general applicability pertaining to designated historic districts in the Town.

#### **SECTION 4.5 - BUILDING MOVES**

In accordance with applicable laws, Franchisee shall, upon the written request of any Person holding a building moving permit issued by the Town, temporarily raise or lower its wires to permit the moving of the building(s). Franchisee shall be given not less than thirty (30) days' advance written notice to arrange for such temporary wire changes. The cost to raise or lower wires shall be borne exclusively by the Person(s) holding the building move permit.

#### **SECTION 4.6 - PLANT MAPS**

Upon written request by the Town, Franchisee shall provide to the Town a franchise area map of the Town, which will show those areas in which its facilities exist. Upon written request by the Town, Franchisee shall provide updated franchise area maps annually.

#### **SECTION 4.7 - DIG SAFE**

Franchisee shall comply with all applicable “dig safe” provisions, pursuant to RSA 374:51 of the New Hampshire Laws.

#### **SECTION 4.8 - DISCONNECTION AND RELOCATION**

(a) Franchisee shall, at its sole cost and expense, protect, support, temporarily disconnect, relocate in the same street, or other Public Ways, or remove from any street or any other Public Way and places, any of its property as required by the Franchising Authority or its designee by reason of traffic conditions, public safety, street construction, change or establishment of street grade, or the construction of any public improvement or structure by any Town department acting in a governmental capacity.

(b) In requiring Franchisee to protect, support, temporarily disconnect, relocate or remove any portion of its property, the Franchising Authority shall treat Franchisee the same as, and require no more of Franchisee, than any other similarly situated company.

(c) In either case, Franchisee shall have the right to seek reimbursement under any applicable insurance or government program for reimbursement.

#### **SECTION 4.9 - PROHIBITION AGAINST RESELLING OF SERVICE**

No Person shall resell, without the express prior written consent of Franchisee, any Cable Service, program or signal transmitted over the Cable System by Franchisee.

#### **SECTION 4.10 - EMERGENCY REMOVAL OF PLANT**

(a) If, at any time, in case of fire or disaster in the Town, it shall be necessary in the reasonable judgment of the Franchising Authority to cut or move any of the wires, cable or equipment of the Cable Television System, the Town shall have the right to do so without cost or liability, provided however that, wherever possible, the Franchising Authority gives Franchisee written notice and the ability to relocate wires, cable or other equipment.

(b) In either case, Franchisee shall have the right to seek reimbursement under any applicable insurance or government program for reimbursement. All cable operators or public or municipal utility companies shall be treated alike if reimbursed for such costs by the Town.

#### **SECTION 4.11 - EMERGENCY POWER**

The Cable System shall incorporate equipment capable of providing standby powering of the head end for a minimum of seventy-two (72) hours upon failure of the power furnished by the electric utility company, unless for reasons of Force Majeure.

### **ARTICLE 5**

#### **PROGRAMMING**

#### **SECTION 5.1 - BASIC CABLE SERVICE**

Franchisee shall make available a Basic Cable Service tier to all subscribers in accordance with 47 U.S.C. § 534.

#### **SECTION 5.2 - PROGRAMMING**

(a) Pursuant to 47 U.S.C. § 544, Franchisee shall maintain the mix, quality and broad categories of Video Programming as set forth in **Exhibit B attached hereto**. Pursuant to federal law, all Video Programming decisions, excluding PEG Access Programming, are at the sole discretion of Franchisee.

(b) Franchisee shall comply with 47 C.F.R. § 76.1603 of the FCC Rules and Regulations regarding notice of programming changes.



### **SECTION 5.3 - REMOTE CONTROLS**

In accordance with applicable law, Franchisee shall allow Subscribers to purchase remote control devices which are compatible with the converter installed by Franchisee, if any, and allow the use of remotes. Franchisee takes no responsibility for changes in its equipment or services that might render inoperable the remote control devices acquired by Subscribers.

### **SECTION 5.4 - STEREO TV TRANSMISSIONS**

All Broadcast Signals that are transmitted to Franchisee's head end in stereo shall be transmitted in stereo to Subscribers.

### **SECTION 5.5 - CABLE CHANNELS FOR COMMERCIAL USE**

Pursuant to 47 U.S.C. § 532, Franchisee shall make available channel capacity for commercial use by Persons unaffiliated with Franchisee. Rates for use of commercial access channels shall be negotiated between Franchisee and the commercial user in accordance with federal law.

## **ARTICLE 6**

### **PEG ACCESS CHANNEL & TECHNOLOGY FUNDING**

#### **SECTION 6.1 - PEG ACCESS PROGRAMMING**

The Franchising Authority and/or its designee(s) shall be responsible for the provision of PEG Access Programming to Subscribers in the Town.

#### **SECTION 6.2 - PEG ACCESS CHANNELS**

(a) Upon ninety (90) day advance written request and subject to Section 6.2 (c) below, the Franchisee shall make available to the Franchising Authority and/or its designee(s) two (2) Downstream Channels for Durham PEG Access use, as follows:

(b) The Franchisee shall provide the two (2) activated Downstream Channels for PEG Access use, one for the school channel in standard definition (“SD”) format, and the other for the Town, in High-Definition (“HD”) format, in the Franchisee’s Basic Service. The Franchising Authority and/or its designee(s) shall be responsible for providing the PEG Access Channel Signal(s) in HD or SD format, as the case may be, to the demarcation point at the designated point of origination for the PEG Access Channel(s). The Franchisee shall distribute the PEG Access Channel Signal on its Cable System in HD or SD format, as the case may be, without substantial alteration or deterioration. The Cable System shall be capable of transmitting color video signals received at the Headend in color, stereo audio signals received at the Headend in stereo and properly formatted closed captioned signals received at the Headend.

(c) Within eighteen (18) months in order to provide PEG Access Programming to subscribers, Franchisee and Franchising Authority shall utilize the following method of bringing PEG Access programming content onto the System: from a Town identified and designated point of demarcation and via direct connections provided by Franchisee from specified PEG origination locations as set forth on **Exhibit C**, attached hereto. The Franchisee may, with the Town's written approval (which will not be unreasonably withheld) and at Franchisee's expense, interconnect its Cable System with the existing cable operator's cable system(s) in order to cablecast, on a live basis, all PEG Access Programming carried by the existing cable operator consistent with this Agreement.

(d) Franchisee shall provide a fiber link from Town Hall, 8 Newmarket Road, Durham, NH, to the Department of Public Works, 100 Stone Quarry Drive, Durham, NH, to facilitate PEG origination/return capacity to the Town. Installation shall be on the same schedule as the construction of the Cable System, subject to force majeure.

(e) Said PEG Access Channels shall be used to transmit PEG Access Programming to Subscribers at no cost to the Town and/or PEG Access Users.

(f) The Franchisee shall not move or otherwise relocate the channel location(s) of the PEG Access Channel, once established, without the advance, written notice to the Franchising

Authority and/or its designee(s); such notice shall be at least thirty (30) days. The Franchisee shall use its best efforts, in good faith, to minimize any PEG Access Channel relocation.

(g) The Franchising Authority and/or its designee(s) shall be responsible for the picture quality of PEG Access Programming at the input of the video transmission equipment that will be permanently located at each origination location listed below, which is the demarcation point between the video origination equipment owned, operated and maintained by the Franchisee and the Franchising Authority's and/or its designee(s) end-user equipment. The Franchisee may require access to said video transmission equipment for the purpose of testing, maintaining, and/or adjusting output levels of the video transmission equipment; the Franchisee shall test and adjust the levels of such output as reasonably necessary to ensure good picture quality. The Franchisee may request that the Franchising Authority and/or its designee(s) first test and determine if end-user equipment is the source of any Signal problems.

(h) Provided the two (2) activated PEG Access Channels outlined above are being utilized as described, the Franchising Authority may elect to request in writing, following a vote by Council at a public meeting, a third PEG Access Channel solely for the purposes of providing programming in accordance with Section 611 of the Cable Act. The Franchisee shall have up to six (6) months to provide said additional channel. If the Town exercises its option to request a third PEG Channel, the Franchising Authority shall notify the Franchisee of the live programming location, which may be the same as an existing location listed on Exhibit C. All costs for construction and activation of the third Access Channel, including required head-end electronics and any required line extensions, shall be paid by the Town in advance subject to the Franchisee providing the Town with a detailed estimate of said costs.

### **SECTION 6.3 - EQUIPMENT OWNERSHIP AND MAINTENANCE**

The Town shall own and maintain all PEG Access equipment purchased with funding pursuant to this Franchise.

## **SECTION 6.5 - PEG ACCESS CHANNEL(S) MAINTENANCE**

The Franchisee shall monitor the PEG Access Channels for technical quality and shall ensure that they are maintained at standards commensurate with those which apply to the Cable System's commercial channels; provided, however, that the Franchisee is not responsible for the technical quality of PEG Access Programming.

## **SECTION 6.5 - CENSORSHIP**

The Franchisee shall not engage in any program censorship or any other control of the content of the PEG Access Programming on the Cable System, except as otherwise required or permitted by applicable law.

## **SECTION 6.6 - PEG ACCESS CABLECASTING**

(a) In order that PEG Access Programming can be cablecast over the PEG Access Downstream Channels, all PEG Access Programming shall be encoded and then transmitted from the PEG Access Origination Locations specified herein to the headend or hub, where such PEG Access Programming shall be retransmitted in the downstream direction on one of the PEG Access Downstream Channel(s).

(b) It shall be the Franchisee's sole responsibility to ensure that said PEG Access Programming is properly switched electronically to the appropriate PEG Access Downstream Channel(s), in an efficient and timely manner. Any manual switching shall be the responsibility of the Franchising Authority and/or its designee(s). The Franchisee shall not charge the Franchising Authority and/or its designee(s) for such switching responsibility. The Franchisee and the Franchising Authority shall negotiate in good faith any difficulties that arise regarding cablecasting of PEG Access Programming.

(c) The Franchisee shall provide and maintain all other necessary switching and/or processing equipment located in its Headend facility in order to switch upstream PEG Access Signals from the Town and/or its designee(s) to the designated Downstream PEG Access

Channel(s). Nothing herein shall require the Franchisee to provide any other switching equipment or any other end-user equipment.

(d) In accordance with applicable law, the Franchisee reserves the right to pass through or line-item costs associated with this Franchise, including the provision of PEG Access Programming to Subscribers.

## **ARTICLE 7**

### **CUSTOMER SERVICE & CONSUMER PROTECTION**

#### **SECTION 7.1 - CUSTOMER SERVICE**

Franchisee shall comply with all applicable customer service regulations of the FCC (47 C.F.R. §§ 76.309; 1601, 1602, 1603 and 1619) as they exist or as they may be amended from time to time.

#### **SECTION 7.2 - CONSUMER COMPLAINT**

Franchisee shall comply with RSA 53-C:3-d regarding Quality of Service and RSA 53-C:3-e regarding customer complaints.

#### **SECTION 7.3 - SERVICE INTERRUPTIONS**

In the event that Franchisee's service to any Subscriber is completely interrupted for twenty-four (24) or more consecutive hours, Franchisee will upon request grant such Subscriber a pro rata credit or rebate, on a daily basis, of that portion of the service charge during the next consecutive billing cycle, or at its option, apply such credit to any outstanding balance then currently due. In the instance of other individual Subscriber service interruptions, credits shall be applied as described above after due notice to Franchisee from the Subscriber.

#### **SECTION 7.4 - PROTECTION OF SUBSCRIBER PRIVACY**

Franchisee shall comply with all applicable federal and state privacy laws and regulations, including 47 U.S.C. 551 and regulations adopted pursuant thereto.

#### **SECTION 7.5 - PROPRIETARY INFORMATION**

Notwithstanding anything to the contrary set forth in this Franchise, Franchisee shall not be required to disclose information which it reasonably deems to be proprietary or confidential in nature. The Franchising Authority agrees to treat any information disclosed by Franchisee as confidential and only to disclose it to those employees, representatives, and agents of the Franchising Authority that have a need to know in order to enforce this Franchise and who shall agree to maintain the confidentiality of all such information. Franchisee shall not be required to provide Subscriber information in violation of 47 U.S.C. 551 or any other applicable federal or state privacy law. For purposes of this Section, the terms “proprietary or confidential” include, but are not limited to, information relating to the Cable System design, customer lists, marketing plans, financial information unrelated to the calculation of franchise fees or rates pursuant to FCC rules, or other information that is reasonably determined by Franchisee to be competitively sensitive. In the event that the Franchising Authority receives a request under a state “sunshine,” public records or similar law for the disclosure of information Franchisee has designated as confidential, trade secret or proprietary, the Franchising Authority shall notify Franchisee of such request and cooperate with Franchisee in opposing such request.

#### **SECTION 7.6 - EMPLOYEE IDENTIFICATION CARDS**

All of Franchisee’s employees and contractors, including repair and sales personnel, entering private property shall be required to carry an employee identification card issued by Franchisee and bearing a picture of such employee or contractor. All of Franchisee’s vehicles or Franchisee’s contractors’ vehicles performing work in on the cable system in the Town shall be placarded to identify them. Agents and contractors hired by Franchisee to perform any substantial work on the Cable System in the Town shall reasonably inform the Town’s Police

Department of the general work location within the Town and provide relevant vehicle identification prior to commencing such work.

#### **SECTION 7.7 - TERMINATION OF SERVICE**

(a) In the event a Subscriber's Cable Service is terminated, monthly charges for service shall be pro-rated on a daily basis and, where advance payment has been made by a Subscriber, the appropriate refund shall be made by Franchisee to the Subscriber within forty-five (45) days of such termination provided, in the instance when the Subscriber is relocating, Subscriber has provided Franchisee a forwarding address and returned any equipment the subscriber has rented from the Franchisee has been returned.

(b) Franchisee shall have the right to disconnect a Subscriber for failure to pay an overdue account, for theft of services, or other violation of cable-related laws; provided that:

- (i) Franchisee's billing practices and policy statement set forth the conditions under which an account will be considered overdue; and
- (ii) The Subscriber's account is at least thirty (30) days delinquent.

### **ARTICLE 8**

#### **PRICES & CHARGES**

##### **SECTION 8.1 - PRICES AND CHARGES**

All rates, fees, charges, deposits and associated terms and conditions to be imposed by Franchisee or any affiliated Person for any Cable Service as of the Effective Date shall be subject to regulation in accordance with applicable FCC's rate regulations and federal law, currently 47 U.S.C. § 543. Before any new or modified rate, fee, or charge is imposed, Franchisee shall follow the applicable FCC and State notice requirements and rules and notify affected Subscribers, which notice may be by any means permitted under applicable law. Nothing in this Franchise

shall be construed to prohibit the reduction or waiver of charges in conjunction with promotional campaigns for the purpose of attracting or retaining Subscribers.

## **ARTICLE 9**

### **REGULATORY OVERSIGHT**

#### **SECTION 9.1-FRANCHISE FEE PAYMENTS**

(a) In accordance with Section 622 (b) of the Cable Act (47 U.S.C. § 542(b)), the Franchisee shall pay to the Franchising Authority, throughout the term of this Franchise, a Franchise Fee equal to four percent (4%) of Franchisee's Gross Annual Revenues.

(b) In accordance with Section 622(b) of the Cable Act (47 U.S.C. § 542(b)), Franchisee shall not be liable for a total financial commitment pursuant to this Franchise and applicable law in excess of five percent (5%) of its Gross Annual Revenues. That said five percent (5%) cap shall include (i) non-exempt PEG contributions whether in-kind or cash payments, and (ii) the marginal cost to Franchisee to provide the in-kind courtesy cable drops and services as enumerated within Exhibit A.

(c) Each payment shall be accompanied by a statement of the Gross Annual Revenues and a statement certifying the factual basis for payment, including a breakdown by category of Franchisee's Gross Annual Revenues upon which such payment is based.

(d) The Franchising Authority may, within twelve (12) months of receipt of any Franchise Fee payment, conduct an audit of all of Franchisee's financial records relevant to the Gross Annual Revenue, and Franchisee shall make such information available to the Franchising Authority or its agent(s). If, after such audit an additional fee is owed to the Franchising Authority, such fee shall be paid within thirty (30) days after such audit and the Franchisee shall contribute to the costs of such audit in an amount not to exceed One Thousand Dollars (\$1,000.00). The interest on such additional fee shall be charged from the due date at the rate of two percent (2%) above the Prime Rate during the period that such additional amount is owed.



In the event any such audit reveals an overpayment, then the Town shall remit back to the Franchisee such overpaid amounts in a timely manner.

## **SECTION 9.2 - INDEMNIFICATION**

Franchisee shall indemnify, defend and hold harmless the Franchising Authority, its officers, employees, and agents from and against any liability or claims resulting from property damage or bodily injury (including accidental death) that arise out of Franchisee's construction, operation, maintenance or removal of the Cable System, including, but not limited to, reasonable attorney's fees and costs, provided that the Franchising Authority shall give Franchisee written notice of its obligation to indemnify and defend the Franchising Authority within timely (best efforts of ten (10) business days) receipt of a claim or action pursuant to this Section. If the Franchising Authority determines that it is necessary for it to employ separate counsel, the costs for such separate counsel shall be the responsibility of the Franchising Authority.

## **SECTION 9.3 - INSURANCE**

(a) Franchisee shall carry insurance throughout the term of this Franchise and any removal period with an insurance company authorized to conduct business in New Hampshire satisfactory to the Franchising Authority protecting, as required in this Franchise, Franchisee and listing the Town as an additional insured, against any and all claims for injury or damage to Persons or property, both real and personal, caused by the construction, installation, operation, maintenance or removal of its Cable System. The amount of such insurance against liability for damage to property shall be no less than One Million Dollars (\$1,000,000) as to any one occurrence. The amount of such insurance for liability for injury or death to any Person shall be no less than One Million Dollars (\$1,000,000) and Two Million Dollars (\$2,000,000) on account of injury to or death of any number of Persons in any occurrence. The amount of such insurance for excess liability shall be Five Million Dollars (\$5,000,000) in umbrella form.

(b) Franchisee shall carry insurance against all claims arising out of the operation of motor vehicles and general tort or contract liability in the amount of One Million Dollars (\$1,000,000) combined single limit for bodily injury and consequent death and property damage per occurrence.

(c) All insurance coverage, including Workers' Compensation, shall be maintained throughout the period of this Franchise. All expenses incurred for said insurance shall be at the sole expense of Franchisee.

(d) Franchisee shall provide Franchising Authority with certificate(s) of insurance for all policies required herein upon written request.

#### **SECTION 9.4 - PERFORMANCE BOND**

(a) Franchisee has submitted and shall maintain throughout the duration of this Franchise and any removal period a performance bond in the amount of Fifty Thousand Dollars (\$50,000) running to the Town with a surety company satisfactory to the Franchising Authority to guarantee the following terms; subject to Section 9.8 herein (Notice and Opportunity to Cure):

- (i) The satisfactory completion of the construction and operation of the Cable System in the time schedule provided herein;
- (ii) The satisfactory restoration of pavements, sidewalks and other improvements;
- (iii) The satisfactory operation of the Cable System in compliance with the material terms and conditions of this Franchise;
- (iv) The indemnification of the Town; and
- (v) The satisfactory removal or other disposition of the Cable System.

Franchisee shall not reduce the amount of or cancel said bond, or materially change the terms of said bond from the provisions of Section 9.4(a) herein without the Franchising Authority's prior written consent. The Franchising Authority shall not unreasonably withhold its consent.

## **SECTION 9.5 - REPORTS**

Franchisee shall maintain for public inspection all records required by the FCC and by N.H. RSA 53-C:3-e.

## **SECTION 9.6 - EQUAL EMPLOYMENT OPPORTUNITY**

Franchisee is an Equal Opportunity Employer and shall comply with federal and state law and applicable FCC regulations with respect to Equal Employment Opportunities.

## **SECTION 9.7 - REVOCATION OF FRANCHISE**

This Franchise may be terminated by the Franchising Authority, after notice and opportunity to cure pursuant to Section 9.8 hereof and after a duly noticed public hearing, for any of the following reasons:

- (a) For failure to file and maintain the performance bond as described in Section 9.4 (Performance Bond) or to maintain insurance as described in Section 9.3 (Insurance);
- (b) A violation of any material obligation of Franchisee which remains uncured for thirty (30) calendar days after written notice from the Franchising Authority, except as otherwise provided in this section;
- (c) Repeated failure to maintain signal quality under the standards required by this Franchise, or by the FCC, whichever is more stringent;
- (d) For any transfer or assignment of the Franchise made in violation of Section 9.9 herein;
- (e) For repeated failure to comply with the material terms and conditions of the Franchise;
- (f) For failure to pay the Franchise Fee within thirty days (30) calendar days after the due date. The Town shall have given the Franchisee ninety (90)

days' notice, in writing, of its intent to terminate. Except as to subsection (e) above:

- (i) If the Franchisee is contesting the validity of a claim of default in court, then any termination shall be delayed pending the outcome of the litigation;
- (ii) If the Franchisee has defaulted due to a Force Majeure beyond the control of the Franchisee, this Franchise shall not be terminated and shall remain in effect as long as the Franchisee demonstrates to the Franchising Authority that it is diligently working to correct the default and the Franchisee provides an acceptable schedule to cure said default.

#### **SECTION 9.8 - NOTICE AND OPPORTUNITY TO CURE**

(a) In the event that the Franchising Authority has reason to believe that Franchisee has defaulted in the performance of any or several provisions of this Franchise, except as excused by Force Majeure, the Franchising Authority shall notify Franchisee in writing, by certified mail, of the provision or provisions which the Franchising Authority believes may have been in default and the details relating thereto. Franchisee shall have ninety (90) days from the receipt of such notice to:

(i) respond to the Franchising Authority in writing, contesting the Franchising Authority's assertion of default and providing such information or documentation as may be necessary to support Franchisee's position; or

(ii) cure any such default (and provide written evidence of the same), or, in the event that, by nature of the default, such default cannot be cured within such ninety (90) day period, take reasonable steps to cure said default and diligently continue such efforts until said default is cured. Franchisee shall report to the Franchising Authority, in writing, by certified mail, at forty-five (45) day intervals as to Franchisee's efforts, indicating the steps taken by Franchisee to cure said default

and reporting Franchisee's progress until such default is cured. The Franchising Authority shall issue a written acknowledgement after Franchisee's notice that it cured said default.

(b) The Franchising Authority shall issue a written reply within thirty (30) days of receiving Franchisee's response, pursuant to (a) above, either accepting or rejecting Franchisee's response, and/or shall issue a written acknowledgement of Franchisee's cure of the default pursuant to (a) above, within (30) days of receiving written notice of the cure from Franchisee, or, in the alternative, shall notify Franchisee, by certified mail that the default remains and that the Franchising Authority is scheduling a hearing, pursuant to (d) below.

(c) In the event that (i) Franchisee fails to respond to such notice of default; and/or (ii) Franchisee fails to cure the default or to take reasonable steps to cure the default within the required ninety (90) day period; the Franchising Authority or its designee shall promptly schedule a public hearing no sooner than fourteen (14) days after written notice, by certified mail, to Franchisee. Franchisee shall be provided reasonable opportunity to offer evidence, question witnesses, if any, and be heard at such public hearing.

(d) Within thirty (30) days after said public hearing, the Franchising Authority shall issue a written determination of its findings. In the event that the Franchising Authority determines that Franchisee is in such default, the Franchising Authority may determine to pursue any lawful remedy available to it.

(e) In the event that (i) the Franchising Authority fails to issue a written reply within thirty (30) days of accepting or rejecting Franchisee's response pursuant to (a) above; (ii) the Franchising Authority fails to issue a written acknowledgement after Franchisee's notice that it cured said default pursuant to (b) above; and/or (iii) the Franchising Authority fails to schedule a public hearing pursuant to (c) above; and/or (iv) the Franchising Authority fails to issue a written determination with thirty (30) days after the public hearing pursuant to (d) above, then the issue of said default against Franchisee by the Franchising Authority shall be considered null and void.

## **SECTION 9.9 - TRANSFER OR ASSIGNMENT**

This Franchise shall not be transferred or assigned without the prior written consent of the Franchising Authority, which consent shall not be arbitrarily or unreasonably withheld. No consent shall be required, however, for a transfer in trust, by mortgage, hypothecation, or by assignment of any rights, title, or interest of the Franchisee in the Franchise or in the Cable System in order to secure indebtedness, or for a transfer of the Franchisee's interest in the Cable System to another entity directly or indirectly owned or controlled by Atlantic Broadband (NH-ME), LLC. Within thirty (30) days of receiving a request for consent, the Franchising Authority shall, in accordance with FCC rules and regulations, notify Franchisee in writing of the additional information, if any, that it requires to determine the legal, financial, and technical qualifications of the transferee or new controlling party. If the Franchising Authority has not taken action on Franchisee's request for consent within one hundred twenty (120) days after receiving such request, consent shall be deemed given.

## **SECTION 9.10 - REMOVAL OF SYSTEM**

Upon termination of this Franchise or of any renewal hereof by passage of time or otherwise, Franchisee shall remove its supporting structures, poles, transmission and distribution systems and other appurtenances from the streets, ways, lanes, alleys, parkways, bridges, highways, and other public and private places in, over, under, or along which they are installed and shall restore the areas to their original condition. If such removal is not completed within six (6) months of such termination, the Franchising Authority shall cause all or part of same to be removed at Franchisee's expense, or, at its option, the Franchising Authority or other property owner may deem any property not removed, after said six (6) month period, as having been abandoned.

## **SECTION 9.11 - INCORPORATION BY REFERENCE**

(a) All presently and hereafter applicable conditions and requirements of federal, state and generally applicable local laws, including but not limited to the rules and regulations of the

FCC and the State of New Hampshire, as they may be amended from time to time, are incorporated herein by reference, to the extent not enumerated herein. All such general laws, rules, and regulations, as amended, shall control the interpretation and performance of this Franchise to the extent that any provision of this Franchise conflicts with or is inconsistent with such laws, rules or regulations.

(b) Should the State of New Hampshire, the federal government or the FCC require the Franchisee to perform or refrain from performing any act the performance or non-performance of which is inconsistent with any provisions herein, the Franchising Authority and the Franchisee will thereupon, if they determine that a material provision herein is affected, modify any of the provisions herein to reflect such government action.

#### **SECTION 9.12- NO THIRD PARTY BENEFICIARIES**

Nothing in this Franchise is intended to confer third-party beneficiary status on any member of the public to enforce the terms of this Franchise.

#### **SECTION 9.13 - ANNUAL TOWN REVIEW AND REPORT**

(a) At the Town's written request the Franchisee will attend an annual meeting with the Franchising Authority or its designee to review compliance with the terms of this Franchise and matters of interest to either party. No later than thirty (30) days prior to such meeting either party may submit a list of items to be reviewed.

(b) Additionally, at the Town's written request, Franchisee shall submit an annual report in the form attached as Exhibit D.

## **ARTICLE 10**

### **MISCELLANEOUS**

#### **SECTION 10.1 - SEVERABILITY**

If any section, subsection, sentence, clause, phrase, or other portion of this Franchise is, for any reason, declared invalid, in whole or in part, by any court, agency, commission, legislative body, or other authority of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent portion. Such declaration shall not affect the validity of the remaining portions hereof, which other portions shall continue in full force and effect.

#### **SECTION 10.2 - FORCE MAJEURE**

If for any reason of Force Majeure Franchisee is unable in whole or in part to carry out its obligations hereunder, said Franchisee shall not be deemed in violation or default during the continuance of such inability. Unless further limited elsewhere in this Franchise, the term "Force Majeure" as used herein shall have the following meaning: strikes; acts of God; acts of public enemies, orders of any kind of the government of the United States of America or of the State of New Hampshire or any of their departments, agencies, political subdivisions, or officials, or any civil or military authority; insurrections; riots; pandemics; epidemics; landslides; lightning; earthquakes; tornados; fires; hurricanes; volcanic activity; storms; floods; washouts; droughts, arrests; civil disturbances; explosions; partial or entire failure of utilities; unavailability of materials and/or essential equipment; environmental restrictions or any other cause or event not reasonably within Franchisee's control.

#### **SECTION 10.3 - NOTICES**

(a) Every notice to be served upon the Franchising Authority shall be delivered or sent by certified mail or UPS (postage prepaid) or as allowed by applicable law to the following address or such other address as the Franchising Authority may specify in writing to Franchisee.



Town of Durham  
Attn: Town Council  
8 Newmarket Road  
Durham, NH 03824

(b) Every notice served upon Franchisee shall be delivered or sent by certified mail or UPS (postage prepaid) to the following address or such other address as Franchisee may specify in writing to the Franchising Authority.

Atlantic Broadband (NH-ME), LLC  
Director of Regional Operations  
21 Jarvis Road  
Rochester, NH 03868

With a copy to

Atlantic Broadband  
SVP & General Counsel  
2 Batterymarch Park  
Suite 205  
Quincy, MA 02169

(c) Delivery of such notices shall be equivalent to direct personal notice, direction or order, and shall be deemed to have been given at the time of receipt.

#### **SECTION 10.4 - ENTIRE AGREEMENT**

This instrument contains the entire agreement between the parties, supersedes all prior agreements or proposals except as specifically incorporated herein, and cannot be changed without written amendment following publication of the proposed amendment in a manner consistent with the publication and notice provisions of RSA Chapter 43.

#### **SECTION 10.5 - CAPTIONS**

The captions to sections throughout this Franchise are intended solely to facilitate reading and reference to the sections and provisions of the Franchise. Such captions shall not affect the meaning or interpretation of the Franchise.

#### **SECTION 10.6 - APPLICABILITY OF FRANCHISE**

All of the provisions in this Franchise shall apply to the Town, Franchisee, and their respective successors and assigns.

#### **SECTION 10.7 - WARRANTIES**

Franchisee warrants, represents and acknowledges that, as of the Effective Date of this Franchisee:

(a) Franchisee is duly organized, validly existing and in good standing under the laws of the State;

(b) Franchisee has the requisite power and authority under applicable law and its by-laws and articles of incorporation and/or other organizational documents, is authorized by resolutions of its Board of Directors or other governing body, and has secured all consents which are required to be obtained as of the date of execution of this Franchise, to enter into and legally bind Franchisee to this Franchise and to take all actions necessary to perform all of its obligations pursuant to this Franchise;

(c) This Franchise is enforceable against Franchisee in accordance with the provisions herein; and

(d) There is no action or proceeding pending or threatened against Franchisee which would interfere with performance of this Franchise.

(Signature page to follow)

**SIGNATURE PAGE**

In Witness Whereof, the Franchise is hereby issued as of \_\_\_\_\_, 2021 by the Town Council of the Town of Durham, New Hampshire, as Franchising Authority, and all terms and conditions are hereby agreed to by Atlantic Broadband (NH-ME), LLC, as Franchisee.

**Town of Durham**

**By:** \_\_\_\_\_

**Print:** \_\_\_\_\_

**Title:** \_\_\_\_\_

**Date:** \_\_\_\_\_

**Atlantic Broadband (NH-ME), LLC**

**By:** \_\_\_\_\_

**Print:** Leslie J. Brown

**Title:** SVP & General Counsel

**Date:** \_\_\_\_\_

## EXHIBIT A

### PUBLIC BUILDINGS ON THE CABLE SYSTEM

#### Municipal Buildings:

Town Offices	8 Newmarket Road, Durham
Public Works Garage	100 Stone Quarry Drive, Durham
Police Station	86 Dover Road, Durham
Fire Station	51 College Road, Durham
Durham Public Library	49 Madbury Road, Durham
Parks and Recreation Department	2 Dover Road, Durham
Wastewater Treatment Plant	50 Piscataqua Road, Durham
Churchill Rink at Jackson's Landing	10 Old Piscataqua Road, Durham
Spruce Hole	Packers Falls Rd., Durham
Old Concord Road Pump Station	Corner Old Concord Tpk. & 2-Mile Rd., Durham
Dover Pump Station	46 Dover Road, Durham
Durham Historic Assoc.	2 Dover Road, Durham
Old Court House	Corner of Main Street and Newmarket Road, Durham
Transfer/Recycling Station	100 Durham Point Road, Durham
Oyster River Youth Association	11 School House Lane, Durham

#### Public School Buildings:

Oyster River Middle School	1 Coe Drive, Durham
Oyster River High School	55 Coe Drive, Durham

**EXHIBIT B**  
**PROGRAMMING**

Franchisee shall provide the following broad categories of Video Programming:

- News Programming;
- Sports Programming;
- Public Affairs Programming;
- Children's Programming;
- Entertainment Programming;
- Local Programming, and
- Weather Programming.

**EXHIBIT C**  
**VIDEO RETURN LINES TO CURRENT DURHAM STUDIO**

**Public School Buildings:**

Oyster River High School	55 Coe Drive, Durham
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**Municipal Buildings:**

Durham Public Library	49 Madbury Road, Durham
Town Offices	8 Newmarket Road, Durham
Department of Public Works	100 Stone Quarry Drive, Durham

**EXHIBIT D**  
**ANNUAL REPORT**

**Town of Durham for \_\_\_\_\_**  
*(Year)*

Customer Service Telephone Number:

Location of Head End (Reception Facility):

Franchise Fee Paid: \$\_\_\_\_\_

Contact Person to Service Unresolved Customer Complaints:

Updated Labor/Material Costs (if applicable) for installation over 225 feet from existing plant:

Upon written request from the Franchising Authority, Franchisee shall also provide the following:

Customer Service Statistics:

- a) Number of reports of system outages and response time for such outages:
- b) A summary of written complaints and brief description re: resolution of such complaints:

S:\DP-DY\Durham\Atlantic Broadband Competitive Cable TV Franchise\Franchise Agreements\Atlantic Competitive Proposal Drafts\2021 09 08  
Town of Durham Proposed Franchise Agreement Final for Pub Hrg.docx





TOWN OF DURHAM  
8 NEWMARKET ROAD  
DURHAM, NH 03824  
Tel: 603-868-5577  
Fax: 603-868-1858

AGENDA ITEM: # **11B**

DATE: September 13, 2021

## COUNCIL COMMUNICATION

**INITIATED BY:** Jim Rice, Assessor

**AGENDA ITEM:** PUBLIC HEARING AND ACTION ON RESOLUTION #2021-10  
AUTHORIZING THE RAISING, APPROPRIATING, AND  
EXPENDITURE OF AN ADDITIONAL \$120,831.00, INCLUDING  
INTEREST, ON PROPERTY TAX ABATEMENTS FOR ALPHA GAMMA  
RHO, GAMMA MU ALUMNI ASSOCIATION AND NH BETA  
HOUSING, LLC FRATERNITIES FOR TAX YEARS 2018, 2019, &  
2020 WITHIN THE FY 2021 UNASSIGNED FUND  
BALANCE TO FUND SAID ABATEMENTS

**CC PREPARED BY:** Jim Rice, Assessor  
Jennie Berry, Administrative Assistant

**CC PRESENTED BY:** Jim Rice, Assessor

### **AGENDA DESCRIPTION:**

Alpha Gamma Rho, Gamma Mu Alumni Association, and NH Beta Housing, LLC fraternities filed an appeal of their assessment(s) with the NH Board of Tax and Land Appeals (BTLA) for tax year(s) 2018 & 2019. On May 25 & 26, 2021, the BTLA held a consolidated hearing regarding all three appeals and decided that the taxpayer(s) proved their burden that their properties were over-assessed, and the appeal(s) were granted. The BTLA ordered that the amount paid in excess shall be refunded with six percent interest per annum from the date paid to the refund date. See attached excel spreadsheet for abatement amounts plus interest.

The Town of Durham did not budget for these abatements during the FY 2021 budget process. Therefore, in accordance with the Town Charter, the Council will need to amend the FY 2021 budget to use monies to pay the abatement. The Administrator recommends that monies come from the unassigned fund balance. Section 5.5 "Appropriations after adoption of budget" states that:

"No appropriation shall be made for any purpose not included in the annual budget as adopted unless **approved by a two-thirds majority of the Council after a public hearing. The Council shall, by resolution, designate the source of any money so appropriated.** This provision shall not apply, however, to emergency appropriations adopted pursuant to 3.10 of this Charter."

At its August 16, 2021 meeting, the Town Council scheduled a public hearing to be held on this item for its September 13, 2021 meeting. A Public Hearing notice was published in the *Foster's/Seacoast Online* on Thursday, August 26, 2021. The notice

was also posted on the outside bulletin board at Town Hall, as well as at the Durham Public Library and Department of Public Works. *Resolution #2021-10 is attached for the Council's review and consideration.*

**LEGAL AUTHORITY:**

RSA 76:16 describes the process for the apportionment, assessment, and abatement of property taxes.

Section 5.5 "Appropriations after adoption of budget" of the Durham Town Charter.

**LEGAL OPINION:**

N/A

**FINANCIAL DETAILS:**

As part of the FY 2021 budget, the Town of Durham did not appropriate any funding for this abatement. It is the recommendation of the Administrator that monies for this abatement come from the unassigned fund balance.

As of the town's last audit for the period ending December 31, 2020, the unassigned fund balance is \$3,715,628.00.

**SUGGESTED ACTION OR RECOMMENDATIONS:**

**MOTION 1:**

*The Durham Town Council does hereby OPEN the Public Hearing on Resolution #2021-10 authorizing the raising, appropriating, and expenditure of an additional \$120,831.00, including interest, within the FY 2021 Unassigned Fund Balance to fund property tax abatements for Alpha Gamma Rho, Gamma Mu Alumni Association, and NH Beta Housing, LLC Fraternities for Tax Years 2018, 2019, and 2020.*

**MOTION 2:**

*The Durham Town Council does hereby CLOSE the Public Hearing on Resolution #2021-10 authorizing the raising, appropriating, and expenditure of an additional \$120,831.00, including interest, within the FY 2021 Unassigned Fund Balance to fund property tax abatements for Alpha Gamma Rho, Gamma Mu Alumni Association, and NH Beta Housing, LLC Fraternities for Tax Years 2018, 2019, and 2020.*

**MOTION 3:**

*The Durham Town Council does hereby ADOPT (as presented/as amended) Resolution #2021-10 authorizing the raising, appropriating, and expenditure of an additional \$120,831.00, including interest, within the FY 2021 Unassigned Fund Balance to fund property tax abatements for Alpha Gamma Rho, Gamma Mu Alumni Association, and NH Beta Housing, LLC Fraternities for Tax Years 2018, 2019, and 2020.*

## **RESOLUTION #2021-10 OF DURHAM, NEW HAMPSHIRE**

**AUTHORIZING THE RAISING, APPROPRIATING, AND EXPENDITURE OF AN ADDITIONAL ONE HUNDRED TWENTY THOUSAND EIGHT HUNDRED THIRTY ONE DOLLARS AND ZERO CENTS (\$120,831.00) WITHIN THE FY 2021 GENERAL FUND BUDGET TO ABATE ALPHA GAMMA RHO, GAMMA MU ALUMNI ASSOCIATION AND NH BETA HOUSING, LLC FRATERNITIES FOR TAX YEARS 2018, 2019, & 2020.**

**WHEREAS**, Alpha Gamma Rho, Gamma Mu Alumni Association and NH Beta Housing, LLC. fraternities filed an appeal of their assessment(s) with the NH Board of Tax and Land Appeals (BTLA) for tax year(s) 2018 & 2019.

**WHEREAS**, the BTLA decided that an abatement was warranted for tax years 2018, 2019, and 2020 for Alpha Gamma Rho, Gamma Mu Alumni Association and NH Beta Housing, LLC.; and

**WHEREAS**, additional funds in the amount of \$120,831.00 are necessary to abate; and

**WHEREAS**, in accordance with Section 5.5 of the Town Charter, the Durham Town Council may approve additional appropriations not included in the annual budget by resolution designating the source of the additional appropriation with a two-thirds vote of the Council after a public hearing; and,

**WHEREAS**, the \$120,831.00, not included in the approved 2021 budget, would come from the Unassigned Fund Balance; and

**WHEREAS**, a public hearing notice was published in the *Foster's Daily Democrat* on August 26, 2021 and was posted on the public bulletin board located outside of the Town Hall, at the Department of Public Works, and the Durham Public Library; and

**WHEREAS**, on September 13, 2021, a public hearing was held, in accordance with Article 5, Section 5.5 of the Durham Town Charter, on Resolution #2021-10 to raise, appropriate, and expend an additional \$120,831.00 within the 2021 Unassigned Fund Balance to abate Alpha Gamma Rho, Gamma Mu Alumni Association and NH Beta Housing, LLC for TY 2018, 2019 and 2020 and abate in the amount of \$120,831.00 including interest.

**NOW, THEREFORE BE IT RESOLVED** that the Durham Town Council, the governing body of the Town of Durham, New Hampshire, does hereby ADOPT Resolution #2021-10 to raise, appropriate, and expend an additional \$120,831.00 within the 2021 General Fund Budget.

**PASSED AND ADOPTED** this \_\_\_\_\_ day of \_\_\_\_\_, 2021 by a majority vote of the Durham Town Council with \_\_\_\_\_ affirmative votes, \_\_\_\_\_ negative votes, and \_\_\_\_\_ abstentions.

\_\_\_\_\_  
Katherine Marple, Chair  
Durham Town Council

**ATTEST:**

\_\_\_\_\_  
Lorrie Pitt, Town Clerk-Tax Collector

DRAFT



TOWN OF DURHAM  
8 NEWMARKET ROAD  
DURHAM, NH 03824  
Tel: 603-868-5571  
Fax: 603-868-1858  
www.ci.durham.nh.us

**AGENDA ITEM: # 11C**

**DATE: September 13, 2021**

## COUNCIL COMMUNICATION

**INITIATED BY:** Public Works Department

**AGENDA ITEM:** CONTINUED DISCUSSION AND POSSIBLE ACTION REGARDING  
THE MILL POND DAM OVER THE OYSTER RIVER

**CC PREPARED BY:** April Talon, Town Engineer  
Richard Reine, Director of Public Works

**PRESENTED BY:** Todd Selig, Town Administrator  
April Talon, Town Engineer

**AGENDA DESCRIPTION:**

The purpose of this Council Communication is to request the approval of the final design contract for or for Alternative 3 - Dam Stabilization or for Alternative 5 - Dam Removal with Vanasse Hangen Brustlin, Inc. (VHB) in the amount of \$247,999 or \$284,226, respectively.

The Oyster River Dam, also known as the Mill Pond Dam, is located on the Oyster River as it flows through the Town of Durham prior to its discharge into Little Bay. Constructed in 1913, the dam is a concrete Ambursen-style dam consisting of a spillway, a set of gated outlets at the right abutment, and a fish ladder at the left abutment. It is approximately 140 feet long, with a maximum structural height of approximately 13 feet. Due to its age, engineering significance, and association with local history, the dam is listed on the NH Register of Historic Places. The dam impounds the Oyster River approximately 0.8 mile upstream of the dam, as well as portions of Hamel Brook extending as far as 0.4 miles upstream.

The NHDES Dam Bureau has identified several safety deficiencies associated with the current dam, including concerns with its overall structural integrity and stability. The dam does not meet current NHDES dam safety standards which require such "low-hazard" dams to pass a 50-year storm event with at least one foot of freeboard between the water surface and the top of the dam abutments. The Town was notified of these problems in multiple Letters of Deficiency (LOD), most recently in February 2018.

With the completion of the VHB Team's November 2020 Feasibility Study and July 2021 Supplemental Analysis, the Town Council intends to develop engineering plans, to obtain the necessary environmental permits, and select a contractor to complete the dam project by way of a public bid process. At the request of the Town, VHB has prepared two separate work scopes for review, one which assumes the Town will proceed with Alternative 3 and a second which assumes that Town will proceed with Alternative 5.

**The design scope for "Alternative 3 – Dam Stabilization" would involve the following elements:**

- This scope assumes that the Town will NOT pursue "Option 1 – Pond Restoration Dredge" as described in the Feasibility Study.
- This scope does not include the development of landscaping plans such as improvements to Mill Pond Park associated with mitigation of community or recreational impacts.
- It is also assumed that the Town can successfully negotiate required legal agreements and releases of liability from the abutter on the right abutment (legal services by others) – and that NHDES will approve a waiver to treat the dam as a non-menace structure. Because the abutter legal agreement and NHDES waiver are both pre-requisites for Alternative 3, early project actions will be focused on finalizing these agreements.
- Spillway Stabilization: Design and construct a "new" spillway within the confines of the existing spillway. This would be achieved through the installation of reinforced concrete within each of the spillway cells and around the rib walls to create a mass concrete section. Concrete reinforcement and anchors to the bedrock foundation would be provided, resulting in a spillway section that would be stable regardless of the presence of the existing spillway structure.
- Right Training Wall Scour: Remove deteriorated concrete in the area of scour; replace with new reinforced concrete.
- Fish Ladder Undermining: Fill the void beneath the fish ladder with flowable fill or other suitable fill material; provide a scour apron to prevent recurrence.
- Gated Outlet Stabilization: Construct a new gravity section upstream of the existing gated outlet structure to provide an overall section meeting stability requirements. Complete concrete repair throughout the structure including removal of deteriorated concrete and replacement with new reinforced concrete.
- Gate Replacement: Remove and dispose the existing gates; install new gates. Through recent operations, the left gate has sufficient capacity to drain the impoundment; as such, the right gate could be removed and the conduit through the gated outlet structure could be properly abandoned/filled.
- Downstream Fish Passage Notch: Install a notch located on the right end of the spillway and consisting of three sets of stop logs to control flows and create a series of plunge pools through the height of the spillway. For safety and

operational purposes, the notch would be provided with a catwalk and railings over the stoplogs.

- Development of an Integrated Vegetation Management Plan to control the potential spread of invasive plant species.

**The design scope for “Alternative 5 – Dam Removal” would involve the following elements:**

- This scope does not include the development of landscaping plans such as improvements to Mill Pond Park associated with mitigation of community or recreational impacts.
- Remove the entire existing dam structure, including the fish ladder, while allowing the left and right abutments to remain in place.
- Reshape the river channel within the footprint of the existing dam and immediately upstream and downstream to ensure upstream fish passage through the restored reach.
- Reshape the river channel approximately 600 feet upstream of the location of the dam to stabilize the channel and remove approximately 3,000 cubic yards of sediment deposited in the center of the Mill Pond impoundment.
- Stabilize the river using bioengineered techniques, natural channel design, or traditional engineered approaches as appropriate.
- If needed, develop a design to stabilize retaining walls/foundation structures and embankments in the immediate vicinity of the dam, upstream of the NH 108 Bridge.
- Development of an Integrated Vegetation Management Plan to control the potential spread of invasive plant species.

**LEGAL AUTHORITY:**

Article VI, Section 4-20 of the Administrative Code of the Town of Durham states: Professional services contracts (architecture, engineering, construction management, risk management, financial and auditing and other professional services or consulting work) of thirty thousand (\$30,000) dollars or more may be entered into after receiving proposals from various interested firms, evaluating those proposals and anticipated quality of service to be rendered, and Town Administrator recommendation to and approval by the Town Council. Such services of less than fifteen thousand (\$10,000) dollars may be procured in a manner deemed responsible and prudent by the Town Administrator.

**LEGAL OPINION:**

N/A

**FINANCIAL DETAILS FOR ALTERNATIVE #3 – DAM STABILIZATION:**

ACCOUNT	TITLE	BUDGETED	EXPENSED/ ENCUMBERED TO DATE	REQUESTED	REMAINING
07-2185-801-36-000	Oyster River Dam Design (Mill Pond)	\$275,000	\$0	\$247,999	\$27,001
07-1784-800-36-000	Mill Pond Restoration	\$150,000	\$109,000	\$0	\$41,000
TOTAL		\$425,000	\$109,000	\$247,999	\$68,001

**FINANCIAL DETAILS FOR ALTERNATIVE #5 – DAM REMOVAL:**

ACCOUNT	TITLE	BUDGETED	EXPENSED/ ENCUMBERED TO DATE	REQUESTED	REMAINING
07-2185-801-36-000	Oyster River Dam Design (Mill Pond)	\$275,000	\$0	\$275,000	\$0
07-1784-800-36-000	Mill Pond Restoration	\$150,000	\$109,000	\$9,226	\$31,774
TOTAL		\$425,000	\$109,000	\$284,226	\$31,774

**SUGGESTED ACTION OR RECOMMENDATIONS:**

**MOTION - OPTION #1**

*The Durham Town Council, upon recommendation by the Administrator, does hereby approve the Final Design Contract for Alternative #3 – Dam Stabilization to Vanasse Hangen Brustlin, Inc. for the sum of \$247,999 and authorizes the Administrator to sign said contract with the monies coming from Account #07-2185-801-36-000. Approval of this alternative is contingent upon the NHDES Dam Bureau approving a waiver to regulate the dam as a “non-menace structure”. Furthermore, approval of such a waiver request would be contingent upon the abutting property owner recognizing that dam failure would have a detrimental impact on their property and accepting the consequences associated with such an occurrence. NHDES would require that any such agreement would run with the land such that future property owners would also be bound.*

OR



**MOTION - OPTION #2**

*The Durham Town Council, upon recommendation by the Administrator, does hereby approve the Final Design Contract for Alternative # 5 - Dam Removal to Vanasse Hangen Brustlin, Inc. for the sum of \$284,226 and authorizes the Administrator to sign said contract with the monies coming from Account #07-2185-801-36-000 and #07-1784-800-36-000.*