

LEGAL UPDATE FOR HEALTH OFFICERS

NH Health Officers' Association

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A. Entering Private Property

- First – look for authority in a statute! Remember that towns and cities in NH 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
- **When can health officers enter private property?**
 1. **With consent**: may enter any private property (including living quarters) if you get consent from the owner or consent of an occupant who you reasonably believe to be at least 18 years old.
 - RSA 128:5, III and RSA 128:5-a: To investigate and take appropriate action to safeguard the public health and/or prevent pollution of an aquifer or body of water.
 - RSA 147:3: Health officer “shall inquire into all nuisances and other causes of danger to the public health...”
 - RSA 48-A:8, III: Authority to investigate regarding minimum housing standards.
 2. **With an administrative inspection warrant** under RSA 595-B from a court: according to the terms of the warrant itself. It will spell out where, when, whom, how, and for what purpose.
 - RSA 147:3: Health officer may obtain an administrative inspection warrant under RSA 595-B, including the authority to forcibly enter property, to investigate nuisances and public health threats.
 - RSA 48-A:8, III: Health officer may obtain administrative inspection warrant to investigate regarding minimum housing standards.

3. **Without either consent or an administrative inspection warrant:**

- To investigate and take appropriate action to safeguard the public health and/or prevent pollution of an aquifer or body of water (RSA 128:5, III and RSA 128:5-a) – BUT not “living quarters.” So, nonresidential property, or unoccupied residential property, meaning no one actually lives there. If someone lives there but no one is home – that does not count.
- After a written order to abate a nuisance has been issued under RSA 147:4, and if the owner hasn’t complied with that order by the deadline in the order, the health officer “may forcibly enter” to abate the nuisance.
- If the property owner either doesn’t live in town or is unknown, *and* the building, vessel or enclosure is not occupied, or the occupant is unable to remove the nuisance or threat (in the health officer’s opinion), then 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. RSA 147:6. 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.

• **Guidance for Every Case:**

- **Keep a paper trail.** Keep dated notes/reports that spell out how you learned of the problem, what you learned from which person or property visit, all attempts to provide notice or obtain consent for an inspection, research you did to find an absentee owner, etc. If you do an inspection, write a detailed, dated, signed report.
- **Provide as much notice as you can.**
- **Bring a law enforcement officer with you.** This is for safety. Remember that it will not solve the problem if you need a warrant or consent.
- **Don’t do any extra inspecting.** Stick to the reason you’re there (what’s in the warrant, the specific emergency situation, the specific complaint/tip that brought you there).
- **Don’t enter without consent or a warrant unless there is an immediate threat to public health, an aquifer or a water body. Be prepared to explain to a judge why it fits one of those categories.** If it’s not one of those things, either get a warrant (if you can wait) or go to someone who can enter without a warrant (if a resident’s life is in danger, for example).
- **Bottom line:** Generally, do not enter private property without consent of owner, consent of adult occupant, or administrative search warrant. Why? Criminal trespass under RSA 635:2, guns, dogs....

• **Who else might be able to enter private property?**

- Police – but only with a warrant or with probable cause
- 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, without a warrant or consent.

- Building inspector – only with a warrant or consent, just like health officer
- Note that none of these statutes provides the same authority to health officers to enter without consent or a warrant.
- **What else can you do?**
 - Generally okay to view property from any “public” vantage point (on the street or sidewalk, at the foot of the driveway, over a fence or hedge without standing on something and without lifting camera up over fence).
 - No selfie sticks, no drones. They invade private property and are the same thing as entering without a warrant or permission. Cases around the country tend to find a 4th Amendment illegal search problem with this.
 - Can you look from neighboring property? Probably, if (a) you have consent of the owner of the neighboring property, and (b) you only view from places the neighbor could ordinarily view, such as back porch, second floor window, again NOT lifting camera over fence). 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

B. What Is an Unsanitary Condition?

- RSA 48-A:14 (Housing Standards) – lists the following which may be considered “unsanitary housing conditions:
 - Infestations by insects or rodents
 - Bed bug infestation
 - Defective internal plumbing or a back-up of sewage caused by a faulty septic or sewage system
 - Roof or walls leak consistently (i.e., conditions leading to mold)
 - Plaster is falling from walls or ceilings
 - Accumulation of garbage or rubbish
 - Inadequate supply of water or inability to provide hot water
 - Leaks in gas lines, defective pilot lights
 - Lack of heating facilities that are properly installed, safely maintained and in good working condition, or which can safely and adequately heat all habitable rooms to at least 56 degrees
- Other conditions that could result in neurobehavioral disorders, asthma, cancer, injury, poisoning from water, carbon monoxide poisoning, diseases
- Solvents, chemicals, improperly working or improperly vented appliances that can create unhealthy indoor air quality

C. Combining Order to Vacate (RSA 147:16-a) with 155-B Order

- **Health Officer Order to Vacate Building:** RSA 147:16-a gives the Health Officer the authority to order occupants to vacate a building, structure or other premises, IF:
 - Based on reasonable information and belief

- Health Officer believes the condition of the premises constitutes a clear and imminent danger to the life or health of occupants or other persons, and
- Protection of life or health requires vacating the premises.
- Does NOT apply to a residence occupied only by the owner and owner's immediate family, unless the condition constitutes a clear and imminent danger to the life or health of people *other than* the occupants.
- **Process for Order to Vacate:**
- Immediately: Inform owner and all occupants of the order (orally or otherwise) as soon as practicable, by whatever means are practicable. Include the deadline for vacating premises (which is set in light of the seriousness and immediacy of the danger)
- Post notice at each entrance to building/premises: brief description of dangerous condition, notice that the premises has been ordered vacated, who made the order, effective date/time of order. Notice must remain posted so long as it is in effect. (See RSA 147:16-a, II for suggested language.)
- Within 24 hours of the order (or next business day), send notice by registered mail to owner of property and known lessees or others who have control over the premises. OR may serve written notice personally by "peace officer." Notice must include address/description of premises, particulars of the danger to life, health or safety, effective date/time of the order, statement of the right to a hearing in circuit court, district division to contest the order or have court consider whether responsible party should be required to remove or abate the source of danger.
- Forward copy of this second notice to local law enforcement.
- File a copy of this second notice, with a list of names and addresses of all people to whom notice was sent, in circuit court, district division.
- "Any person specially aggrieved" may file in court to contest the order. If so, court must hold a hearing no later than 7 days after the request. Court determines whether order is justified and/or whether responsible party will be ordered to remediate situation. Court can affirm, reverse, or modify the order.
- Note: if court finds the order as frivolous or in bad faith, or not based upon reasonable information and belief, municipality may be ordered to pay costs and attorneys' fees of any aggrieved person who requested a hearing.
- **Governing Body Order re Hazardous or Dilapidated Buildings:** RSA 155-B authorizes the governing body (board of selectmen, town council, city council/mayor and aldermen) to order property owners to repair or remove hazardous buildings. A "hazardous building" is a structure or parts of a structure that, because of inadequate maintenance, dilapidation, physical damage, unsanitary condition, or abandonment, constitute a fire hazard or a hazard to public safety or health. If the owner doesn't comply the town/city can repair or remove the building, but only after obtaining a court order.
 - **Procedure for Governing Body Order:**
 - Governing body has sheriff serve original order to owner, including description of the hazardous condition that needs to be repaired/removed, reasonable time to

comply, information about what will happen if they do not comply or file an answer with the court.

- Once service is made, town/city files with the circuit court, district division a copy of the order and proof of service on the owner.
- Town/city also records a registry of deeds a notice describing the property affected, the nature of the order that has been issued, and a statement that a proceeding has begun under RSA 155-B to address a hazardous building.
- Next step depends on what the owner does:
 - If they remedy the condition within the time provided, town/city records notice at registry that the proceeding has been abandoned.
 - The owner has 20 days from when they are served to serve an answer on the town/city and file it with the court. If they do, the court will schedule an evidentiary hearing (which takes priority over other civil matters) and decide what to do.
 - If the owner does nothing, the town/city may file with the court a motion to enforce the original order. The court may order a hearing or may simply issue an order. The court's decision will tell the town/city when it may proceed to fix the hazardous condition.
- Any party "aggrieved" by the court's decision may appeal to the superior court within 15 days.
- Once the town/city has a court order, it may take actions necessary to correct the problem as set forth in the order. If any personal property has to be removed to fix the problem, and/or if there is salvage value in anything, the town/city may sell it and apply the proceeds against the costs incurred (but only as approved by the court). The costs constitute a lien on the property, BUT only after they are approved by the court. If the owner doesn't pay the approved cost judgment by the next December 1, that amount becomes a tax lien against the property and is enforceable like any other tax lien.
- **To combine these two, must meet both sets of requirements for procedure:**
 - If a "hazardous building" is occupied, it may make sense to issue both kinds of orders to remove people from the building and correct the problem.
 - Only appropriate if occupied by someone other than owner/immediate family unless the problem constitutes a clear and imminent danger to other people.
 - Could issue one joint order/notice to vacate and to correct the hazardous condition (health officer and governing body)
 - Inform occupants ASAP
 - Post notice on property
 - Have sheriff serve detailed order (including information for both kinds of orders)
 - File copy with law enforcement
 - File order and proof of service with circuit court district division
 - Record notice of proceedings at registry
 - Two responses possible: aggrieved person may file in court to contest the order to vacate, and owner may serve town/city with answer contesting the order to

repair/remove hazardous building. Likely separate hearings if that happens (order to vacate first, order to repair/remove building later).

D. Nuisance – Enforcing Rules and Writing Citations

Enforcement Options:

- **Ordinary Order to Abate – RSA 147:4**

Once a public nuisance of a public health threat is discovered, the health officer may notify the owner or occupant in writing and order them to remove or abate it within a particular time.

- Notice should identify the property at issue, explain what the problem is and how the health officer knows this information (observed from outside, performed inspection, etc.), exactly what action is required to be taken by the owner/occupant, and the date by which that action must be completed. Also suggest including in the notice a statement that if they fail to take action, the health officer is authorized by law to forcibly enter and cause the nuisance to be removed or destroyed.
- Notice given in person or left at residence. However, consider having police serve it or sending an additional copy by certified mail to create a reliable paper trail.
- If they do not comply within the time given in the notice, the health officer may forcibly enter (and may employ other people to help) and remediate the nuisance or threat. RSA 147:4 and :5.
- If the owner is unknown to the health officer or doesn't reside in town, AND either the premises are unoccupied or the occupant is unable to remove the threat/nuisance, the health officer may abate the nuisance or remove the threat immediately and without notice. RSA 147:6. However—this only applies if both conditions are met. Better to provide notice and wait, if possible.
- To recover costs, town must file an action in court against the owner/occupant. RSA 147:7.

- **Alternative Order to Abate – RSA 147:7-a and :7-b**

To recover costs without going to court (at least if the owner doesn't file a formal objection), and instead have costs paid directly by the owner to the town OR charged to the owner as a tax lien on the property, the health officer must follow specific notification and abatement procedures.

- Health officer must first get consent of governing body to use this method (Order for Abatement Costs)
- Begin with special notice to owner and occupants, sent by registered mail, including a description of the problem, the date(s) of any inspection, the corrective actions required, and a reasonable time by which those actions must be taken. Notice must also state that failure to take corrective action may result in an action by the town, and the cost of these actions shall result in a lien against the property. RSA 147:7-a.
- If owner fails to fix the problem by the deadline in the notice, the health officer may correct the problem. Keep careful records of all costs of these actions.

- Then – Order for Abatement Costs is issued to owner, including a copy of the original notice, a statement of the corrective actions taken by the town, an accounting of the town’s expenses, a statement that the abatement costs constitute a lien against the real estate that is enforceable in the same manner as real estate taxes and that if no objection is filed with the health officer within 30 days, the account will be committed to the tax collector, the address of the health officer, and a copy of RSA 147:7-b.
 - Order is served on the owner (and the person to whom property tax bills are assessed, if it is a different person than the owner) by the sheriff, in the same way a lawsuit would be served.
 - If no objection is filed with the health officer within 30 days, the health officer turns it over to the tax collector (copy of the order, proof of service, and certification that no objection was received) and it proceeds just like a regular property tax lien.
 - If owner does file an objection, next step is for health officer to file a motion to affirm the order. File with district division (up to \$25,000) or superior court (over that amount). Court will conduct a hearing on the motion and issue an order to affirm, correct or deny the order.
- Prosecute “violation” as criminal violation – RSA 147:1, III
 - Order Building Vacated – RSA 147:16-a (See Section C above)

E. Lead Paint RRP – Enforcing Rules

- RRP = Renovation, Repair, and Painting
- **Federal regulatory program** affecting contractors, property managers and others who disturb painted surfaces in residential houses, apartments and child-occupied facilities such as day care centers and schools built before 1978. Does not apply to property owner performing work on their own property, but DOES apply to landlords or their employees performing the work on rental property.
 - Federal Toxic Substances Control Act (TSCA): Title IV of this act authorizes EPA to address lead-based paint in pre-1978 housing and other buildings and structures.
 - EPA regulations: 40 C.F.R. Part 745, Subpart E (residential property renovations): requires, among other things, that people who are compensated for performing renovation of pre-1978 housing must provide a lead hazard information pamphlet to the owner and occupant prior to commencing renovation. Subpart L sets forth the procedures and requirements for the accreditation of training programs and renovations, procedures and requirements for certification of individuals and companies engaged in lead-based paint activities, work practice standards for performing such activities, and delegation of programs.
- Two major requirements regarding “renovation” (which means any activity that disturbs painted surfaces and includes most repair, remodeling and maintenance activities, including window replacement):
 - Pre-renovation education (distribute lead pamphlet before starting renovation work, post notices, etc.)

- Training, certification and work practice requirements: Firms must be certified and employees must be trained in use of lead-safe work practices, and lead-safe work practices that minimize occupants' exposure to lead hazards must be followed. "Lead-safe work practices" include things like work area containment of dust and debris, prohibition of open-flame burning and power tools without HEPA exhaust control, cleanup requirements.
- **Enforcement:** EPA enforces these requirements. Failure or refusal to comply may result in a notice of noncompliance or action for civil penalties for each violation (and in extreme situations criminal proceedings may result). Enforcement activities are targeted at those who neither comply nor cooperate to address their obligations, and there are incentives for small businesses to comply, voluntarily disclose and correct violations.
- **To Report Violations:** EPA Tip & Complaint Line: 617-918-8477
- www.epa.gov/compliance/incentives/smallbusiness/index.html - information about EPA's Small Business Policy, which encourages small companies to self-report possible violations and get help coming into compliance.
- <https://www.epa.gov/sites/production/files/documents/sbcomplianceguide.pdf> - EPA's Small Entity Compliance Guide to Renovate Right (handbook for how to comply with RRP requirements)
- **NH Dept of Health and Human Services:**
 - Division of Public Health, Bureau of Community Health Services has the "Healthy Homes and Lead Poisoning Prevention Program"
 - Implements some of the provisions of 2018 SB 247 (Chapter 4), which amended various statutes regarding lead poisoning prevention. Includes statutes regarding day care licensing, insurance coverage for testing, RSA 477:4-a (notification regarding lead in contracts for purchase and sale of real estate), drinking water in schools, and testing (by DHHS) for lead in drinking water.
 - Also amends a variety of sections in **RSA 130-A (Lead Paint Poisoning Prevention and Control)**. DHHS has authority to inspect rental housing and child care facilities, and if they find a lead exposure hazard, they are required to provide a copy of findings and any order regarding abatement to the health officer. However, the law imposes no obligations on the health officer whatsoever regarding inspections, enforcement or other action.
 - See handout – DHHS "SB 247 Quick Guide"