

LEGAL CONSIDERATIONS FOR HEALTH OFFICERS

NH Health Officers' Association

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I. Authority to Act

- a. No "home rule" in New Hampshire
 - "Home Rule" = ability of towns and cities to take actions they find appropriate without having to ask for permission. Some states grant this power to their towns and cities.
 - NH Constitution grants *no* power directly to municipalities. This means towns and cities only have authority to act if the legislature gives it to them through a statute. The legislature may withdraw this authority at any time by repealing or amending a statute.
 - "Towns only have such powers as are expressly granted to them by the legislature and such as are necessarily implied or incidental thereto." *Girard v. Allenstown*, 121 N.H. 268 (1981).
 - Before acting, town and city officials must find a statute that authorizes or necessarily implies the authorization for that action. It is not enough to say "nothing prohibits it" or "our municipal voters authorized it."
 - Examples: enacting local health regulations or housing standards, removing a nuisance, entering property, imposing fines...these all require authority in a statute.
- b. General authority for health officers under RSA Chapter 147
- c. Preemption: A lower level of government may not enact regulation that conflicts with a higher level of government.
 - Federal law trumps state law; state law trumps municipal regulation.
 - Even if one statute seems to authorize an action, the State or Federal governments may override the statute and "preempt" (prohibit or limit) local action.
 - Preemption is either express (a statute says "municipalities may not enact ordinances regarding this subject") or implied (a court finds that a higher level of government has occupied an entire field and there is no room for conflicting local regulation).
 - Examples: Indoor Smoking Act RSA 155:64, Large Groundwater Withdrawals RSA 485-C:20.

II. Entering Private Property

- a. Where is the statutory authority?
- b. **RSA 128:5, III and RSA 128:5-a:** Health officer may investigate and take appropriate action to safeguard the public health and/or prevent pollution of aquifer or body of water. Health officer may “enter upon private property” except “living quarters”.
- c. **RSA 147:3 Investigations and Complaints.** Health officers of towns...shall inquire into all nuisances and other causes of danger to the public health, and for the purpose of such investigations, or whenever they shall know or have cause to suspect that any nuisance or other thing injurious to the public health is in any building, vessel or enclosure, **they may obtain an administrative inspection warrant under RSA 595-B, including authority to forcibly enter therein and make such search, pursuant to RSA 595-B:5.**
- d. **RSA 48-A:8, III** – may investigate regarding minimum housing standards, but only with consent of owner/occupant or administrative inspection warrant.
- e. **RSA 147:4** – once a written order to abate a nuisance has been issued, if the owner or occupier hasn’t complied by the written deadline, health officer “may forcibly enter” to abate the nuisance.
- f. **RSA 147:6** –When the owner is unknown to the health officer or does not reside in town, *and* the building, vessel or enclosure is not occupied, or the occupant is, in the health officer’s opinion, unable to remove the nuisance or threat, the health officer may, without previous notice, immediately cause the nuisance or other thing they deem injurious to the public health to be removed or destroyed. Caution: make a reasonable effort to find out who is the owner (i.e., go to the tax collector), and try notice first if you can. Keep paper trail of your efforts.
- g. **Any Recent Legislation?** No. A legislative study committee was created in 2012 to consider changing the law regarding local officials entering onto private property. Study committee report concluded that a change to the law was necessary, but nothing came of it. No changes were made to increase or reduce the ability of local officials to enter private property (except for conservation commissions).
- h. **Bottom line:** Do not enter private property without consent of owner, consent of adult occupant, or administrative search warrant.
 - Criminal trespass under RSA 635:2, guns, dogs....
- i. **Others who may have authority:**
 - DES – Under RSA 485-A:18, I: Any authorized member or agent of the department may enter any land or establishment for the purpose of collecting information that

may be necessary to the purposes of this chapter and no owner of such establishment shall refuse to admit any such member or employee.

- DHHS – Under RSA 147:14-a, DHHS may enter to investigate drainage or septic systems.
- Note that neither of these statutes provides the same authority to health officers to enter without consent or a warrant.

j. What else can you do?

- Can you look from neighboring property? Yes, if consent from owner of neighboring property. May be helpful in gathering enough information to get administrative inspection warrant or getting DES or other partner interested in helping.
- Use partners: DES, DHHS (septic, elderly services), DCYF, Fire Chief, Police Chief, Building Inspector, Code Enforcement Officer
- Bring an officer with you (depending on circumstances)

III. Liability and Immunity

- a. Bad things happen. When are you liable, and when are you protected?
 - Owner consents but later denies it and sues for trespass, etc.
 - Enter without a warrant or consent.
 - Damage or injury occurs while you are there and you are blamed.
 - Find something you weren't expecting when you investigate and turn it over to the police; owner sues.
 - Investigate and find nothing, then owner sues.
- b. Immunity = protection from liability at all (i.e., suit will be dismissed)
- c. RSA 31:104. Automatically under this law, health officers are immune from liability for civil damages for decisions made and actions taken while acting in their official capacity, within the scope of their authority, and in good faith.
- d. Municipal immunity.
 - Towns and cities are immune from liability for the “exercise of an executive or planning function involving the making of a basic policy decision characterized by the exercise of a high degree of official judgment or discretion.” *Merrill v. Manchester*, 114 N.H. 722 (1974). In other words, deciding whether a complaint is significant enough to require investigation and other similar discretionary decisions are protected.
 - NOTE: once a policy decision is made, there is no immunity for negligent failure to follow the plan.
 - What if you miss something? There is good news. “Cities and towns have not been, and are not now, guarantors of public peace, safety and welfare.” *Doucette v. Bristol*, 138 N.H. 205 (1993). Use “reasonable care” in determining the facts during an investigation, avoid “reasonably foreseeable” dangers, and that is usually sufficient to protect the town or city from liability. *Island Shores Condominium Ass’n v.*

Concord, 136 N.H. 300 (1992); *Cui v. Barrington Police Department*, 155 N.H. 447 (2007).

- Municipality may be immune even when an intentional (as opposed to negligent) action causes damage or injury, so long as the person acted under a reasonable belief that the conduct was authorized by law. *McSweeney v. Huckins*, No. 2013-184 (4/11/14). Example – person at the door who consents doesn't actually live there or is only 17 but you reasonably believe that they can consent.
- e. Indemnity = protection of one party from damage or loss by another (i.e., someone will cover the damages and costs for you)
- RSA 31:106: automatically under the law, health officers will be indemnified by the town or city for personal financial loss and expenses arising out of any claim regarding violation of federal civil rights, so long as acting within the scope of office and not acting with malice.
 - RSA 31:105: If governing body has adopted this statute (selectmen, town/city council), health officer may be indemnified by town or city for financial loss and expense of a lawsuit against the health officer for negligence or accidental damage if the suit arises out of the health officer's actions within the scope of office.
 - Note that intentional conduct or bad-faith conduct is not covered by either of these protective statutes.
 - Conduct that is outside the "scope of office" (i.e., not authorized by law as part of the health officer's job) is not covered either.
- f. Question: would health officer be indemnified for, or immune from, liability for trespass onto private property?

IV. Enforcement

- a. Violation of Health Officer regulations under RSA 147 is a "violation." RSA 147:1, III
- i. Violation = crime, prosecuted in court.
- b. Abatement of Nuisance of Public Health Threat under RSA 147:
- i. HO can notify the owner or occupant of a nuisance/health threat, and order them to remove or abate it within a certain time period. RSA 147:4.
 - ii. If they don't comply, HO can enter forcibly and take care of it. RSA 147:4.
 - iii. Town may bring action (suit in district division/superior court) to recover the costs and HO fees. RSA 147:7.
 - iv. Alternative: To recover without going to court (at least if the owner doesn't file a formal objection) and instead have it either paid directly by owner or charged as a tax lien, HO must follow procedure outlined in RSA 147:7-a and 147:7-b. Special notice to owner right from the start of the matter (RSA 147:7-a), explaining the problem and when it must be corrected, sent by registered mail. If owner fails to fix the problem, HO

- must follow procedure in RSA 147:7-b, serve the order to pay costs on the owner properly, and then turn over to Selectmen to become a tax liability.
- v. If you don't follow the steps exactly, you may not be able to take advantage of the tax lien process and still wind up going to court.

V. Right to Know Law (RSA Chapter 91-A)

a. Penalties for Violating the Law

- When a court finds that a public body or public agency (such as health officer) “purposefully” violated the law, and knew or should have known that what they did was a violation, the court is required to make the public body or agency pay the plaintiff’s reasonable attorney’s fees and costs if the litigation was necessary to enforce compliance with the law. RSA 91-A:8, I.
- If court finds bad faith violation by any individual officer, employee or official, the court is required to assess a civil penalty of \$250 - \$2,000. The penalty is payable to the town or city the official works for. In addition, the court may require the official to reimburse the town or city for any attorney’s fees or costs it paid during the lawsuit or damages it paid to the plaintiff who sued the officer and/or town or city. RSA 91-A:8, IV.
- Court may also issue an injunction (“don’t do it again”) and require training for local officials and employees at their own expense (but doesn’t say who provides the training). RSA 91-A:8, V.
- The immunities and indemnities discussed above don’t help in these situations.

b. Consultation with Legal Counsel

- RSA 91-A generally requires all meetings of public bodies be open to the public, with proper notice, and minutes kept.
- “Non-meetings” – list in RSA 91-A:4, I(b) of what is not a meeting. When something is not a meeting, no notice, access or minutes are required.
- One type of “non-meeting” is a “consultation with legal counsel.”
- *Ettinger v. Madison Planning Board*, 162 N.H. 785 (2001): “consultation” requires a two-way contemporaneous conversation, in person or over the telephone.
- Reading memo of legal advice or letter from attorney is fine; discussing it as a public body is not.
- What to do? Consider (1) having attorney there or on the phone, (2) have the conversation in a public meeting, or (3) have the conversation in a nonpublic session if the subject matter is appropriate for nonpublic sessions under RSA 91-A:3, II. (For example, if the advice relates to litigation pending or threatened in writing by or against the town, a discussion may occur in nonpublic session even if the attorney is not present or on the phone.)
- Consider two scenarios: (1) health officer meets with attorney alone; (2) health officer and board of selectmen meet with attorney. How does law apply?

c. Confidentiality of Legal Advice

- In general, a client has the privilege to refuse to share confidential communications to and from its attorney related to legal advice. This privilege (the “attorney-client privilege”) means those communications are exempt from disclosure under RSA 91-A. *Professional Fire Fighters of NH v. NHLGC*, 163 N.H. 613 (2012).
 - The privilege belongs to the client and exists until the client discloses the information to a third party who is not covered by the privilege. For example, if a consultant is hired by the attorney to help with the matter, the information may be shared with the consultant for that purpose without destroying the privilege. *Cameron v. Marlborough*, No. 213-2011-CV-337 (Cheshire County Superior Court, 2/27/12).
 - *Ettinger*: written legal advice is considered confidential and subject to the attorney-client privilege until a public body discusses it in public. Then the information becomes public.
- d. Confidentiality of Governmental Records
- Generally, governmental records must be made available to the public upon reasonable request unless there is a specific exemption in the law. RSA 91-A:4.
 - *38 Endicott Street North, LLC v. State Fire Marshal*, 163 N.H. 656 (2012): confidentiality of records compiled for “law enforcement purposes”
 - i. RSA 91-A does not explain how to handle law enforcement records; court use test under FOIA.
 - ii. Until 2012, NH courts applied it only to police records.
 - iii. If records were compiled for law enforcement purposes, and if disclosure would have any of the 6 listed negative effects, then they are confidential. *Montenegro v. Dover*, 162 N.H. 641 (2011).
 - iv. New: State Fire Marshal’s Office is a “mixed-function agency” with some law enforcement and some administrative functions.
 - v. When records are compiled for law enforcement purposes (rather than administrative), then see if they meet any of the 6-part test. In the *38 Endicott Street North, LLC* case, “investigation into potential criminal wrongdoing” regarding a fire.
 - FOIA test for confidentiality of law enforcement records: if a record meets any one or more of these factors, it is not discloseable.
 - i. Interference with law enforcement proceedings
 - ii. Interference with a defendant’s right to a fair trial
 - iii. Invasion of privacy
 - iv. Disclosing confidential sources
 - v. Disclosing investigative techniques and procedures
 - vi. Endangering the life or safety of any person
 - Open question remains – how far does this extend? Which other local and state agencies have some “law enforcement functions”?
 - i. RSA 157:1 – Health Officers may make regulations, and willful violation of those regulations is a “violation” under the criminal law with associated fine.

- ii. RSA 147:2 – Board of Health “shall” enforce DHHS rules regarding public health.
 - iii. RSA 147:9 –failure to comply with statutory requirements re: toilets and drains is a “violation” under criminal law with associated fine.
 - However, this doesn’t mean all records are confidential; only those related to the agency’s law enforcement function AND meet the 6-factor test. Caution is advised when dealing with a document request under RSA 91-A because it has not yet been tested beyond police departments and the State Fire Marshal’s Office.
 - Administrative Inspection Warrants – are public documents unless the court orders otherwise. RSA 595-B:3.
- e. Good news! Frivolous lawsuits, vexatious litigants.
- RSA 91-A:8, II: When a court finds a lawsuit is in bad faith, frivolous, unjust, vexatious, wanton or oppressive, it may order the plaintiff to pay the town or city the attorney’s fees it had to pay to defend the lawsuit. (As of 1/1/13)
 - Superior Court had done this once before and law was changed to clarify that courts may do so. *Cady v. Deerfield*, No. 21-2001-EQ-498 (Rockingham Cty. Sup. Ct., 4/23/12). The Court described the lawsuit as frivolous and brought in bad faith, requiring the Town to expend considerable taxpayer resources to defend it.
 - RSA 507:15-a, Vexatious Litigants. If a judge finds a person has brought three or more lawsuits that were initiated for the purpose of harassment, the court can order the plaintiff to retain an attorney in all court actions, or post a cash or surety bond sufficient to cover all attorney’s fees and anticipated damages in every lawsuit they bring. (Effective 7/2/13). Not limited to Right to Know lawsuits; applies to any kind of suit.

VI. Administrative Inspection Warrants – RSA 595-B

- a. Basics:
- An administrative inspection warrant is a written order from a court authorizing a public official to conduct certain inspections.
 - In towns and cities, may be requested by health officers, fire and police departments, building inspectors, code enforcement officers, local land use board, assessors.
 - Health officers may request them for investigations under RSA 48-A (housing standards), RSA 128 and RSA 137 (sanitation, nuisances, threats to public health and water)
 - Circuit Court, District Division. Where to find your court on the state’s website: <http://www.courts.state.nh.us/courtlocations/index.htm#district>. Central phone number (toll-free): 1-855-212-1234.
- b. What to include in the Affidavit/Request to the Court

- Establish that there is “probable cause” for the inspection. This can only come from facts, NOT speculation or assumption. Facts that are known, come from reliable sources, and would lead a reasonable person to believe that a problem situation exists. Includes things the health officer has seen, heard, or smelled; statements from neighbors, relatives, other municipal officials who have been there (if the source is trustworthy); pictures from a reliable source, etc. Include all details, such as names of those who complained, specific facts, timeline of events. Make it easy for the judge to understand why you need to be there.
 - Attorney General’s Office has defined probable cause as “that which would lead a person of reasonable caution to believe that evidence s present on private property that would show that a statute, code or ordinance has been violated and that an inspection of the premises will confirm this.”
 - Consent: There MUST be an explanation of exactly when and how consent to enter the property was sought and denied, or explain why the health officer was reasonably justified in not seeking consent (example – owner is known to shoot first and ask questions later).
 - Specifics of requested authorization:
 - The place, dwelling, structure, premises, vehicle or records to be inspected
 - The purpose for which the inspection is to be made
 - The time and manner of any testing or sampling to be done
 - If photos or videos are to be taken
 - If authorization for “forcible” entry is sought, demonstrate that there is a probable violation of a law that would present an immediate threat to public health or safety, or explain that reasonable attempts to serve a previous warrant have been unsuccessful
 - If issued, the warrant will state specifically what may be inspected, the purpose of the inspection, and any limitations the court imposes.
- c. Obtaining the Warrant
- File the petition and affidavit(s) with the court clerk.
 - Court will tell you when the hearing will be held.
 - At the hearing, the judge may question health officer and/or others under oath
- d. Conducting the Inspection
- 8:00 a.m. – 6:00 p.m., unless otherwise authorized in the warrant
 - May only “forcibly” enter if warrant says so
 - May bring a police officer with you
 - Must give a copy of the warrant to the owner or occupant of the place to be inspected (or if no one is there, leave a copy at the place where the inspection is conducted.
 - If any samples are taken, must give owner/occupant a receipt (or leave with the copy of the warrant). Specify what was taken and from where.
 - Time limits: Return warrant to court within 7 days of issuance unless it is extended or renewed by the court, and attach an inventory of any samples taken. At this point, it becomes a public document unless the court orders otherwise.

- e. What if the owner/occupant still refuses to let you in, or lets you in but won't allow access to certain places or allow you to take samples? This is a misdemeanor (which is a crime). RSA 595-B:8.