JEOPARDY!
ADMINISTRATIVE APPEALS

Board of Claims:
- RSA 541-B:3
- RSA 541-B:9
- RSA 541-B:11
- N.H. Admin. R., Cla 102.03

Commission for Human Rights:
- RSA 354-A:21
- RSA 354-A:21-a
- RSA 354-A:28
- N.H. Admin. R., Hum 202.01
- N.H. Admin. R., Hum 203.01
- N.H. Admin. R., Hum 219.04

Department of Environmental Services:
- RSA 21-M:3
- RSA 21-O:3
- RSA 21-O:5-a
- RSA 21-O:7
- RSA 21-O:9
- RSA 21-O:11
- RSA 21-O:14
- Appeal of NH Dept of Environmental Services, __ NH __ (Slip Op. Dec. 28, 2023)
- Appeal of Michele (New Hampshire Wetlands Council), 168 N.H. 98, 103 (2015)

Board of Tax and Land Appeals:
- RSA 71-B:1
- RSA 71-B:7
- RSA 71-B:12
- RSA 71-B:14
- RSA 76:16-a
- RSA 498-A:9-a
- RSA 498-A:24
- RSA 498-A:25
- RSA 498-A:27
- RSA 541:6
- RSA 541:13
- RSA 541-A:33
- Appeal of Porobic, 175 NH 456 (2022)
- N.H. Admin. R., Tax 201.30
- N.H. Admin. R., Tax 210.04

Office of Professional Licensure and Certification:
- RSA 310:10
- RSA 310:14
- N.H. Admin. R., PLC
- NH OPLC Process for Report of Non-Compliance

Agency Records:
- RSA 33-A:3-a
- RSA 91-A:4
- RSA 170-G:8-a
- RSA 290:16
- RSA 611-B:21

Miscellaneous reference:
- Administrative rules: What is the Official Version of a Rule?
- McNamara v. Hersh, 157 N.H. 72 (2008).
- New Hampshire Drafting and Procedure Manual for Administrative Rules

TITLE LV
PROCEEDINGS IN SPECIAL CASES

CHAPTER 541-B
CLAIMS AGAINST THE STATE

Section 541-B:3

541-B:3 Appointment and Qualifications of Board Members. –
I. The governor shall appoint 2 competent persons to serve as board members; preferably each shall be a member of the New Hampshire Bar Association.
II. The chief justice of the New Hampshire supreme court shall appoint the chairman of the board. The chairman shall be a judicial referee, if one is available, but if not, then the chairman shall be a member of the New Hampshire Bar Association.
III. The president of the senate shall appoint one member of the senate, and the speaker of the house of representatives shall appoint one member of the house of representatives, to serve as board members.
IV. All members shall be residents of the state and if any member ceases to be a resident of this state a vacancy is created.

Source. 1977, 595:2, eff. July 1, 1977.

TITLE LV
PROCEEDINGS IN SPECIAL CASES

CHAPTER 541-B
CLAIMS AGAINST THE STATE

Section 541-B:9

541-B:9 Jurisdiction. –

I. Claims under this chapter shall be brought solely in accordance with the provisions of this chapter.

II. The board shall have original and exclusive jurisdiction to investigate, conduct hearings and make decisions, and render or deny awards on all claims under this chapter not exceeding $5,000 against any agency, except those claims arising under workers' compensation, unemployment compensation, eminent domain proceedings, RSA 110-B:73, RSA 207:23-a, RSA 228:29, and RSA 491:8.

III. The board shall have concurrent jurisdiction to investigate, conduct hearings and make decisions, and render or deny awards, except those claims arising under workers' compensation, unemployment compensation, eminent domain proceedings, RSA 110-B:73, RSA 207:22-25, RSA 228:29 and RSA 491:8, with the superior court on all claims in excess of $5,000, but not exceeding $50,000, against any agency.

IV. Except as otherwise provided, the superior court shall have original and exclusive jurisdiction of all claims in excess of $50,000 against any agency.

V. Notwithstanding paragraph II, the department of corrections shall have exclusive jurisdiction to investigate, conduct hearings and make decisions, and render or deny awards on claims against the department of corrections when the amount involved is less than $500.

V-a. Notwithstanding paragraph II, the department of health and human services shall have exclusive jurisdiction to investigate, conduct hearings and make decisions, and render or deny awards on claims against New Hampshire hospital when the amount involved is less than $500.

VI. The board of claims may authorize payment of uncontested claims based upon a review of the record, without holding a hearing.

Source. 1977, 595:2. 1985, 412:6. 1987, 14:3. 1997, 166:1. 1999, 296:9, eff. Sept. 14, 1999; 344:8, eff. Nov. 18, 1999.

TITLE LV
PROCEEDINGS IN SPECIAL CASES

CHAPTER 541-B
CLAIMS AGAINST THE STATE

Section 541-B:11

541-B:11 Procedure. –
The procedure for the filing and adjudication of claims is as follows:
I. The claimant shall first file the claim in writing with the agency involved.
II. When a claim has been filed with any agency, the head of the agency shall make or cause to be made a preliminary investigation and provide the attorney general with the results of such investigation.
III. Any person initiating a claim with the board under the provisions of RSA 541-B:9, II or III shall file the claim with the secretary of state, who shall forward the claim to the board.
IV. The secretary of state shall notify the agency, the attorney general, and the claimant of the next scheduled quarterly meeting of the board and of the pertinent information as to when the claim has been scheduled for a hearing. The claimant, attorney general, and agency shall have at least 10 days' written notice of the date, time and place of the hearing.
V. When a claim is forwarded to the board by the secretary of state, the board shall schedule such claim for a hearing no later than the next succeeding quarterly meeting of the board, if the board has met in the current quarter or not enough time is left within said quarter to comply with the notice required pursuant to paragraph IV. Upon the request of any party, the board may continue any claim until a succeeding quarterly meeting in order that the party may perform necessary and adequate discovery.
VI. The claimant may represent himself or he may be represented by an attorney. The claimant may subpoena witnesses and compel their attendance, and also may require the production of books, papers and documents. The attorney general shall represent the agency.
VII. All hearings before the board shall be subject to the provisions of RSA 91-A.

Source. 1977, 595:2. 1985, 412:8, eff. July 3, 1985.

CHAPTER Cla 100 ORGANIZATIONAL RULES

PART Cla 101 DEFINITIONS

Cla 101.01 "Agency" means "agency" as defined in RSA 541-B:1, I, namely, "all departments, boards, offices, commissions, institutions, other instrumentalities of state government, including but not limited to the Pease development authority, division of ports and harbors, the New Hampshire housing finance authority, the New Hampshire energy authority, and the Pease development authority, and the general court, including any official or employee of same when acting in the scope of his or her elected or appointed capacity, but excluding political subdivisions of the state."

Source. #2659, eff 3-28-84; EXPIRED 3-28-90

New. #5481, eff 11-1-92, EXPIRED: 11-1-98

New. *#8508 eff 12-9-05*

Cla 101.02 "Board" means "board" as defined in RSA 541-B:1, II, namely, "the board of claims established by RSA 541-B:2."

Source. #2659, eff 3-28-84; EXPIRED 3-28-90

New. #5481, eff 11-1-92, EXPIRED: 11-1-98

New. *#8508 eff 12-9-05*

Cla 101.03 "Claim" means "claim" as defined by RSA 541-B:1, II-a, namely, "any request for monetary relief for either:

(a) Bodily injury, personal injury, death or property damages caused by the failure of the state or state officers, trustees, officials, employees, or members of the general court to follow the appropriate standard of care when that duty was owed to the person making the claim, including any right of action for money damages which either expressly or by implication arises from any law, unless another remedy for such claim is expressly provided by law; or

(b) Property damages suffered by a state employee or official during the performance of that employee's or official's duties while on state business where compensation is appropriate under principles of equity and good conscience."

Source. #2659, eff 3-28-84; EXPIRED 3-28-90

New. #5481, eff 11-1-92, EXPIRED: 11-1-98

New. *#8508 eff 12-9-05*

Cla 101.04 "Political subdivision" means "political subdivision" as RSA 541-B:1, VI, namely, "any village district, school district, town, city, county or unincorporated place in the state."

Source. *#8508 eff 12-9-05*

PART Cla 102 DESCRIPTION OF THE AGENCY

Cla 102.01 Composition of the Board. The board consists of 5 members appointed in accordance with RSA 541-B:3 for terms specified in RSA 541-B:4.

Source. *#8508 eff 12-9-05*

Cla 102.02 Responsibilities of the Board.

(a) The responsibilities of the board are to investigate, conduct hearings upon, decide and render or deny awards on claims against agencies within the jurisdictions set forth in (b) below.

(b) With the exception of claims described in RSA 541-B:19 and those specified in (c) below, the board's jurisdictions are:

(1) Original and exclusive over claims not exceeding $5,000, except those arising under workers' compensation, unemployment compensation, eminent domain proceedings, RSA 110-B:73, RSA 207:23-a, RSA 228:29, and RSA 491:8; and

(2) Jurisdiction concurrent with the superior court over claims in excess of $5,000 but not exceeding $50,000, except those arising under workers' compensation, unemployment compensation, eminent domain proceedings, RSA 110-B:73, RSA 207:22-25, RSA 228:29 and RSA 491:8.

(c) The board's jurisdiction excludes claims against the department of corrections and claims against New Hampshire hospital when the amount involved is less than $500.

Source. *#8508 eff 12-9-05*

Cla 102.03 Meetings of the Board.

(a) The board shall meet quarterly and at such additional times as its business requires.

(b) The time and place of the meetings shall be noticed to the public in accordance with RSA 91-A:2, II.

(c) Pursuant to RSA 541-B:8 a majority of the board shall constitute a quorum to conduct hearings and a vote of at least a majority of the quorum shall be required to adopt and approve any matter considered by it.

Source. *#8508 eff 12-9-05*

Cla 102.04 Records of Board Actions.

(a) Minutes shall be kept of board meetings which are not hearings and of official actions taken by the board.

(b) The minutes shall record the members who participate in each vote and shall separately record the position of members who concur, dissent or abstain.

(c) Minutes of board actions which are not exempt from disclosure under RSA 91-A:3, II or RSA 91-A:5 shall be public records.

(d) A recording shall be made of the board's hearings.

Source. *#8508 eff 12-9-05*

PART Cla 103 PUBLIC INFORMATION

Cla 103.01 Mailing Address, Telephone Number and Access for TTY/TDD Users.

(a) The office of the secretary of state shall be the office of record for the board.

(b) The board’s mailing address is:

Board of Claims
c/o Secretary of State
State House Room 204
Concord, New Hampshire 03301

(c) The board's telephone number is (603) 271-3242.

(d) Access for in-state TTY/TDD users is through Relay New Hampshire by dialing 711 or by dialing 1-800-735-2964.

(e) Correspondence, filings and other communications intended for the board shall be mailed to the address set forth in (b) above.

(f) Information may be obtained by using the numbers set forth in paragraphs (c) and (d).

Source. *#8508 eff 12-9-05*

Cla 103.02 Inspection and Copies of Records.

(a) The board shall make available records subject to public inspection under RSA 91-A during weekday business hours at the office of the secretary of state.

(b) Persons desiring to inspect or obtain copies of records shall identify as specifically as possible the information being sought.

(c) Persons desiring copies of written records other than transcripts of hearings shall pay the actual costs of copying.

(d) Persons desiring transcripts of hearings shall pay the costs of transcription, printing of the transcript and mailing.

(e) If records are requested which contain both public information and information exempt from disclosure pursuant to RSA 91-A or other law, the board shall delete the information exempt from disclosure and provide the remaining information.

Source. *#8508 eff 12-9-05*

CHAPTER Cla 200 PROCEDURAL RULES

PART Cla 201 DEFINITIONS

Cla 201.01 “Adjudicative proceeding” means “adjudicative proceeding” as defined in RSA 541-A:1, I., namely “the procedure to be followed in contested cases, as set forth in RSA 541-A:31 through RSA 541-A: 36.”

Source. #2659, eff 3-28-84; EXPIRED 3-28-90

2. The board requires information not obtained through the process of requesting it pursuant to (b)(2) above.

(d) The board shall administratively dismiss a claim if the claim is plainly outside the jurisdiction of the board.

(e) The board's order dismissing a claim shall include:

(1) Notice to the claimant of the dismissal and of the claimant's right to request a hearing of the matter;

(2) The record of the vote dismissing the claim; and

(3) Notice to the claimant of entitlement to reimbursement of any filing fee paid.

(f) The board shall issue its administrative decision in the form of a written order delivered to:

(1) The claimant;

(2) The agency claimed against;

(3) The attorney general; and

(4) The secretary of state.

(g) The board's order on a claim on which payment is administratively approved shall include:

(1) The amount of the award; and

(2) The record of the vote approving the claim.

Source. #8511, eff 12-09-05, EXPIRED: 12-9-13

Cla 302.06 Claimant's Right to an Adjudicative Hearing. A claimant shall be entitled to a hearing under the following circumstances:

(a) When the claim has not been administratively approved;

(b) When the claim has been administratively approved in an amount different from the amount claimed; or

(c) For the purpose of determining the board's jurisdiction when the claimant wishes to challenge dismissal of the claim pursuant to Cla 302.05(d).

Source. #8511, eff 12-09-05, EXPIRED: 12-9-13

APPENDIX

RULE	STATUTE
Cla 101	RSA 541-A:7
Cla 102.01	RSA 541-B:3; RSA 541-B:4
Cla 102.02	RSA 541-B:19; RSA 541-B:9, I-V-a
Cla 102.03(a)	RSA 541-B:11, IV and V
Cla 102.03(b)	RSA 541-B:8
Cla 102.04(a)	RSA 91-A:2, II; RSA 541-A:16, I(a)
Cla 102.04(b)	RSA 541-A:16, I(a)
Cla 102.04(c)	RSA 91-A:2, II;
Cla 102.04(d)	RSA 541-A:16, I(a); RSA 541-A:16, I(b)(2)
Cla 103.01	RSA 541-A:16, I(a)
Cla 103.02	RSA 91-A:4
Cla 201	RSA 541-A:7
Cla 202.01	RSA 541-A:7
Cla 202.02	RSA 541-A:30-a, III(j)
Cla 203	RSA 541-A:30-a, III(f)
Cla 204.01	RSA 541-A:30-a, I; RSA 541-A:31, III

Cla 204.02	RSA 541-A:30-a, III(b)
Cla 204.03(a)	RSA 541-A:30-a, I; RSA 541-B:10, I
Cla 204.03(b) (c) and (d)	RSA 541-A:30-a, III(k)
Cla 204.03(e)	RSA 541-A:30-a, I; RSA 541-B:10, I
Cla 204.04	RSA 541-A:30-a, I; RSA 541-B:10, I
Cla 204.05	RSA 541-A:30-a, III(a)
Cla 204.06 and Cla 207	RSA 541-A:30-a, I; RSA 541-B:10, I
Cla 208.01	RSA 541-B:10, III; RSA 541:30-a, I
Cla 208.02	RSA 541-B:10, III; RSA 541-B:11, VI; RSA 541:30-a, I
Cla 208.03 and Cla 208.04	RSA 541-B:10, III; RSA 541:30-a, I
Cla 209	RSA 541-A:30-a, III(c)
Cla 210.01	RSA 541-A:30-a, I; RSA 541-B:10, I
Cla 210.02	RSA 541-A:30-a, III(h)
Cla 211, Cla 212 and Cla 213	RSA 541-A:30-a, I; RSA 541-B:10, I
Cla 213.01 and Cla 213.02	RSA 541-A:30-a, I; RSA 541-B:10, I
Cla 213.03(a)-(g)	RSA 541-B:10, II
Cla 213.03(h)	RSA 541-B:11, VII
Cla 213.04	RSA 541-A:30-a, III(d) and (e)
Cla 213.05	RSA 541-A:30-a, I; RSA 541-B:10, I
Cla 214.01, 214.02 and 214.03	RSA 541-A:30-a, I; RSA 541-B:10, I
Cla 214.04	RSA 541-B:11, VI; RSA 541-B:18; RSA 541-A:16, I(b)
Cla 215	RSA 541-B:10, I and IV
Cla 216	RSA 541-A:16, I(c)
Cla 217	RSA 541-A:16, I(b)(3)
Cla 218	RSA 541-A:16, I(d)
Cla 219	RSA 541-A:11, VII
Cla 301	RSA 541-A:7
Cla 302.01(a)	RSA 541-B:9; RSA 541-B:21, I and III; RSA 541-B:21-a, I and III; RSA 541-B:14, IV; RSA 541-B:19
Cla 302.01(b)	RSA 541-B:10, I
Cla 302.02	RSA 541-B:10, I
Cla 302.03(a)	RSA 541-B:11, I
Cla 302.03(b)(1)	RSA 541-B:11, III
Cla 302.03(b)(2)	RSA 541-B:17
Cla 302.03(c)	RSA 541-B:11, III; RSA 541-A:7
Cla 302.04	RSA 541-B:10, I
Cla 302.05	RSA 541-A:1, IV

TITLE XXXI
TRADE AND COMMERCE

CHAPTER 354-A
STATE COMMISSION FOR HUMAN RIGHTS

Complaint Procedures and Review

Section 354-A:21

354-A:21 Procedure on Complaints. –

I. (a) Any person claiming to be aggrieved by an unlawful discriminatory practice may make, sign and file with the commission a verified complaint in writing which shall state the name and address of the person, employer, labor organization, employment agency or public accommodation alleged to have committed the unlawful discriminatory practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the commission. The attorney general or one of the commissioners may, in like manner, make, sign, and file such complaint.

(b) In connection with the filing of such complaint, the attorney general is authorized to take proof, issue subpoenas and administer oaths in the manner provided in the civil practice law and rules. Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with the provisions of this chapter, may file with the commission a verified complaint asking for assistance by conciliation or other remedial action.

II. (a) After the filing of any complaint, one of the commissioners designated by the chair shall make, with the assistance of the commission's staff, prompt investigation in connection therewith; during the course of the investigation, the commission shall encourage the parties to resolve their differences through settlement negotiations; and if such commissioner shall determine after such investigation that probable cause exists for crediting the allegations of the complaint, the commissioner shall immediately endeavor to eliminate the unlawful discriminatory practice complained of by conference, conciliation and persuasion. The members of the commission and its staff shall not disclose what has occurred in the course of such endeavors, provided that the commission may publish the facts in the case of any complaint which has been dismissed, and the terms of conciliation when the complaint has been so disposed of. When the investigating commissioner finds no probable cause to credit the allegations in the complaint, the complaint shall be dismissed, subject to a right of appeal to superior court. To prevail on appeal, the moving party shall establish that the commission decision is unlawful or unreasonable by a clear preponderance of the evidence. The findings of the investigating commissioner upon questions of fact shall be upheld as long as the record contains credible evidence to support them. If it reverses the finding of the investigating commissioner, the superior court shall remand the case for further proceedings in accordance with RSA 354-A:21, II, unless the complainant or respondent elects to proceed with a hearing in superior court pursuant to RSA 354-A:21-a.

(b) In case of failure to eliminate an unlawful discriminatory practice complained of, or in advance thereof, if, in the judgment of the commissioner making the investigation, circumstances so warrant, the commissioner shall cause to be issued and served in the name of the commission, a written notice, together with a copy of such complaint, as the same may have been amended, requiring the person, employer, labor organization or employment agency named in such complaint, hereinafter referred to as respondent, to answer charges of such complaint at a hearing before 3 members of the commission, designated by the chair and sitting as the commission, at a time and place to be fixed by the chair and specified in such notice. The place of any such hearing shall be the office of the commission or such other place as may be designated by it.

(c) The case in support of the complaint may be presented before the commission by the complainant or complainant's representative and the commissioner who shall have previously made the investigation and caused the notice to be issued shall not participate in the hearing except as a witness, nor shall he participate in the subsequent deliberation of the commission in such case; and the aforesaid endeavors at conciliation shall not be received in evidence. The respondent shall file a written verified answer to the complaint and appear at such hearing in person or otherwise, with or without counsel, and submit testimony. The commission or the complainant shall have the power reasonably and fairly to amend any complaint, and the respondent shall have like power to amend his other answer. The commission shall not be bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken at the hearing shall be under oath and transcribed at the request of any party. The cost of transcription shall be borne by the party requesting the transcript unless the party is indigent, in which case the commission shall pay the cost.

(d) If, upon all the evidence at the hearing, the commission shall find that a respondent has engaged in any unlawful

discriminatory practice as defined in this chapter, the commission shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including, but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay, restoration to membership in any respondent labor organization, or the extension of full, equal and unsegregated accommodations, advantages, facilities and privileges to all persons, as in the judgment of the commission, will effectuate the purpose of this chapter and including a requirement for report of the manner of compliance. Such cease and desist orders for affirmative relief may be issued to operate prospectively. The commission may also order compensatory damages to be paid to the complainant by the respondent and, in order to vindicate the public interest, order the respondent to pay an administrative fine. The administrative fine shall be deposited in the general fund. The amount of the administrative fine shall not exceed:

(1) $10,000 if the respondent has not been adjudged to have committed any prior discriminatory practice in any administrative hearing or civil action.

(2) $25,000 if the respondent has been adjudged to have committed a prior discriminatory practice in any administrative hearing or civil action and the adjudication was made no more than 5 years prior to the date of filing the current charge.

(3) $50,000 if the respondent has been adjudged to have committed 2 or more discriminatory practices in any administrative hearings or civil actions and the adjudications were made during the 7-year period preceding the date of filing of the charge.

(e) When issuing an order awarding back pay, the commission shall calculate the back pay award by determining the amount the complainant would have earned but for the unlawful discriminatory practice. The commission shall subtract from that amount any unemployment compensation or interim earnings received by the complainant for the time period covered by the back pay award.

(f) If upon all the evidence the commission shall find that a respondent has not engaged in any such unlawful discriminatory practice, the commission shall state its findings of fact and shall issue and cause to be served on the complainant an order dismissing the said complaint as to such respondent. A copy of its order shall be delivered in all cases to the attorney general, and such other public officers as the commission deems relevant or proper. The commission shall establish rules of practice to govern, expedite, and effectuate the foregoing procedure and its own actions thereunder.

III. Any complaint filed pursuant to this section by an aggrieved person must be filed within 180 days after the alleged act of discrimination. Any complaint filed pursuant to this section by the attorney general or one of the commissioners must be so filed within 180 days after the alleged unlawful discriminatory practice.

IV. In administering this section, the commission shall be exempt from the provisions of RSA 541-A:29, II, but shall close each case or commence adjudicative proceedings on such case under RSA 354-A:21 within 24 months after the filing date of the complaint.

Source. 1992, 224:1-3. 1994, 251:3; 412:44. 2000, 277:3, 4, 5. 2006, 126:3, 4, eff. July 1, 2006.

TITLE XXXI
TRADE AND COMMERCE

CHAPTER 354-A
STATE COMMISSION FOR HUMAN RIGHTS

Complaint Procedures and Review

Section 354-A:21-a

354-A:21-a Choice of Forum. –

I. Any party alleging to be aggrieved by any practice made unlawful under this chapter may, at the expiration of 180 days after the timely filing of a complaint with the commission, or sooner if the commission assents in writing, but not later than 3 years after the alleged unlawful practice occurred, bring a civil action for damages or injunctive relief or both, in the superior court for the county in which the alleged unlawful practice occurred or in the county of residence of the party. Any party alleged to have committed any practice made unlawful under this chapter may, in any case in which a determination of probable cause has been made by the investigating commissioner, remove said complaint to superior court for trial. A court in cases so removed may award all damages and relief which could have been awarded by the commission, except that in lieu of an administrative fine, enhanced compensatory damages may be awarded when the court finds the respondent's discriminatory conduct to have been taken with willful or reckless disregard of the charging party's rights under this chapter. A superior court trial shall not be available to any party if a hearing before the commission has begun or has concluded pursuant to RSA 354-A:21, II(b), or to a complainant whose charge has been dismissed as lacking in probable cause who has not prevailed on an appeal to superior court pursuant to RSA 354-A:21, II(a). In superior court, either party is entitled to a trial by jury on any issue of fact in an action for damages regardless of whether the complaining party seeks affirmative relief.

II. The charging party shall notify the commission of the filing of any superior court action, and the respondent shall notify the commission of the removal to superior court after a finding of probable cause. After such notice, the commission shall dismiss the complaint without prejudice. A party electing to file a civil action with the superior court under paragraph I shall be barred from bringing any subsequent complaint before the commission based upon the same alleged unlawful discriminatory practice.

III. The commission may, after a finding of probable cause, bring suit in superior court at its own expense on behalf of an aggrieved person in housing discrimination cases.

Source. 2000, 277:6. 2006, 126:5, 6, eff. July 1, 2006.

TITLE XXXI
TRADE AND COMMERCE

CHAPTER 354-A
STATE COMMISSION FOR HUMAN RIGHTS

Opportunity for Public Education Without Discrimination a Civil Right

Section 354-A:28

354-A:28 Procedure on Public School Complaints. –
I. Any person claiming to be aggrieved by a discriminatory practice prohibited under RSA 354-A:27 may initiate a civil action in superior court against a school or school district for legal or equitable relief, or file a complaint with the commission as provided in RSA 354-A:21. The attorney general may also initiate such a civil action in superior court or by complaint with the commission.
II. Any complaint filed with the commission pursuant to paragraph I shall comply with and be subject to the procedures outlined in this chapter, with the exception that such complaints may be removed to superior court at any time in compliance with RSA 508:4.

Source. 2019, 282:2, eff. Sept. 17, 2019.

(3) An unincorporated association;

(4) An organization;

(5) A partnership;

(6) A limited liability company;

(7) A professional corporation;

(8) A business; and

(9) A unit of state or local government; and

(o) "Verified" means signed, and sworn or affirmed, before a notary public or justice of the peace.

Source. #6686, eff 2-5-98, EXPIRED: 2-5-06

New. #8589, INTERIM, eff 3-18-06, EXPIRED: 9-14-06

New. (See Revision Note at chapter heading for Hum 200) #8814, eff 2-3-07, EXPIRED: 2-3-15

PART Hum 202 COMPLAINTS

Hum 202.01 Filing a Complaint.

(a) The following people and entities shall be entitled to file a complaint:

(1) Any person claiming to be aggrieved by an unlawful discriminatory practice;

(2) Pursuant to RSA 354-A:21, I(a), any member of the commission;

(3) Pursuant to RSA 354-A:21, I(a), the attorney general; and

(4) Pursuant to RSA 354-A:21, I(b), any employer some or all of whose employees refuse, or threaten to refuse, to cooperate with the provisions of RSA 354-A.

(b) A complaint shall be:

(1) In writing;

(2) Signed and dated by the complainant; and

(3) Verified.

(c) A complaint filed by a group of persons shall be signed, dated and verified by each person in the group.

(d) A complaint filed by a parent or guardian on behalf of a minor child shall be signed, dated and verified by the parent or guardian on behalf of such child.

Source. #6686, eff 2-5-98, EXPIRED: 2-5-06

New. #8589, INTERIM, eff 3-18-06, EXPIRED: 9-14-06

New. (See Revision Note at chapter heading for Hum 200) #8814, eff 2-3-07, EXPIRED: 2-3-15

Hum 202.02 Employment Discrimination Complaints.

(a) All complaints of employment discrimination or employment discrimination combined with other types of discrimination, including those filed pursuant to RSA 354-A only and those filed pursuant to both RSA 354-A and federal law, shall be made:

(1) On an EEOC form charging discrimination, provided by the commission and further described in (b) below; or

(2) In a letter including the information called for by (b) below.

(b) On the EEOC charge form the complainant shall provide the following:

(1) The complainant's name, including whether the complainant uses the title "Mr., Ms. or Mrs.;

(2) The complainant's home telephone number;

(c) If filed by facsimile transmission:

(1) The faxed copy shall be received by the commission at its offices by the date called for by (b) above; and

(2) The original complaint shall be received by the commission at its offices no more than 14 days later.

Source. (See Revision Note at chapter heading for Hum 200) #8814, eff 2-3-07, EXPIRED: 2-3-15

Hum 202.05 Amendment of Complaints and Responses.

(a) The complainant or commissioner filing a complaint may amend the complaint at any time prior to the date scheduled for the pre-hearing conference if the amendment is for any of the following purposes:

(1) To cure technical defects or omissions, including failure to verify;

(2) To clarify and amplify allegations made in the original complaint; or

(3) To allege additional acts constituting unlawful discriminatory practices which relate to the subject manner of the original complaint.

(b) The date of filing of any amendment shall be deemed, for the purpose of the time limit on the filing of complaints, to be the same as the date of filing of the original complaint.

(c) The response to a complaint may be amended at any time prior to the date scheduled for the pre-hearing conference.

(d) When a complaint has been amended, the respondent shall have the opportunity to amend the response.

Source. (See Revision Note at chapter heading for Hum 200) #8814, eff 2-3-07, EXPIRED: 2-3-15

PART Hum 203 CHOICE OF SUPERIOR COURT AS FORUM

Hum 203.01 Removal of Case to Superior Court by the Complainant.

(a) Pursuant to RSA 354-A:21-a, I any person alleging to be aggrieved by any practice made unlawful by RSA 354-A shall have the option to remove his or her complaint by filing a civil action in superior court within the limitations set forth in Hum 203.03 and in accordance with (b) below.

(b) The civil action shall be brought:

(1) Not later than 3 years after the alleged unlawful practice; and

(2) Within the following time limits:

a. No earlier than 180 days following a timely filing with the commission; or

b. If the commission assents in writing, earlier than 180 days following a timely filing with the commission.

(c) A complainant wishing to file a civil action earlier than 180 days following a timely filing with the commission shall request the assent of the commission by:

(1) Filing a signed written motion stating:

a. The request and the reasons for it; and

b. Compliance with (2) and (3) below;

(2) Forwarding a copy of the motion to all other parties; and

(3) Seeking concurrence from all other parties.

(d) All other parties shall have the right to object to the motion described in (c) above within 10 days of receipt of the motion.

(e) The investigating commissioner shall make a decision on the motion described in (c) above within 20 days of receipt of any objection to the motion or 30 days from the filing of the motion, whichever comes later.

(f) The investigating commissioner shall grant the motion if:

(1) The complainant seeks to remove in order to consolidate the complaint of discrimination with other causes of action in court; or

(2) The commission can not complete its investigation within 180 days.

(g) A complainant who has filed a civil action in superior court:

(1) Shall notify the commission of having done so; and

(2) Shall not file a subsequent complaint with the commission based upon the same alleged unlawful practice.

Source. #6686, eff 2-5-98, EXPIRED: 2-5-06

New. #8589, INTERIM, eff 3-18-06, EXPIRED: 9-14-06

New. (See Revision Note at chapter heading for Hum 200) #8814, eff 2-3-07, EXPIRED: 2-3-15

Hum 203.02 Removal of Case to Superior Court by the Respondent After Determination of Probable Cause.

(a) Pursuant to RSA 354-A:21-a, a respondent shall have the option to remove a case to superior court for trial within the limitations of Hum 203.03 and by following the procedures in (b) below whenever the investigating commissioner has:

(1) Made a determination of probable cause;

(2) Notified the parties to that effect; and

(3) Issued an order scheduling a public adjudicative hearing.

(b) The respondent shall:

(1) File with the commission:

a. Written notice of intent to remove the case to superior court, including a statement that a copy of the notice has been forwarded to the complainant or to the complainant's attorney; and

b. Proof of having filed the case in superior court consisting of a copy of the filed writ or complaint stamped by the superior court to show date of filing; and

(2) Forward to the complainant or to the complainant's attorney a copy of the notice described in (1)a. above.

Source. #6686, eff 2-5-98, EXPIRED: 2-5-06

New. #8589, INTERIM, eff 3-18-06, EXPIRED: 9-14-06

New. (See Revision Note at chapter heading for Hum 200) #8814, eff 2-3-07, EXPIRED: 2-3-15

Hum 203.03 Limitation on Removal of Cases. Pursuant to RSA 354-A:21-a, I, a superior court trial shall not be available:

(a) To any party if a public adjudicative hearing before the commission has begun or has been concluded; or

(b) To a complainant whose complaint has been dismissed as lacking in probable cause and who has not prevailed on an appeal to superior court.

Source. #6686, eff 2-5-98, EXPIRED: 2-5-06

New. #8589, INTERIM, eff 3-18-06, EXPIRED: 9-14-06

New. (See Revision Note at chapter heading for Hum 200) #8814, eff 2-3-07, EXPIRED: 2-3-15

PART Hum 204 REPRESENTATION BY ATTORNEY

Hum 204.01 Representing Clients in Proceedings Pursuant to Hum 200.

(a) An attorney who is an active member in good standing of the Bar of New Hampshire shall be eligible to represent a client in proceedings pursuant to this chapter by:

(1) Participating in all conferences and meetings;

(2) Signing documents on behalf of his or her client, except as otherwise provided in these rules; and

(3) Filing documents.

(b) An attorney who is not a member of the Bar of New Hampshire shall be similarly eligible to represent a client if:

both parties;

(4) Information in the nature of a trade secret;

(5) Information or documents with regard to which a party has requested confidentiality and said request has been approved by the director, applying RSA 91-A:5;

(6) Pursuant to RSA 91-A:5:

a. Confidential, commercial and financial information;

b. Test questions, scoring keys and other examination data used to administer a licensing examination, examination for employment or academic examination;

c. Personnel, medical, welfare, library user and other files whose disclosure would constitute an invasion of privacy; and

c. Other information protected as confidential by RSA 91-A:5; and

(7) Notes and internal memoranda written by commission staff or commissioners.

Source. (See Revision Note at chapter heading for Hum 200) #8814, eff 2-3-07, EXPIRED: 2-3-15

Hum 219.02 Requests by Parties for Photocopies.

(a) Upon request, parties may obtain copies of materials in the investigative file which are not confidential.

(b) The commission shall not charge a fee for 25 or fewer pages.

(c) The commission shall charge the commission's costs for more than 25 pages.

Source. (See Revision Note at chapter heading for Hum 200) #8814, eff 2-3-07, EXPIRED: 2-3-15

Hum 219.03 Information Available to State and Federal Agencies.

(a) All information and documents contained in an investigative file shall be made available to the U.S. Equal Employment Opportunity Commission and the U.S. Department of Housing and Urban Development if the complaint has been filed with both the commission and the federal agency.

(b) Information regarding a discrimination case shall be made available to other state or federal agencies when such state or federal agencies have established a need to know.

(c) A need to know shall be any of the following:

(1) Need for information for federal investigations of alleged civil rights violations;

(2) Need for information to determine qualifications of government contractors; or

(3) Information sought by subpoena or court order.

Source. (See Revision Note at chapter heading for Hum 200) #8814, eff 2-3-07, EXPIRED: 2-3-15

Hum 219.04 Information Disclosed to the Public.

(a) No information regarding complaints filed, investigation of complaints, pre-determination settlement negotiations, or conciliation negotiations shall be disclosed to the public by any commissioner or staff member prior to issuance of a notice of public hearing after a finding of probable cause.

(b) Pursuant to RSA 354-A:21, II(a), the commission shall publish the facts in a case which has been closed when it determines that to do so would serve to inform the public of the commission's operations, jurisdiction and remedies.

(c) Case information obtained from the U.S. Equal Employment Opportunity Commission shall not be disclosed.

Source. (See Revision Note at chapter heading for Hum 200) #8814, eff 2-3-07, EXPIRED: 2-3-15

PART Hum 220 SCHEDULING AND CONTINUANCES

Hum 220.01 Scheduling.

TITLE I
THE STATE AND ITS GOVERNMENT

CHAPTER 21-M
DEPARTMENT OF JUSTICE

Section 21-M:3

21-M:3 Attorney General; Deputy; Associates; Assistants. –

I. The attorney general shall be appointed as provided by the constitution. He shall serve for a term of 4 years. He shall have been admitted to the practice of law in New Hampshire. He shall also be qualified by reason of education and experience.

II. The attorney general shall nominate the deputy attorney general for appointment by the governor, with the consent of the council. The deputy attorney general shall serve for a term to expire on March 31, 1987, and thereafter for a fixed term of 4 years. The deputy attorney general shall have been admitted to the practice of law in New Hampshire and be qualified by reason of education and experience.

III. (a) The attorney general, subject to the approval of the governor and council, may appoint assistant attorneys general within the limits of the appropriation made for the appointments, each of whom shall hold office for a term of 5 years. Any vacancy in such office may be filled for the unexpired term. An assistant attorney general may be removed only as provided by RSA 4:1.

(b) The attorney general may, in his or her discretion, designate to serve without compensation, current assistant United States Attorneys, with prior authorization from the United States Attorney, or assistant county attorneys, with prior authorization from the county attorney, to assist with state cases.

IV. The attorney general may designate senior assistant attorneys general. Senior assistant attorneys general may serve as bureau chiefs and in such other positions as the attorney general may determine. Senior assistants shall serve in that capacity at the pleasure of the attorney general. Notwithstanding any other provision of law, the positions in this section shall be funded within appropriations made to the department of justice for each biennium and through the salary adjustment fund, as needed.

V. The attorney general may designate associate attorneys general. Associate attorneys general may serve as directors of the divisions of public protection and legal counsel and shall serve in that capacity at the pleasure of the attorney general.

VI. The attorney general shall nominate, subject to confirmation by the governor and council, an unclassified director of administration for the office of attorney general, within the limits of the appropriation made for the appointment, who shall serve for a 5-year term. The director of administration may be removed only as provided by RSA 4:1.

VII. The attorney general may nominate, subject to confirmation by the governor and council, criminal justice investigators and consumer protection investigators within the limits of the appropriations made for the appointments, each of whom shall have statewide law enforcement authority, shall be a peace officer as defined by RSA 594:1, III, and shall serve for a 5-year term. Any person nominated for such a position shall be certified or eligible for certification as a police officer pursuant to RSA 106-L:5, V. A criminal justice investigator or a consumer protection investigator shall be removed if he or she fails to achieve certification or if he or she is decertified by the police standards and training council, otherwise a criminal justice investigator or a consumer protection investigator may be removed only as provided by RSA 4:1.

VIII. The attorney general shall appoint qualified applicants to serve as hearing officers for appeals to any of the councils established under RSA 21-O. The attorney general and the commissioner of the department of environmental services may enter into a memorandum of understanding to transfer funds sufficient to fund the hearing officer position, clerical and support personnel and services, and related expenses. Such individual or individuals shall:

(a) Be an attorney qualified by education and experience in the conduct of administrative adjudicative hearings and the application of law to facts, preferably a retired justice of the superior or supreme court; and

(b) Be fully screened by the attorney general from the outset of any such appeal from any attorney representing the department.

VIII-a. Upon request by the commissioner of the department of environmental services, the attorney general shall appoint qualified applicants to serve as hearing officers for all administrative enforcement matters authorized under any provision of law, including, but not limited to, administrative fines and license actions. The attorney general and the commissioner of the department of environmental services may enter into a memorandum of understanding to fund the hearing officer position, clerical and support personnel and services, and related expenses. Such individual or individuals shall:

(a) Be an attorney qualified by education and experience in the conduct of administrative adjudicative hearings and the application of law to facts;

(b) Be fully screened by the attorney general from the outset of any such appeal from any attorney representing the department;
(c) Regulate all procedural aspects of a proceeding, including presiding over the hearing and any prehearing conferences; and
(d) Provide the commissioner with a proposed written decision on the merits within 45 days of the conclusion of the final hearing.
IX. When designated as the hearing officer for a particular appeal to any of the councils established under RSA 21-O, the hearing officer shall:
(a) Regulate all procedural aspects of a proceeding, including presiding over the hearing and any prehearing conferences;
(b) Subject to RSA 21-O:14, at the first prehearing conference order the parties and any persons who have been allowed to intervene to participate in mediation if the hearing officer concludes that it is reasonably possible that mediation will result in the resolution of the issues in dispute in the proceeding. No order to mediate shall stay the appeal proceeding;
(c) Adopt all findings of fact made by the council except to the extent any such finding is without evidentiary support in the record;
(d) Deliberate with the council before reaching conclusions on mixed questions of law and fact;
(e) Decide all questions of law presented during the pendency of the appeal; and
(f) Prepare and issue written decisions on all motions and on the merits of the appeal within 100 days of the conclusion of the hearing on the merits. The hearing officer shall provide the council with a proposed written decision on the merits within 45 days of the conclusion of the hearing on the merits. If requested to do so by the members of the council participating in the discussion, the hearing officer shall meet with those members within the 100-day period to discuss the decision.
X. The hearing officer may issue a subpoena, upon the request of any party to an appeal filed after the effective date of this paragraph, and only to the extent the information or testimony sought is reasonably necessary for the determination of matters within the council's jurisdiction. A subpoena may be requested for purposes of discovery as may be allowed by the council's rules or to provide testimony at any hearing conducted in the proceeding, or both. All costs associated with the issuance of any subpoena issued by the hearing officer shall be paid by the party requesting the subpoena.
XI. The attorney general, subject to the approval of the governor and council, may appoint a director of the office of victim/witness assistance, within the limits of the appropriation made for the appointment, who shall hold office for a term of 5 years. Any vacancy in such office may be filled for the unexpired term. The director of the office of victim/witness assistance may be removed only as provided by RSA 4:1.
XII. The attorney general, subject to the approval of the governor and council, may appoint a director of communications within the limits of the appropriation made for the appointment, who shall hold office for a term of 5 years. Any vacancy in such office may be filled for the unexpired term. The director of communications may be removed only as provided by RSA 4:1.
XIII. The attorney general, subject to the approval of the governor and council, may appoint a permanent director of diversity and community outreach, within the limits of the appropriation made for the appointment, who shall hold office for a term of 5 years. Any vacancy in such position may be filled for the unexpired term. The director of diversity and community outreach may be removed only as provided by RSA 4:1.
XIV. The attorney general, subject to the approval of the governor and council, may appoint permanent assistant deputy medical examiners within the limits of the appropriation made for the appointment, each of whom shall serve at the pleasure of the chief medical examiner pursuant to RSA 611-B:5.
XV. The attorney general, subject to the approval of the governor and council, may appoint a permanent chief forensic investigator and/or a deputy chief forensic investigator, within the limits of the appropriation made for the appointment, who shall hold office for a term of 5 years. Any vacancy in such position may be filled for the unexpired term. The chief forensic investigator and deputy chief forensic investigator may be removed only as provided by RSA 4:1.

Source. 1985, 300:1; 410:12, 13. 1986, 135:5. 1990, 266:4. 2001, 158:104. 2002, 276:3. 2007, 235:2. 2009, 40:1. 2010, 354:1, eff. Sept. 18, 2010. 2012, 246:1, 16, eff. June 18, 2012. 2017, 206:5, eff. Sept. 8, 2017. 2019, 202:4, eff. Sept. 8, 2019; 346:166, eff. July 1, 2019. 2021, 91:159, eff. July 1, 2023. 2023, 79:18, 252, eff. July 1, 2023.

TITLE I
THE STATE AND ITS GOVERNMENT

CHAPTER 21-O
DEPARTMENT OF ENVIRONMENTAL SERVICES

Section 21-O:3

21-O:3 Duties of Commissioner. –
In addition to the powers, duties, and functions otherwise vested by law in the commissioner of the department of environmental services, including RSA 21-G, the commissioner, except as otherwise provided in this chapter, shall:
I. Represent the public interest in the administration of the functions of the department of environmental services and be responsible to the governor, the general court, and the public for such administration.
II. Provide for, in consultation with the commissioner of the department of administrative services and the state treasurer, a system of accounts and reports which will ensure the integrity and lawful use of all fees, funds, and revenues collected by the department, the use of which is restricted by state or federal law.
III. Have the authority to receive, administer, and internally audit all present and future federal and state water-related, air pollution control, and waste grant programs.
IV. Have the authority to adopt rules, pursuant to RSA 541-A, necessary to assure the continuance or granting of federal funds or other assistance intended to promote the administration of this chapter, not otherwise provided for by law, and to adopt all rules necessary to implement the specific statutes administered by the department or by any division or unit within the department, whether the rulemaking authority delegated by the legislature is granted to the commissioner, the department, or any administrative unit or subordinate official of the department. The water well board and the state board for the licensing and regulation of plumbers shall be exempt from the rulemaking provisions described in this section.
IV-a. Have the authority to reorganize rules of the department to conform to the requirements of RSA 541-A and the uniform drafting and numbering system adopted by the division of administrative rules, office of legislative services. Reference changes shall be limited to title, chapter, part, and section designations and numbers and substitution of terms reflecting reorganization of the department to the existing statutory structure, and shall be made subject to review by the division of administrative rules, office of legislative services for consistency and accuracy of such changes. Such reference changes shall be integrated into the rules and such amendments to the rules shall become effective when notice of these reference changes is published by the director of legislative services in the rulemaking register. Reference changes made prior to January 1, 1992, shall be exempt from the procedures and requirements of RSA 541-A. Changes authorized under this section shall not affect the adoption or expiration date of rules changed under this section.
V. Collect and account for all fees, funds, taxes, or assessments levied upon any person subject to the jurisdiction of the department of environmental services.
VI. Establish a water resources assessment program which shall, among other things, collect and manage data on water resources and water use within the state. The commissioner shall be authorized to use federal funds for such program.
VII. Contract with, subject to approval by the governor and council, regional planning commissions in the development of regional plans and ensure that local plans are consistent with regional management plans for entire watershed areas.
VIII. Provide all necessary clerical and technical support to any council established by this chapter. At a minimum, the commissioner shall:
(a) Provide comfortable and adequate space for the use of all councils in performing their official duties; and
(b) Provide all necessary clerical and support personnel and services in order to:
(1) Prepare and distribute notices and other documents required under RSA 91-A for council meetings; and
(2) Prepare and maintain as public records the official minutes of the meetings of all councils supported by the department.
VIII-a. Have the authority to enter into a memorandum of understanding with the attorney general pursuant to RSA 21-M:3, VIII and VIII-a, to fund the hearing officer position, clerical and support personnel and services, and related expenses.
IX. [Repealed.]
X. [Repealed.]

Source. 1986, 202:1. 1989, 346:4. 1990, 230:1; 261:4. 1996, 296:3. 1997, 295:2, 3. 2010, 354:2. 2011, 224:117, III, eff. July 1, 2011. 2023, 79:19, eff. July 1, 2023.

TITLE I
THE STATE AND ITS GOVERNMENT

CHAPTER 21-O
DEPARTMENT OF ENVIRONMENTAL SERVICES

Section 21-O:5-a

21-O:5-a Wetlands Council. –

I. There is established a wetlands council for the purpose of implementing the provisions of law conferring on the department authority to decide matters relative to resources of the state, including, but not limited to, excavating, dredging, and filling waters of the state as well as activities occurring within the state's regulated shoreland under RSA 483-B. Appointees and officials shall have voting rights as members of the wetlands council; provided, however, that nothing in this section shall be construed as affecting other duties of the department with reference to dams, water levels, and administration of the department of environmental services. The wetlands council shall be composed of the following:

(a) The executive director of the department of fish and game or designee.

(b) The commissioner of transportation or designee.

(c) The commissioner of natural and cultural resources or designee.

(d) The director of the office of planning and development or designee.

(e) The commissioner of the department of agriculture, markets, and food, or designee.

(f) Eight members of the public appointed by the governor and council for a term of 3 years or until a successor is chosen. One of these shall be a member of a municipal conservation commission at the time of appointment, and be one of 3 nominees submitted by the New Hampshire Association of Conservation Commissions; one shall be a supervisor, associate supervisor, former associate supervisor, or former supervisor, of a conservation district at the time of appointment, and be one of 3 nominees submitted by the New Hampshire Association of Conservation Districts; one shall be a municipal official other than a member of the conservation commission at the time of appointment, and be nominated by the New Hampshire Municipal Association; one shall be a natural resource scientist and be one of 3 nominees submitted by the New Hampshire Association of Natural Resource Scientists; one shall be a member of the construction industry and be one of 3 nominees submitted by the Associated General Contractors of New Hampshire; one shall be a member of the marine industry and be one of 3 nominees submitted by the New Hampshire Marine Trades Association; one shall have experience in environmental protection and resource management at the time of appointment and be one of 4 nominees submitted, 2 each, by the New Hampshire Audubon Society and the Society for the Protection of New Hampshire Forests; and one shall be a farm or forest landowner and be one of 2 nominees submitted, one each, by the New Hampshire Farm Bureau Federation and the New Hampshire Timberland Owners Association. One member of the council shall be elected annually as chairperson by the members of the council.

II. The 8 members appointed under subparagraph I(f) shall be entitled to expenses and $50 compensation per diem. The other members of the council shall receive no additional compensation for their service as members of the council, other than their regular salaries from their respective state departments, but shall receive mileage and other expenses paid at the rate set for state employees.

III. The wetlands council shall receive administrative support from the department.

IV. The council shall consult with and advise the commissioner of the department of environmental services, or his or her designee, on a continuing basis with respect to the policy, programs, goals, and operations of the department as they relate to wetlands and protected shorelands with particular emphasis on long-range planning for the department and on education of the public relative to the functions of the department. In order to accomplish these purposes, the council shall meet with the commissioner, or his or her designee not less frequently than quarterly, or at the call of the chairperson or 3 council members. The council shall file annually a report of its deliberations and recommendations with the commissioner of the department of environmental services and the governor and council.

V. A quorum of at least 3 members of the wetlands council shall hear all administrative appeals from department decisions made under RSA 482-A relative to wetlands, or under RSA 483-B relative to shoreland protection and shall decide all disputed issues of fact in such appeals, in accordance with RSA 21-O:14.

VI. The commissioner of the department of environmental services shall present all proposed rules relative to wetlands and protected shorelands to the wetlands council for consideration prior to filing a notice of proposed rule under RSA 541-A:6. The council shall present any objections to proposed rules to the commissioner in writing within 15 days. The commissioner may adopt a rule to which the council has objected only after presenting a written reply to the council detailing the reasons

for adopting the rule over the objections of the council.
VII. The council shall adopt rules in accordance with the rulemaking provisions of RSA 541-A to govern its proceedings. The council shall be subject to the requirements of RSA 541-A:36, notwithstanding RSA 21-O:14.
VIII. The council shall approve disbursements of the aquatic resource compensatory mitigation fund established under RSA 482-A:29.

Source. 1996, 296:35. 2002, 210:1. 2003, 319:9. 2004, 257:44. 2006, 313:3. 2007, 209:1. 2008, 171:3, 4. 2010, 354:3, eff. Sept. 18, 2010. 2015, 67:1, eff. Aug. 1, 2015. 2017, 156:14, I, 64, eff. July 1, 2017. 2019, 202:6, eff. Sept. 8, 2019. 2021, 91:198, eff. July 1, 2021. 2023, 79:20, eff. July 1, 2023.

TITLE I
THE STATE AND ITS GOVERNMENT

CHAPTER 21-O
DEPARTMENT OF ENVIRONMENTAL SERVICES

Section 21-O:7

21-O:7 Water Council. –

I. There is established a water council which shall consist of 15 members:

(a) Thirteen of the members shall be public members appointed by the governor, with the consent of the council, who shall serve for terms of 4 years. Of these members, 2 shall represent the industrial interests of the state; one shall represent the vacation home or private recreational interests of the state; one shall represent the agricultural interests of the state; one shall be an employee of any municipal or privately-owned waterworks in the state; one shall be a representative of the septage hauling industry, nominated by the New Hampshire Association of Septage Haulers; one shall be a member of a statewide nonprofit conservation or environmental organization; one shall be a treatment plant operator; one shall be a designer or installer of septic systems, nominated by the Granite State Designers and Installers Association; one shall represent New Hampshire rivers, nominated by the New Hampshire Rivers Council, and one shall represent New Hampshire lakes, nominated by the New Hampshire Lakes Association. The 2 remaining members shall be appointed and commissioned respectively as the chairman and vice chairman of the council;

(b) The remaining 2 members shall include:

(1) The executive director of fish and game, or designee; and

(2) The director of parks and recreation, or designee.

(c) Each member of the council, before entering upon his or her duties, shall take an oath to administer the duties of office faithfully and impartially, and such oath shall be filed in the office of the secretary of state.

II. Appointive members shall receive no compensation except for mileage and other expenses incurred while performing council business. The other members of the council shall receive no additional compensation for their service as members of the council other than their regular salaries from their respective state departments, but shall receive mileage and other expenses incurred while performing council business. Mileage shall be paid at the rate set for state employees.

III. The council shall consult with and advise the director of the division of water with respect to the policy, programs, goals, and operations of the division other than those relating to wetlands under RSA 482-A, with particular emphasis on long-range planning for the division and on education of the public relative to the functions of the division, on a continuing basis. In order to accomplish said purposes, the council shall meet with the director not less frequently than quarterly, or at the call of the chairman or 3 council members. The council shall file annually a report of its deliberations and recommendations with the commissioner of the department of environmental services and the governor and council.

IV. A quorum of at least 3 members of the water council shall hear all administrative appeals from department decisions relative to the functions and responsibilities of the division of water other than department decisions made under RSA 482-A relative to wetlands and RSA 483-B relative to shoreland protection, and shall decide all disputed issues of fact in such appeals, in accordance with RSA 21-O:14.

V. The director of the division of water shall present all rules proposed to be implemented by the water division, other than rules implementing RSA 482-A relative to wetlands, and RSA 483-B relative to shoreland protection, to the water council for consideration prior to filing a notice of proposed rule under RSA 541-A:6. The council shall present any objections to proposed rules to the director of the division of water and to the commissioner in writing within 15 days. The commissioner may adopt a rule to which the council has objected only after presenting a written reply to the council detailing the reasons for adopting the rule over the objections of the council.

Source. 1986, 202:1. 1987, 283:4. 1990, 252:1. 1994, 412:8. 1995, 226:10; 310:182. 1996, 228:6, 7. 2000, 44:1. 2003, 319:9. 2004, 257:44. 2008, 171:1, 2. 2010, 354:4, eff. Sept. 18, 2010. 2012, 246:2, eff. June 18, 2012. 2015, 67:2, eff. Aug. 1, 2015. 2023, 79:21, eff. July 1, 2023.

TITLE I
THE STATE AND ITS GOVERNMENT

CHAPTER 21-O
DEPARTMENT OF ENVIRONMENTAL SERVICES

Section 21-O:9

21-O:9 Waste Management Council. –

I. There is established a waste management council consisting of the following, appointed by the governor and council, each of whom shall serve a 4-year term:

(a) A chairman, representing the public interest;

(b) Three municipal officials, at least 2 of whom shall be elected officials, representing the public interest, nominated by the New Hampshire Municipal Association;

(c) An expert in public health, representing the public interest;

(d) A local conservation commission member, representing the public interest, nominated by the New Hampshire Association of Conservation Commissions;

(e) A professor or assistant professor of environmental science or sanitary engineering, representing the public interest;

(f) A representative of the private waste management industries;

(g) A licensed sanitary or environmental engineer from private industry;

(h) A representative of the municipal public works field;

(i) A representative of the business or financial communities;

(j) [Repealed.]

(k) A representative of communities which recycle or recover solid waste, representing the public interest, nominated by the New Hampshire Resources Recovery Association; and

(l) A representative of private industries that generate hazardous waste.

II. One member of the council shall be elected vice chairman by the members of the council. All members shall be New Hampshire residents. The members representing the public interest shall not have any official or contractual relationship with, or receive any significant portion of their income from, any person subject to division of waste management permits or enforcement orders. Members shall disclose all potential conflicts of interest, and shall not vote on matters in which they have a direct interest. The council may elect other officers.

III. Council members shall receive no compensation except for mileage and other expenses incurred while performing council business. Mileage shall be paid at the rate set for state employees.

IV. The council shall consult with and advise the director of the division of waste management with respect to the policy, programs, goals and operations of the division, regarding its solid and hazardous waste management functions and responsibilities, with particular emphasis on long-range planning for the division regarding solid and hazardous waste management and on education of the public relative to the functions of the division regarding solid and hazardous waste management, on a continuing basis. In order to accomplish said purposes, the council shall meet with the director not less frequently than quarterly, or at the call of the chairman or 3 council members. The council shall file annually a report of its deliberations and recommendations with the commissioner of the department of environmental services and the governor and council.

V. A quorum of at least 3 members of the waste management council shall hear all administrative appeals from department decisions relative to the functions and responsibilities of the division of waste management, and shall decide all disputed issues of fact in such appeals, in accordance with RSA 21-O:14.

VI. The director of waste management shall present all rules proposed to be implemented by the division of waste management to the waste management council for consideration prior to filing a notice of proposed rule under RSA 541-A:6. The council shall present any objections to proposed rules to the director of waste management and to the commissioner in writing within 15 days. The commissioner may adopt a rule to which the council has objected only after presenting a written reply to the council detailing the reasons for adopting the rule over the objections of the council.

VII. [Repealed.]

Source. 1986, 202:1. 1989, 341:1-4; 418:3. 1990, 195:5; 252:16, I. 1994, 412:9. 1995, 226:11. 1996, 228:8; 251:26. 2010, 354:5, eff. Sept. 18, 2010. 2023, 79:22, eff. July 1, 2023.

TITLE I
THE STATE AND ITS GOVERNMENT

CHAPTER 21-O
DEPARTMENT OF ENVIRONMENTAL SERVICES

Section 21-O:11

21-O:11 Air Resources Council. –

I. There is hereby established an air resources council which shall be composed of 11 members, including one representing the steam power generating industry; one representing the oil industry; one representing the natural gas industry; one representing the manufacturing component of industry; one representing the field of municipal government; and 6 members appointed at large who shall represent the public interest, one of whom shall be a licensed practicing physician or other health care professional possessing expertise in the field of public health and the health-related impacts of air pollution, one of whom shall represent the field of recreation, and at least one of whom shall represent environmental interests. The council members who shall represent the public interest may not derive any significant portion of their income from persons subject to permits or enforcement orders, and may not serve as attorney for, act as consultant for, serve as officer or director of, or hold any other official or contractual relationship with any person subject to permits or enforcement orders. All potential conflicts of interest shall be adequately disclosed. The members shall be residents of the state and shall be appointed by the governor with the consent of the executive council. Each member shall serve for a term of 4 years.

II. The council members shall receive no compensation except for mileage and other expenses incurred while performing council business. Mileage shall be paid at the rate set for state employees. The governor and council shall annually select a chairman from the membership at large and one of the council members to serve as vice-chairman. When the chairman is absent, it shall be the duty of the vice-chairman to assume and administer the duties of the chairman.

III. The council shall consult with and advise the director of the division of air resources with respect to the policy, programs, goals and operations of the division, with particular emphasis on long-range planning for the division and on education of the public relative to the functions of the division, on a continuing basis. In order to accomplish said purposes, the council shall meet with the director not less frequently than quarterly, or at the call of the chairman or 3 council members. The council shall file annually a report of its deliberations and recommendations with the commissioner of the department of environmental services and the governor and council.

IV. A quorum of at least 3 members of the air resources council shall hear all administrative appeals from department decisions relative to the functions and responsibilities of the division of air resources and shall decide all disputed issues of fact in such appeals, in accordance with RSA 21-O:14.

V. The director of air resources shall present all rules proposed to be implemented by the air resources division to the air resources council for consideration prior to filing a notice of proposed rule under RSA 541-A:6. The council shall present any objections to the proposed rule to the director of air resources and to the commissioner in writing within 15 days. The commissioner may adopt a rule to which the council has objected only after presenting a written reply to the council detailing the reasons for adopting the rule over the objections of the council.

Source. 1986, 202:1. 1994, 412:10. 1995, 226:12; 262:1. 2006, 62:1. 2010, 354:6, eff. Sept. 18, 2010. 2023, 79:23, eff. July 1, 2023.

TITLE I
THE STATE AND ITS GOVERNMENT

CHAPTER 21-O
DEPARTMENT OF ENVIRONMENTAL SERVICES

Section 21-O:14

21-O:14 Administrative Appeals. –

I. (a) For purposes of this chapter, "department permitting decision" means the department's final action on an application or other request for a license as defined in RSA 541-A:1, VIII, whether the action to accept, grant in whole or in part with or without conditions, or deny the application or request and whether the action is taken by the commissioner or by the department official who has statutory authority to take such final action or to whom the commissioner has properly delegated the authority to take such final action.

(b) For purposes of this section, "department enforcement decision" means:

(1) The issuance of an administrative order issued under specific statutory authority for such an order, whether described as an order, an administrative order, a cease and desist order, a notice of violation and order of abatement, or other similar name, which specifies the facts and law that support the department's determination that one or more violations are occurring or have occurred and orders the recipient to cease on-going violations and to take such remediation actions as are necessary to come into compliance with applicable requirements.

(2) The revocation of or the refusal to renew a license as defined in RSA 541-A:1, VIII based on the permit holder's non-compliance with the statute, rules, or terms and conditions of the license or on other good or just cause as defined in rules adopted relative to the license.

(c) "Department decision" means a department permitting decision, a department enforcement decision, and any other decision made by the department that is expressly appealable to a council under the statute granting authority to the department to make the decision. The term does not include rulemaking or an agency declaratory ruling as provided for in RSA 541-A.

I-a. (a) Any person aggrieved by a department decision may, in addition to any other remedy provided by law, appeal such decision by submitting a notice of appeal to the council having jurisdiction over the subject matter of the appeal within 30 days of the date of the decision and shall set forth fully in a notice of appeal every ground upon which it is claimed that the decision complained of is unlawful or unreasonable. Only those grounds set forth in the notice of appeal shall be considered by the council. On any such appeal, the council shall determine whether the department decision was unlawful or unreasonable by reviewing the administrative record together with any evidence and testimony the parties to the appeal may present.

(b) On appeal, the council may affirm the department decision or may remand the matter to the commissioner with a determination that the decision complained of is unlawful or unreasonable. The council shall specify the factual and legal basis for its determination and shall identify the evidence in the record created before the council that supports its decision.

(c) In the case of a remand to the commissioner by the council, the commissioner shall:

(1) Accept the council's determination and take action consistent with the determination, imposing such conditions as are necessary and consistent with the purposes of the chapter under which the department decision was issued; or

(2) Appeal as provided in paragraph III.

(d) If the commissioner issues a revised decision, the department may at any time, and the appellant may within 30 days of issuance, request the council to confirm that the revised decision is consistent with the council's remand order.

I-b. As an alternative to filing an appeal under paragraph I-a and in addition to any other remedy provided by law, any person aggrieved by a department permitting decision may, within 30 days of the date of the decision, file with the council having jurisdiction over the subject matter of the appeal a preliminary notice of appeal and an offer to enter into settlement discussions. Filings made under this paragraph shall be made on forms maintained by the department and shall be governed by the following:

(a) Notwithstanding any other provision of law prescribing the contents of a notice of appeal, a preliminary notice of appeal shall contain only information identifying the appellant, the decision being appealed, and a list of every ground on which the appellant claims that the decision is unlawful or unreasonable.

(b) The preliminary notice of appeal and offer to enter into settlement discussions shall be served on the commissioner and, if not filed by the applicant, on the applicant on the same day as they are filed with the council.

(c) The offer to enter into settlement discussions shall propose mediated settlement discussions, unmediated settlement

discussions, or both.
(d) The department and, if applicable, the applicant shall notify the appellant in writing within 7 days whether they accept the offer to enter into settlement discussions. Any such notification accepting the offer shall propose dates within the ensuing 30 days on which to hold the settlement discussions, and if the appellant's offer proposed both mediated and unmediated settlement discussions the notification shall elect one or the other.
(e) A notice of appeal that complies fully with the council's rules shall be filed no later than 45 days after the preliminary notice of appeal was filed by the appellant under this paragraph. No notice of appeal shall raise grounds for appeal beyond those contained in the preliminary notice of appeal.
(f) If the department and, if applicable, the applicant accept the offer to enter into settlement discussions the appeal shall be stayed until a notice of appeal is filed under subparagraph (e).
(g) If the parties enter into mediated settlement discussions under this paragraph, the provisions of paragraph I-c(a), (b), and (d) shall apply.
I-c. For all mediations ordered pursuant to RSA 21-M:3, IX(b):
(a) The mediator shall be selected by the participants.
(b) The cost of the mediation shall be borne equally by the participants unless the department elects not to pay its share of the cost of the mediation, in which case the appellant and any person who has been allowed to intervene may either agree to bear the cost of the mediation or be excused from the obligation to mediate.
(c) The pre-hearing order issued by the hearing officer shall specify a time period not to exceed 45 days within which the parties shall mediate. The parties may jointly request a specific amount of additional time if they have not reached a complete agreement within the time period specified by the hearing officer but believe a complete agreement can be reached within the additional time.
(d) If the parties and any intervenors reach agreement as a result of mediation and the agreement includes the issuance of a new or revised permit, only persons who did not participate in the mediation and who are aggrieved by the new or revised permit shall be entitled to appeal the issuance of such permit.
I-d. In any appeal of a department enforcement decision filed pursuant to paragraph I-a, the hearing officer shall not order the department to participate in mediation pursuant to RSA 21-M:3, IX(b). The department may participate in mediation in such cases in its sole discretion.
II. Appeal hearings before any council established by this chapter shall be conducted in accordance with the provisions of RSA 541-A governing adjudicative proceedings by an administrative hearing officer assigned by the department of justice, under RSA 21-M:3, VIII. All issues shall be determined as specified in RSA 21-M:3, IX.
III. Any party aggrieved by the disposition of an administrative appeal before any council established by this chapter may appeal such results in accordance with RSA 541.
IV. The councils established under this chapter shall adopt rules under RSA 541-A to govern the conduct of administrative appeals under this section. To the extent possible, the rules of the councils shall be consistent with each other.

Source. 1986, 202:1. 1987, 304:5. 1989, 339:7. 1996, 296:7. 2008, 171:5. 2010, 354:7, eff. Sept. 18, 2010. 2012, 246:3-5, eff. June 18, 2012. 2019, 202:1-3, eff. Sept. 8, 2019. 2023, 79:24, eff. July 1, 2023.

2023 WL 8940253
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Supreme Court of New Hampshire.

APPEAL OF NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SERVICES (New Hampshire Waste Management Council)
Appeal of North Country Environmental Services, Inc. (New Hampshire Waste Management Council)

Nos. 2022-0690, 2022-0690, 2022-0691
|
Argued: October 3, 2023
|
Opinion Issued: December 28, 2023

Synopsis

Background: Department of Environmental Services (DES) and landfill owner sought review of Waste Management Council's order granting environmental organization's appeal of DES permit authorizing expansion of landfill.

Holdings: The Supreme Court, Donovan, J., held that:

harm to all organization members was not required for standing to appeal grant of permit to Council;

owner was not entitled to evidentiary hearing before the Council;

future harm to organization members, as the basis for standing, was not speculative;

hearing officer's capacity need determination was a question of law within his statutory authority; and

proposed facility was not required to operate exclusively during period of shortfall to satisfy the capacity need requirement.

Reversed.

Waste Management Council

Attorneys and Law Firms

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Conservation Law Foundation, of Concord (Heidi H. Trimarco and Thomas F. Irwin on the brief, and Heidi H. Trimarco orally), for Conservation Law Foundation.

Opinion

DONOVAN, J.

***1** In this consolidated appeal, the New Hampshire Department of Environmental Services (DES) and North Country Environmental Services, Inc. (NCES) appeal an order of the New Hampshire Waste Management Council (Council) granting Conservation Law Foundation's (CLF) appeal of a permit that DES issued authorizing the expansion of a landfill owned by NCES. DES argues that the Hearing Officer erred because he: (1) incorrectly reviewed, as a question of law rather than fact, DES's determination under RSA 149-M:11, III(a) (2021) that NCES's proposed facility satisfies a capacity need; and (2) incorrectly interpreted RSA 149-M:11, V (2021). NCES argues that: (1) CLF lacked standing to appeal the permit to the Council; (2) the Hearing Officer erred in his interpretation of RSA 149-M:11, V and by failing to consider administrative gloss; and (3) the Hearing Officer's interpretation of RSA 149-M:11, V renders the statute unconstitutional pursuant to the dormant Commerce Clause of the United States Constitution. We conclude that CLF had standing to appeal the permit to the Council but that the Hearing Officer erred in his interpretation of RSA 149-M:11, V. Accordingly, we reverse.

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I. Facts

The following facts are supported by the record or are otherwise undisputed. In January 2019, NCES applied to DES for a permit to expand its landfill in Bethlehem. NCES proposed operating the project, known as Stage VI, for approximately 2.3 years, from 2021 to 2023. DES indicated to NCES that it was contemplating denying the application for failure to satisfy the capacity need requirement set forth in RSA 149-M:11, III(a) and V. Consequently, NCES withdrew its application. In March 2020, NCES submitted a new application for Stage VI. This time, NCES proposed to extend the facility's operating period from 2021 to 2026.

In October 2020, DES approved NCES's application and issued a permit to NCES. As part of its decision to grant the permit, DES considered New Hampshire's "solid waste capacity need" for the twenty-year period following the grant of the permit. RSA 149-M:11, V; see also RSA 149-M:11, III(a). As required by RSA 149-M:11, V(d), DES determined that in 2026, "there is a projected shortfall in existing permitted disposal capacity to accommodate the total quantity of New Hampshire waste projected to be generated statewide." DES found that because "a capacity shortfall exists during the planning period" of Stage VI, meaning that the shortfall would occur in 2026, and Stage VI would operate through 2026, "the proposed facility satisfies a need for disposal capacity within the planning period." See RSA 149-M:11, V(d).

In November 2020, CLF appealed DES's decision to the Council, seeking to have the permit issued to NCES deemed unlawful and unreasonable. NCES filed a motion to dismiss the appeal for lack of standing, arguing that CLF's reliance upon predicted harms to "a minute fraction of its membership" was insufficient to establish standing. In the alternative, NCES sought an evidentiary hearing before the Council to adjudicate the alleged issues of fact created in conflicting affidavits that CLF and NCES submitted. The Hearing Officer denied NCES's motion to dismiss and request for an evidentiary hearing, as well as NCES's subsequent motion for reconsideration.[1]

***2** In February 2022, the Council held a two-day merits hearing, over which a Hearing Officer presided. See RSA 21-M:3, IX(a) (Supp. 2022). On the second day, the Council members deliberated and issued several unanimous findings, including that: (1) "DES acted reasonably in its measuring the short and long-term capacity needs required by [RSA 149-M:11, III(a)] in issuing the permit"; (2) "DES was lawful in finding the capacity need during the life [of the permit]"; and (3) "DES acted reasonably in issuing a permit to help address the capacity needs during the life of the [permit]." In May 2022, the Council issued an order signed by the Hearing Officer that granted CLF's appeal in part and remanded the decision to grant the permit, ruling that DES "acted unlawfully in finding the NCES Facility provided a substantial public benefit" pursuant to RSA 149-M:11, III(a) and V.

In reaching this decision, the Hearing Officer interpreted RSA 149-M:11, V(d) and explained that, to grant a permit, DES must "determine whether a proposed facility provides a substantial public benefit based upon the short-and long-term need for the proposed facility to provide capacity for New Hampshire waste." See RSA 149-M:11, III(a). In turn, the Hearing Officer also explained, RSA 149-M:11, V(d) "details the method by which [DES] must determine the state's solid waste capacity need." Ultimately, the Hearing Officer concluded that RSA 149-M:11, V(d) "explicitly limits a finding of capacity need to only instances where a proposed facility will satisfy a shortfall. If there is no shortfall, there can be no capacity need." Therefore, according to the Hearing Officer, DES erred in granting NCES a permit because Stage VI was proposed to operate for six years, but the first five years of the facility's operation would occur during a period without any shortfall. The Hearing Officer reasoned that because DES could not "lawfully find there to be a capacity need," it could not determine that Stage VI met "the requirement of [RSA 149-M:11, III(a)] when determining substantial public benefit." See RSA 149-M:11, III(a).

Both DES and NCES filed motions to reconsider. In its motion, NCES raised its prior standing argument and argued that the Hearing Officer's interpretation of RSA 149-M:11, V(d) was erroneous and contrary to the administrative gloss that DES had given the provision. DES also argued that the Hearing Officer erred in his interpretation of RSA 149-M:11 (2021), though it proposed an alternative interpretation to the one that NCES presented. The Hearing Officer denied both DES's and NCES's motions to reconsider. NCES and DES appealed to this court, and their appeals were consolidated.

II. Analysis

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A. Standing

As a preliminary matter, NCES argues that CLF lacked standing to appeal DES's permitting decision to the Council. Specifically, NCES argues that the Hearing Officer erred in denying NCES's motion to dismiss CLF's appeal for lack of standing because: (1) CLF lacked standing to appeal DES's decision to the Council based upon alleged harm to only two CLF members; (2) NCES was entitled to an evidentiary hearing to resolve issues of fact created in conflicting affidavits; and (3) the two affidavits that CLF submitted were insufficient to establish standing because they were premised upon predictions of future harm. CLF contends that the Hearing Officer correctly determined that CLF established standing upon the basis of two members who live close to, and are adversely affected by, the landfill at issue in this appeal. We agree with CLF.

Following CLF's initial appeal to the Council, NCES challenged CLF's standing in a motion to dismiss based upon the fact that CLF relied upon predicted harms to "a minute fraction of its membership" to establish standing. Included with its subsequent objection to NCES's motion to dismiss, CLF provided sworn affidavits from two of its members alleging anticipated harm if Stage VI is approved. NCES filed a reply to CLF's objection and included a sworn affidavit from the manager of its Bethlehem landfill. NCES also sought an evidentiary hearing before the Council to adjudicate the alleged factual discrepancies between CLF's affidavits and NCES's affidavit. The Hearing Officer denied NCES's motion to dismiss and request for an evidentiary hearing, as well as NCES's subsequent motion for reconsideration.

***3** We first consider NCES's argument that CLF lacked standing to appeal DES's decision to the Council based upon alleged harm to only two CLF members. NCES argues that "a membership association or organization has standing where all its members have sustained the requisite injury from the challenged action." CLF counters that for an organization to establish standing, there is no requirement "that all of an organization's members, or any specified quantity or proportion of an organization's members, must suffer harm."

Standing to appeal DES's decision to grant NCES a permit to the Council is established by statute. See RSA 149-M:8 (2021); RSA 21-O:9, V (2020); RSA 21-O:14, I-a(a) (2020). RSA 21-O:14, I-a(a) provides that "[a]ny person aggrieved by a department decision may, in addition to any other remedy provided by law, appeal" such decision to the Council. In construing similarly worded statutes, we have explained that a "person aggrieved" includes any person who can show some "direct definite interest in the outcome of the proceeding." Goldstein v. Town of Bedford, 154 N.H. 393, 395, 910 A.2d 1158 (2006) (quotations omitted). Standing, however, "will not be extended to all persons in the community who might feel that they are hurt by the administrative action." Golf Course Investors of NH v. Town of Jaffrey, 161 N.H. 675, 680, 20 A.3d 846 (2011) (quotation omitted).

The regulations governing Council proceedings also address standing requirements. See N.H. Admin. R., Env-WMC 204.02(b)(5) (replaced 2023). Specifically, the regulations in effect at the time of CLF's appeal to the Council — and the Hearing Officer's decision — provided that:

> A notice of appeal shall include the following:
>
> ...
>
> (5) A clear and concise statement as to why the appellant has standing to bring the appeal, for example, why the appellant will suffer a direct and adverse affect [sic] as a result of the decision being appealed in a way that is more than any impact of the decision on the general public.

N.H. Admin. R., Env-WMC 204.02(b). Notably, neither the statutory scheme nor these regulations governing appeals to the Council address how many members of an organization must possess standing in order for the organization to establish standing. See RSA 149-M:8; RSA 21-O:9, V; RSA 21-O:14, I-a(a); N.H. Admin. R., Env-WMC 204. We observe that, when the Hearing Officer issued his decision, the regulations in effect in three other environmental councils within DES — the Water Council, the Air Resources Council, and the Wetlands Council — expressly provided for organizational standing when at least one of its members could establish standing. See N.H. Admin. R., Env-WC 203.02(a)(6); N.H. Admin. R., Env-AC 204.02(b)(5) (replaced 2023); N.H. Admin. R., Env-WtC 203.02(b) (replaced 2021).[2] Thus, given that neither the statutory scheme nor the regulations governing appeals to the Waste Management Council require that, for an organization to establish standing, it must demonstrate standing for a certain number of its members, we agree with the Hearing Officer that "there is no substantive basis for reaching a different result in an appeal before the Waste Management Council than before any of the other environmental councils." Accordingly, we conclude that the Hearing Officer did not err in ruling that CLF established standing based on harm to only two of its members.

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***4** We next consider whether the Hearing Officer erred in denying NCES's request for an evidentiary hearing. Here, CLF's two affiants provided sworn statements describing the adverse effects that they experience as a result of living close to the Bethlehem landfill. Specifically, they stated that the landfill has caused them to experience noise and odor — both inside and outside the home, interference with views, and negative impact on property values. NCES's affiant, the manager of the Bethlehem landfill, averred that both of CLF's affiants have made numerous, unverified complaints over the years about the landfill, and that CLF's affiants' neighbors have experienced neither noise nor odor from the landfill. Additionally, third-party studies acquired by NCES found that the noise from the landfill is "very low" and "would not disturb any person with an ordinary sensitivity to sound," and that NCES is controlling "off-site odors to the maximum extent practicable." Nothing in the landfill manager's affidavit, however, directly contradicts the personal experiences of CLF's affiants. Accordingly, we conclude that, in relying on the uncontroverted sworn statements from CLF's affiants, the Hearing Officer did not engage in impermissible fact finding and did not err in ruling that the landfill manager's affidavit "does not provide a basis for conducting an evidentiary hearing" on the veracity of the sworn statements of CLF's affiants. See RSA 21-M:3, IX(c), (e); cf. Golf Course Investors of NH, 161 N.H. at 680, 20 A.3d 846 (explaining that a "decision on standing may be subject to de novo review when the underlying facts are not in dispute").

Next, we consider NCES's argument that the affidavits that CLF presented were insufficient to establish standing because "they rely exclusively on predictions of future harm." CLF counters that future harm is sufficient to provide a basis for standing. We agree with CLF. A party can establish standing when "the appellant has suffered or will suffer an injury in fact." Appeal of Londonderry Neighborhood Coalition, 145 N.H. 201, 203, 761 A.2d 426 (2000) (emphasis added); see also Golf Course Investors of NH, 161 N.H. at 683-84, 20 A.3d 846 (considering whether residents could establish standing based upon injuries they alleged would occur if the planning board approved the contested development plans). Here, CLF's two affiants state that the landfill, in its current state, adversely affects them for numerous reasons, including noise, odor, and interference with views. Thus, we agree with the Hearing Officer that it is not "mere speculation" that the affiants' current, negative experiences caused by their close proximity to the landfill "will continue in the future if the Permit to expand the scope and extend the life of the landfill is implemented as now written."[3] See Hannaford Bros. Co. v. Town of Bedford, 164 N.H. 764, 769, 64 A.3d 951 (2013) (explaining that, to establish standing, an injury cannot be speculative). For the foregoing reasons, we conclude that the Hearing Officer did not err in ruling that CLF had standing to appeal DES's issuance of a permit to NCES.

B. Statutory Interpretation

As the appealing parties, NCES and DES bear the burden of demonstrating that the Council's decision is clearly unlawful or unreasonable. Appeal of Conservation Law Found., 174 N.H. 59, 63, 260 A.3d 26 (2021); RSA 541:13 (2021); see RSA 21-O:14, III (2020). We will not set aside or vacate the Council's decision unless it contains an error of law, or NCES or DES establish, by a clear preponderance of the evidence, that the Council's decision was unjust or unreasonable. Appeal of Conservation Law Found., 174 N.H. at 63, 260 A.3d 26; RSA 541:13. We deem the Council's findings on questions of fact properly before it to be prima facie lawful and reasonable. Appeal of Conservation Law Found., 174 N.H. at 63, 260 A.3d 26; RSA 541:13.

On appeal, DES and NCES challenge the Hearing Officer's determination that DES acted unlawfully when it granted NCES a permit to expand its landfill operations. This appeal implicates RSA chapter 149-M (2021 & Supp. 2022), which governs the management of solid waste. See RSA 149-M:1 (2021). The legislature has designated DES responsible for enforcing RSA chapter 149-M. RSA 149-M:4, V (Supp. 2022); RSA 149-M:5 (2021). "Among other solid waste management responsibilities, DES must establish State solid waste management policies and goals, regulate private and public facilities by administering a State permit system, and prepare a statewide solid waste plan." N. Country Envtl. Servs., Inc. v. Town of Bethlehem, 150 N.H. 606, 612, 843 A.2d 949 (2004); see also RSA 149-M:6 (Supp. 2022).

***5** A state permit is required to "construct, operate, or initiate closure" of a solid waste management facility. RSA 149-M:9, I (Supp. 2022); see also Town of Bethlehem, 150 N.H. at 612, 843 A.2d 949. "DES may not issue a permit unless it determines that the proposed solid waste facility provides 'a substantial public benefit.' " Town of Bethlehem, 150 N.H. at 612, 843 A.2d 949 (quoting RSA 149-M:11, III); see also RSA 149-M:11, IX. When determining whether a proposed facility provides "a substantial public benefit," DES must consider, as relevant to this appeal, "[t]he short- and long-term need for a solid waste facility of the proposed type, size, and location to provide capacity to accommodate solid waste generated within the borders of New Hampshire, which

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capacity need shall be identified as provided in paragraph V." RSA 149-M:11, III(a). In turn, RSA 149-M:11, V provides the method by which DES shall "determine the state's solid waste capacity need."

We begin by addressing DES's argument that the Hearing Officer incorrectly reviewed DES's determination that Stage VI satisfies a capacity need pursuant to RSA 149-M:11, III(a) as a question of law rather than a question of fact. CLF counters that the Hearing Officer's invalidation of the permit was "premised on a pure question of law — the plain and unambiguous meaning of RSA 149-M:11 ... which the Hearing Officer was fully authorized to determine."

A Hearing Officer is required to "[a]dopt all findings of fact made by the council except to the extent any such finding is without evidentiary support in the record" and to "[d]ecide all questions of law." RSA 21-M:3, IX(c), (e). The interpretation of a statute presents a question of law. In re J.S., 174 N.H. 375, 379, 262 A.3d 1178 (2021). Here, the Hearing Officer's decision to invalidate DES's permit to NCES was based on a pure question of law — the meaning of "capacity need" pursuant to RSA 149-M:11, III(a) and V. After interpreting RSA 149-M:11, III(a) and V, the Hearing Officer then applied undisputed facts to his interpretation and concluded that the permit was unlawful. Accordingly, we agree with CLF that the Hearing Officer's "capacity need determination was premised purely on statutory interpretation" and the application of undisputed facts and, therefore, that the Hearing Officer did not exceed his statutory authority. See RSA 21-M:3, IX(e).

We next turn to the primary issue on appeal: the interpretation of RSA 149-M:11, V(d) and the meaning of "capacity need." The interpretation of a statute presents a question of law that we review de novo. In re J.S., 174 N.H. at 379, 262 A.3d 1178. In matters of statutory interpretation, the intent of the legislature is expressed in the words of the statute considered as a whole. See State v. Pinault, 168 N.H. 28, 31, 120 A.3d 913 (2015). We first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning. Id. We interpret the statute as written and will not consider what the legislature might have said or add language the legislature did not see fit to include. Id. We interpret statutes in the context of the overall statutory scheme and not in isolation. Id.

As stated above, RSA 149-M:11, V provides that "[i]n order to determine the state's solid waste capacity need, the department shall" conduct a series of inquiries. See RSA 149-M:11, III(a) (stating that "capacity need shall be identified as provided in paragraph V"). First, DES shall "[p]roject, as necessary, the amount of solid waste which will be generated within the borders of New Hampshire for a 20-year planning period." RSA 149-M:11, V(a). Second, DES shall "[i]dentify the types of solid waste which can be managed according to each of the methods listed under RSA 149-M:3 and determine which such types will be received by the proposed facility." RSA 149-M:11, V(b). Third, DES shall "[i]dentify, according to type of solid waste received, all permitted facilities operating in the state on the date a determination is made under this section." RSA 149-M:11, V(c). Finally, the fourth inquiry, which comprises the primary issue on appeal, requires that DES shall:

> ***6** Identify any shortfall in the capacity of existing facilities to accommodate the type of solid waste to be received at the proposed facility for 20 years from the date a determination is made under this section. If such a shortfall is identified, a capacity need for the proposed type of facility shall be deemed to exist to the extent that the proposed facility satisfies that need.

RSA 149-M:11, V(d) (emphasis added). It is the meaning of the second sentence of RSA 149-M:11, V(d) that is contested.

The Hearing Officer interpreted RSA 149-M:11, V(d) to mean that "if a proposed facility operates for a period without any shortfall, then [DES] cannot lawfully find there to be a capacity need." In other words, the Hearing Officer concluded that a capacity need for a proposed facility exists only if a shortfall exists during the entire operating life of the facility. Therefore, because NCES anticipated operating Stage VI from 2021 to 2026, without a shortfall occurring until 2026, the Hearing Officer ruled that, as a matter of law, no capacity need exists. On appeal, CLF argues that this interpretation of RSA 149-M:11, V(d) is correct.

Both NCES and DES disagree with this interpretation of paragraph V(d); though, each party proposes a different interpretation of RSA 149-M:11, V(d). NCES argues that if there is a projected shortfall within the twenty-year planning period, and if the facility will operate within the twenty-year period and provide disposal capacity equal to or less than the projected shortfall, then the proposed facility necessarily satisfies "capacity need" — even if the facility's operation does not overlap with the shortfall. In contrast, DES argues that, although paragraph V(d) "may embody some kind of relationship between shortfall and capacity, it also reflects a purposeful ambiguity that allows the Department to operate within constitutional and factual constraints" and "indicates

that [DES] should use its expertise to determine if the proposed facility 'satisfies' a 'need.' " In other words, DES essentially argues that RSA 149-M:11, V(d) provides the agency with discretion when determining whether "a capacity need for the proposed type of facility" exists. We agree with DES.

We begin our interpretation, as we must, by considering the plain language of RSA 149-M:11, V(d), which instructs DES how to determine whether a proposed facility satisfies a capacity need. The statute provides that if a shortfall is identified within "20 years from the date a determination is made under this section," then "a capacity need for the proposed type of facility shall be deemed to exist to the extent that the proposed facility satisfies that need." RSA 149-M:11, V(d). In effect, pursuant to paragraph V(d), DES must determine whether: (1) there will be a shortfall in the capacity of existing facilities over a twenty-year planning period, starting from the date that the permit is expected to be granted; and (2) if there is a shortfall, whether a capacity need exists. Id. A capacity need exists "to the extent that the proposed facility satisfies that need." Id.

We note that paragraph V(d) uses two different terms: "shortfall" and "capacity need." Id. The Hearing Officer and CLF mistakenly treat the terms "capacity need" and "shortfall" as synonymous, contrary to our principles of statutory construction and the plain meaning of the statute.[4] See State v. Bakunczyk, 164 N.H. 77, 79, 53 A.3d 569 (2012) ("[W]hen the legislature uses two different words, it generally means two different things."); Garand v. Town of Exeter, 159 N.H. 136, 141, 977 A.2d 540 (2009) ("[W]henever possible, every word of a statute should be given effect." (quotation omitted)). Paragraph V(d) provides that if "a shortfall is identified, a capacity need for the proposed type of facility shall be deemed to exist to the extent that the proposed facility satisfies that need," thus differentiating the existence of a "shortfall" from the existence of a "capacity need." RSA 149-M:11, V(d) (emphases added). Determining whether a capacity need exists, based upon the extent to which a proposed facility satisfies said capacity need, requires an inquiry that is separate and distinct from whether a shortfall exists. Although the existence of a shortfall relates to the existence of a capacity need — indeed, a capacity need can exist only if a shortfall exists — it does not compel a finding of a capacity need. Rather, the existence of a shortfall allows DES to engage in the capacity need analysis.

***7** Given this conclusion, we next consider the separate meanings of "shortfall" and "capacity need" as used in RSA 149-M:11, V(d). A "shortfall," as described in RSA 149-M:11, V, exists when, during the twenty-year planning period, the state generates more waste of the type to be received at the proposed facility than existing facilities can accommodate. Here, the parties do not appear to dispute the meaning of "shortfall" or DES's projection that a shortfall will occur in 2026.

"Capacity need," on the other hand, is defined in relation to itself. RSA 149-M:11, V(d) ("[A] capacity need for the proposed type of facility shall be deemed to exist to the extent that the proposed facility satisfies that need." (emphases added)). This determination raises a question of fact: (1) whether a capacity need for the proposed facility exists, which (2) is dependent on the extent that the proposed facility satisfies that need. Id. Paragraph V places resolution of this question squarely within DES's discretion by providing that "[i]n order to determine the state's solid waste capacity need, the department shall" deem a capacity need to exist "to the extent that the proposed facility satisfies that need." RSA 149-M:11, V (emphasis added). Accordingly, we conclude that, pursuant to RSA 149-M:11, V(d), the existence of a "capacity need" for a proposed facility is a discretionary determination that DES must make if it projects that a shortfall will occur within the twenty-year statutory planning period.

CLF agrees with the Hearing Officer's interpretation of the terms "to the extent" and "satisfies" in RSA 149-M:11, V(d) to support its position that a proposed facility can satisfy a capacity need only if it operates exclusively during a period of shortfall. DES responds that:

> [T]he terms "to the extent" and "satisfies" in paragraph V(d) do not refer to mathematically quantifiable subjects like "shortfall" or the amount of "waste generated in New Hampshire." Instead, these terms refer to the more qualitative concept of "need," which they then relate to itself. By stating it in this manner, the Legislature left open the possibility that satisfying a capacity "need" includes more than a simple mathematical relationship to "shortfall."

We agree with DES. The Hearing Officer's application of his definitions of the terms "to the extent" and "satisfies" was premised on an incorrect assumption that "capacity need" is synonymous with "shortfall." Thus, his analysis improperly focused on "the extent that the proposed facility satisfies" the shortfall, rather than "the extent that the proposed facility satisfies" the capacity need. RSA 149-M:11, V(d).

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CLF also argues that the Hearing Officer was correct in concluding that the statute's use of the present tense "satisfies" mandates that a "present-action relationship must exist between the capacity need and the proposed facility," and, as a result, the proposed facility must operate exclusively during periods of shortfall. This interpretation is problematic for two reasons. First, as we have observed, it incorrectly conflates the term "capacity need" with "shortfall." Therefore, even if the use of present tense "satisfies" indicates a temporal requirement, such a requirement would only necessitate that the proposed facility operate during periods of capacity need — not periods of shortfall. See RSA 149-M:11, V(d).

Second, we disagree that the present tense of "satisfies" as used in RSA 149-M:11, V(d) requires the proposed facility to operate exclusively during periods of "capacity need." RSA 149-M:11, V(d) provides that a "capacity need" exists "to the extent that the proposed facility satisfies that need." The provision does not impart any temporal relationship between the proposed facility's operation and the period of capacity need. As long as the proposed facility "satisfies" the capacity need in some manner and at some time, DES maintains discretion to determine that a capacity need for the proposed facility exists. Indeed, the only temporal requirement set forth in RSA 149-M:11, V(d) is that, for DES to consider whether a capacity need exists, a shortfall must be identified at some point during the twenty-year planning period. Thus, the use of the present tense "satisfies," in and of itself, is insufficient to mandate the strict temporal relationship that the Hearing Officer found and CLF argues exists. See 82 C.J.S. Statutes § 412, at 558 (2022) ("A statute written in the present or future tense normally will be applied not only to existing things and conditions but also prospectively to future things and conditions."); cf. Cincinnati Specialty Underwriters Ins. Co. v. Best Way Homes, Inc., 175 N.H. 142, 148, 281 A.3d 997 (2022) (interpreting "the present tense language in the exclusionary provision [of an insurance policy] as having 'no temporal reference' "). Accordingly, for DES to determine that a capacity need exists, a proposed facility does not need to operate exclusively during periods of capacity need.

***8** NCES argues what is essentially the inverse of CLF's argument: if DES identifies a shortfall at any point within the statutory twenty-year period, then DES must determine that a capacity need exists. We disagree. RSA 149-M:11, V(d) instructs DES to "identify any shortfall in capacity," and "if such a shortfall is identified," to determine the existence of a capacity need. Nothing in the language of paragraph V(d) requires DES to find that a capacity need exists solely because there is a projected shortfall. Although the existence of a shortfall within the statutory period allows DES to determine that the proposed facility will satisfy a capacity need, a shortfall does not compel DES to reach such a conclusion. Therefore, even if DES projects a shortfall within the twenty-year planning period, DES may nevertheless deny a permit if it determines that the proposed facility will not satisfy the capacity need.

Our interpretation that RSA 149-M:11, V(d) grants DES discretion to determine whether a capacity need exists is further supported by RSA 149-M:11 as a whole. RSA 149-M:11, III(a) requires DES to determine the "short-and long-term need for a solid waste facility of the proposed type, size, and location." The Hearing Officer correctly stated that whether DES "acted reasonably in determining the 'short-and long-term' capacity need for the NCES Facility required under [RSA 149-M:11, III(a)] is a question of fact." If, however, capacity need is tied solely to the existence of a shortfall and the facility's exclusive operation during said shortfall, then any discretion that DES has to identify the "short- and long-term need" for the proposed facility is essentially eliminated. RSA 149-M:11, III(a). Moreover, the requirement set forth in paragraph III(a) that DES evaluate the short- and long-term capacity need for a proposed facility would be unnecessary if a finding of capacity need can occur only when a facility operates exclusively during a shortfall.

Our interpretation also comports with the purpose of RSA 149-M:11. RSA 149-M:11, I, states that the purpose of the public benefit requirement is, inter alia, to "provide for the solid waste management need of the state and its citizens" and to "ensure that adequate capacity exists within the state to accommodate the solid waste generated" within the state. We agree with NCES that "[t]here is a substantial difference between ensuring that there is an adequate supply of a resource for a consumer and limiting that supply to the amount necessary to meet the needs of that consumer." Our interpretation of RSA 149-M:11, V(d) requires DES to "[i]dentify any shortfall" prior to determining the existence of a capacity need. This conclusion best enables DES to meet its obligation to "provide for the solid waste management needs of the state and its citizens" and "ensure that adequate capacity exists within the state to accommodate the solid waste generated" within New Hampshire. See RSA 149-M:11, I(a), (b).

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III. Conclusion

For the foregoing reasons, we conclude that RSA 149-M:11, V(d) provides DES with flexibility and discretion to determine the existence of a capacity need and, therefore, how to address a projected shortfall. Given our conclusion that the statute is unambiguous, we need not consider the statute's legislative history or NCES's administrative gloss argument. See Polonsky v. Town of Bedford, 171 N.H. 89, 93, 190 A.3d 400 (2018) ("Absent an ambiguity, we will not look beyond the language of the statute to discern legislative intent."). Additionally, given that we reject the Hearing Officer's interpretation, we need not address NCES's argument that the Hearing Officer's interpretation violates the dormant Commerce Clause of the Federal Constitution. In light of our ruling, we also have no occasion to address CLF's motion to strike evidence from the record that supports NCES's administrative gloss argument. NCES's outstanding motion for an extension of time to object to CLF's motion for summary affirmance is deemed moot. Accordingly, we conclude that DES acted lawfully in issuing the permit and reverse.

***9** Reversed.

BASSETT and HANTZ MARCONI, JJ., concurred.

All Citations

--- A.3d ----, 2023 WL 8940253

Footnotes

1 By statute, the attorney general shall appoint hearing officers for appeals to the Council. RSA 21-M:3, VIII (Supp. 2022); RSA 21-O:9 (2020). Once appointed, the hearing officer shall "[a]dopt all findings of fact made by the council except to the extent any such finding is without evidentiary support in the record" and "[d]ecide all questions of law presented during the pendency of the appeal." RSA 21-M:3, IX(c), (e) (Supp. 2022). The hearing officer shall also "provide the council with a proposed written decision on the merits within 45 days of the conclusion of the hearing on the merits" and "[p]repare and issue written decisions on all motions and on the merits of the appeal within 100 days of the conclusion of the hearing on the merits." RSA 21-M:3, IX(f) (Supp. 2022). Thus, we are reviewing the Hearing Officer's legal determinations when we review any question of law set forth in the Council's order.

2 We note that, since CLF's appeal to the Council and the Hearing Officer's decision, the Wetlands Council, Air Resources Council, and Waste Management Council have adopted new regulations governing each council's procedural rules. See N.H. Admin. R., Ec-Wet 200; N.H. Admin. R., Ec-Air 200; N.H. Admin. R., Ec-Wst 200. Each of these three councils has adopted identical language stating that the appealing party must "[e]stablish that the appellant has standing to bring the appeal." N.H. Admin. R., Ec-Wet 203.03(c)(4)(b); N.H. Admin. R., Ec-Air 203.03(c)(4)(b); N.H. Admin. R., Ec-Wst 203.03(c)(4)(b). Notably, the regulations for the Wetlands Council and the Air Resources Council no longer address how many members must demonstrate standing for an organization to establish standing. See N.H. Admin. R., Ec-Wet 200; N.H. Admin. R., Ec-Air 200.

3 On appeal, NCES argues that the affiants' statements are insufficient to establish standing solely because they are based upon "predictions of future harm." Thus, we limit our analysis to this question, and we do not consider whether the facts themselves are sufficient to establish standing.

4 For example, in the order denying DES's motion to reconsider, the Hearing Officer stated that RSA 149-M:11, V(d) "uses the word 'satisfies,' creating the requirement that a proposed facility 'satisfy' a capacity need/shortfall: the statute creates a direct link between granting a proposed facility and said facility's ability to 'satisfy' a capacity need/shortfall." (Emphases added.) The Hearing Officer conflates the term "shortfall" with "capacity need" as indicated by its statement that RSA 149-M:11, V(d) requires that a proposed facility satisfy a "capacity need/shortfall."

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168 N.H. 98
Supreme Court of New Hampshire.

APPEAL OF Robert C. MICHELE &
a. (New Hampshire Wetlands Council)

No. 2014–509
|
Argued: April 22, 2015
|
Opinion Issued: August 11, 2015

Synopsis

Background: Owners of servient land sought review of ruling of Wetlands Council, upholding decision of Department of Environmental Services (DES) to issue a permit allowing easement holders to install seasonal dock in water adjacent to easement.

Holdings: The Supreme Court, Lynn, J., held that:

easement holder was an owner of land who could apply for dock permit;

any error in treatment of owners of servient land as abutting property owners did not prejudice owners and thus did not require reversal of grant of dock permit; and

fact that installation of dock would likely require owners of servient land to obtain increased liability coverage did not render installation of dock unreasonable and thus did not preclude grant of dock permit.

Affirmed.

***256** Wetlands Council

Attorneys and Law Firms

Cleveland, Waters and Bass, P.A., of Concord (David W. Rayment and Mark S. Derby on the brief, and Mr. Rayment orally), for the petitioners.

***257** Johnson & Borenstein, LLC, of Andover, Massachusetts (Mark B. Johnson on the brief and orally), for the respondents.

Opinion

LYNN, J.

***100** The petitioners, Robert C. and Katherine L. Michele, trustees of the Robert C. Michele Revocable Trust (Micheles), appeal a ruling of the Wetlands Council (Council) upholding a decision of the New Hampshire Department of Environmental Services (DES) to issue a permit allowing the respondents, Joseph and Linda Bremner (Bremners), to install a seasonal dock in water adjacent to the Micheles' pond-front property over which the Bremners have an easement. We affirm.

I

The following facts are derived from the record. The Micheles own property in Jaffrey with approximately 750 feet of shoreline on Gilmore Pond. The Bremners own nearby property that does not directly adjoin the pond. At one time, the Bremners' and Micheles' properties were a single parcel, owned by George and Karen Rickley (Rickleys). When the Rickleys conveyed what is now the Bremners' property, they sought approval to subdivide a section of their 750 feet of shoreline to accompany the plot. The town planning board denied the request, and the Rickleys instead conveyed the plot with an easement over a 118–foot segment of their shoreline.[1] The relevant language of the deed states that the owner of the partitioned lot (now the Bremners) "shall have the right under this easement to the exclusive use of said parcel of shore frontage for whatever purposes they may desire." The Micheles bought their property with full knowledge of the easement.

In 2007, the Bremners applied to DES for a permit to install a seasonal dock in the pond, adjacent to their easement. *See* RSA 482–A:3 (Supp.2007) (subsequently amended). The Micheles objected to the application, arguing that the Bremners had no legal right to apply for a dock permit on the Micheles' land without their consent. In 2009, DES granted the permit, and the Bremners installed a dock. The Micheles promptly filed both a motion for reconsideration and an action in superior court seeking to invalidate the ***101** easement. DES took no further action pending the outcome of the lawsuit. The superior court determined that the easement was valid, and in a 2011 unpublished order, we affirmed the court's ruling. *See Michele v. Bremner,* No. 2010–0844 (N.H. Aug. 24, 2011). Thereafter, DES affirmed its grant

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of the permit. It found that the Bremners' dock qualified as a minimal impact project, *see N.H. Admin. Rules,* Env–Wt 303.04(a), and concluded that, because under its regulations only major shoreline structures require that the fee owner be the applicant, *see id.* 402.18(a), the Bremners could apply for a dock permit. DES also found that the Micheles failed to demonstrate that the seasonal dock unreasonably affected the value or their use and enjoyment of their property. The Micheles appealed to the Council, which affirmed the DES decision. This appeal followed.

II

The Micheles first argue that DES erred in granting the Bremners, as mere easement holders, a permit to install a seasonal dock over the fee owners' objection. Rather than argue that the Bremners ***258** lack a sufficient property interest to install a dock in the water adjacent to the easement, they contend that, under the relevant statutes, DES lacks the authority to issue dock permits to easement holders. In support of this argument, the Micheles advance several theories: (1) the plain meaning of the terms "ownership" and "landowner-applicant" as used in the statutory scheme compel the conclusion that only fee owners can apply for a dock permit, *see* RSA 482–A:11, II (2013); (2) DES, in interpreting the statute, impermissibly went beyond its plain meaning by examining DES regulations; and (3) the instructions and forms that DES uses to administer the statute demonstrate that only fee owners can apply for permits. Alternatively, the Micheles argue that even if the Bremners could apply for a permit under the statute, DES erred in granting a permit because it adversely affected the value and enjoyment of their land.

The Bremners counter that a plain reading of the statute shows that it does not prohibit easement holders from applying for dock permits. They also maintain that this reading is consistent with the statute's purpose, DES's regulations, and DES's forms and procedures. Additionally, the Bremners contend that the issuance of the permit in this case was reasonable, and that many of the Micheles' arguments are based upon unpreserved or irrelevant considerations.

To resolve these issues, we must engage in statutory and regulatory interpretation. Although we give some deference to an agency's interpretation of its own regulations or of a statute it administers, "our deference is not total." *Appeal of Old Dutch Mustard Co.,* 166 N.H. 501, 506, 99 A.3d 290 (2014) (quotation omitted). Concerning statutes, "[w]e are still the final arbiter of ***102** the legislature's intent as expressed in the words of the statute considered as a whole." *Appeal of Town of Seabrook,* 163 N.H. 635, 644, 44 A.3d 518 (2012). As to regulations, "[w]e examine the agency's interpretation to determine if it is consistent with the language of the regulation and with the purpose which the regulation is intended to serve." *Old Dutch Mustard,* 166 N.H. at 506, 99 A.3d 290 (quotation omitted). "We use the same principles of construction when interpreting both statutes and regulations." *Id.*

"We first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning." *Appeal of Local Gov't Ctr.,* 165 N.H. 790, 804, 85 A.3d 388 (2014). "We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." *Id.* "We construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result." *Id.* "Moreover, we do not consider words and phrases in isolation, but rather within the context of the statute as a whole." *Id.* "This enables us to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme." *Id.* Additionally, "[w]hen the language of a statute is plain and unambiguous, we need not look beyond the statute itself for further indications of legislative intent." *Petition of Malisos,* 166 N.H. 726, 729, 103 A.3d 793 (2014).

RSA 482–A:3, I, requires that "any person" who wishes to construct a dock must apply to DES for a permit, unless an exemption applies.[2] The statute further ***259** specifies other requirements that an "applicant" must fulfill. *See* RSA 482–A:3, I(d)(1) (notifying abutters). RSA 482–A:11, II then provides, in relevant part, that "[b]efore granting a permit under this chapter, the department may require reasonable proof of *ownership* by a private *landowner-applicant.*" (Emphasis added.) The Micheles rely primarily upon the legislature's use of the terms "ownership" and "landowner-applicant" in RSA 482–A:11, II to support their position that only fee owners can apply for dock permits. The legislature did not define the terms "owner," "ownership," "landowner," "landowner-applicant" or "applicant." *See* RSA 482–A:2 (Supp.2011) (amended 2012).

"When a term is not defined in the statute, we look to its common usage, using the dictionary for guidance." *K.L.N. Construction Co. v. Town of Pelham,* 167 N.H. 180, 185,

107 A.3d 658 (2014). *Webster's Third New International Dictionary* defines "ownership" as "the state, relation, or fact of being an ***103** owner: lawful claim or title"; and "owner" as "one that has the legal or rightful title *whether the possessor or not*." *Webster's Third New International Dictionary* 1612 (unabridged ed. 2002) (emphasis added). We acknowledge that these are broad definitions. We see no reason, however, to limit the meaning of the terms when the legislature did not see fit to do so. Based upon the common meaning of the term, we conclude that "ownership," as used in the statute, neither is limited to fee ownership nor requires possession. We further conclude that parties who hold title to a shoreline easement, such as the Bremners, are "owners" under the statute. Because the term "owner" encompasses property interests other than fee ownership, the Micheles' citation to the repeated use of the terms "owner," "property owner," and "landowner" throughout the statutory scheme does not advance their argument.

Contrary to the Micheles' argument that the legislature could not have intended easement holders to be able to apply for a permit under the statute, we see no evidence that the purpose of the statute was to change the balance of property rights between fee owners and easement holders from what it was under the common law. As the Micheles point out, we have previously noted that an "easement is a nonpossessory right to the use of another's land." *Arcidi v. Town of Rye,* 150 N.H. 694, 698, 846 A.2d 535 (2004). As explained above, however, possession is not a requirement of an "ownership" interest in land. Further, in *Arcidi,* we said that when there is an express grant of an easement, "a grantee takes by implication whatever rights are reasonably necessary to enable it to enjoy the easement beneficially. This includes the right to make improvements that are reasonably necessary to enjoy the easement." *Id.* at 701, 846 A.2d 535 (citation omitted). *Arcidi* concerned an easement over the plaintiff's land for "ingress and egress by motor vehicle." *Id.* at 697, 846 A.2d 535 (quotation omitted). We held that it was reasonable for the easement holder to cut down trees, fill in wetlands and build a gravel road across the easement. *Id.* at 697, 702, 846 A.2d 535. We conclude that, under the common law, installing a dock—arguably a less impactful project—can be a reasonable use of an easement in at least ***260** some circumstances.[3]

Instead of altering the state of property rights under the common law, the purpose of the statute is "to protect and preserve [the state's] ***104** submerged lands under tidal and fresh waters and its wetlands ... from despoliation and unregulated alteration." RSA 482–A:1 (2013). It follows, therefore, that anyone who could build a dock under the common law can apply for a dock permit under RSA chapter 482–A. Given the broad grant of the Bremners' easement, they have a sufficient ownership interest to obtain a dock permit under RSA chapter 482–A.

The Micheles contend that this interpretation of the statute will impermissibly force DES to decide the relative property rights of parties with competing interests. We have previously stated that DES's authority to regulate docks "does not include the power to determine the relative rights of property owners." *Gray v. Seidel,* 143 N.H. 327, 330, 726 A.2d 1283 (1999). *Gray,* however, involved an appeal of a superior court order which determined that, because DES and other local authorities regulate docks, the court lacked jurisdiction to decide whether building a dock was a reasonable use of the plaintiffs' easement. *Id.* at 329–30, 726 A.2d 1283. We reversed, holding that the court did have jurisdiction to rule on the question of whether the plaintiffs' proposed dock constituted a reasonable use of the easement. *Id.* at 330, 726 A.2d 1283. *Gray* stands merely for the proposition that DES's authority to regulate docks does not divest the courts of jurisdiction to decide underlying property rights. Nothing in that case alters the fact that, in issuing any dock permit, DES must necessarily decide whether the applicant has met the statutory and regulatory criteria. Thus, DES retains the authority to determine whether an applicant has a sufficient property interest to apply for a dock permit.

Although we need not look beyond the plain and unambiguous terms of the statute to ascertain the legislative intent in this case, *see Petition of Malisos,* 166 N.H. at 729, 103 A.3d 793, we note that DES's regulations are consistent with our ruling. The commissioner of DES is empowered to adopt regulations to implement RSA chapter 482–A. RSA 482–A:11, I (2013). DES regulations define "applicant" as someone "who has applied for a permit" and has "an interest in the land on which a project is to be located that is sufficient for the person to legally proceed with the project." *N.H. Admin. Rules,* Env–Wt 101.06. The regulations also state that "[a]n applicant for a shoreline structure defined as major shall be the owner in fee." *Id.* at 402.18. DES read these regulations to mean that only applicants for major projects need be the fee owner; applicants for minor projects, like the Bremners' dock,[4] may have a lesser ownership interest. We agree with DES's interpretation of these regulations.

***105** The Micheles also assert that because the DES application forms and instructions ask for the "owner's"

information and because the forms have no place on them to identify the applicant as an easement ***261** holder, it must follow that only fee owners can apply for a permit. This argument is based upon the same misunderstanding of the meaning of the term "owner" as was discussed above. Because a person who holds an easement interest in property is an "owner" thereof, the absence of additional language in the forms and instructions specifically referencing easement holders provides no support for the Micheles' position.

III

Alternatively, the Micheles argue that even if an easement holder can apply for a permit under the statute, DES and the Council erred in upholding the permit in this case because the Bremners' dock adversely affects the value and enjoyment of the Micheles' property. DES cannot grant a dock permit if doing so will "infringe on the property rights or unreasonably affect the value or enjoyment of property of abutting owners." RSA 482–A:11, II. Whether a permit infringes upon property rights or unreasonably affects the value or enjoyment of another's land is a determination of fact. *Cf. Webb v. Rye,* 108 N.H. 147, 150, 230 A.2d 223 (1967) (stating that whether, under the circumstances, a land use was unreasonable and constituted a nuisance is a question of fact). RSA chapter 541 governs our review of Council decisions. *See Appeal of Dean Foods,* 158 N.H. 467, 471, 969 A.2d 377 (2009). Under RSA 541:13 (2007), we will not set aside the Council's order except for errors of law, unless we are satisfied, by a clear preponderance of the evidence, that it is unjust or unreasonable. The Council's findings of fact are presumed *prima facie* lawful and reasonable. RSA 541:13. In reviewing the Council's findings, our task is not to determine whether we would have found differently or to reweigh the evidence, but, rather, to determine whether the findings are supported by competent evidence in the record. *See Dean Foods,* 158 N.H. at 474, 969 A.2d 377. We review the Council's rulings on issues of law *de novo. Appeal of Portsmouth Regional Hosp.,* 148 N.H. 55, 57, 802 A.2d 1175 (2002).

The Micheles advance several reasons why, in their view, the issuance of the dock permit was unreasonable. They first argue that they are entitled to greater protection than that which RSA 482–A:11, II generally provides because, as fee owners, they have a greater interest than abutting property owners. The statute, however, provides no extra protection for fee owners whose properties are encumbered by water access easements, and we will not add language to the statute that the legislature did not see fit to include. *Local Gov't Ctr.,* 165 N.H. at 804, 85 A.3d 388. In any event, a property owner who has granted an easement to a third party ***106** logically has a lessened—not a heightened—expectation of unencumbered use and enjoyment of his property as compared to a property owner who has not surrendered any interest in his property and is instead seeking protection against interference from an abutter. Consequently, even if we were to assume that DES or the Council erred by treating the Micheles as "abutting owners" under RSA 482–A:11, II, any such error was not prejudicial because it afforded the Micheles more protection than that to which they were entitled under the statute.

The Micheles next contend that the installation of the dock reduces their privacy and seclusion.[5] After a hearing, at which ***262** Mrs. Michele was the sole witness for the petitioners, the Council determined that the Micheles failed to show that the permit unreasonably infringed upon their property rights. It also found that the Micheles were aware of the easement when they purchased their property and that a single witness's subjective testimony failed to show that a small, seasonal dock unreasonably affected the use and enjoyment of the Micheles' land. We cannot say that these findings lack evidentiary support in the record or are unjust or unreasonable.[6]

The Micheles next assert that installation of the dock increased their shorefront liability while eliminating any control they have over the easement area. Their risk is compounded, they argue, by increased incidences of vandalism and trespassing on the easement. Mrs. Michele testified that, as a result of the Bremners' dock, the Micheles' insurance agent advised them to increase their liability coverage. Although agreeing that the dock will likely subject the Micheles to suit if an injury occurs on or around the easement area, the Council found this was inadequate to make installation of the dock unreasonable. The Micheles, when they bought the property, knew that they were responsible for insuring the easement area. Further, the Micheles are incorrect in claiming that they have lost all control of the easement area. The Bremners enjoy only the right to make reasonable use of their easement, which includes using it to access the pond and their dock; the Micheles retain the right to seek relief in court should the Bremners make unreasonable use of the easement.

***107** Finally, the Micheles maintain that the placement of the dock thirteen feet from the easement boundary was unreasonable. RSA 482–A:3, XIII(a) states that "[a]ll boat docking facilities shall be at least 20 feet from an *abutting*

property line in non-tidal waters....” (Emphasis added.) We understand their argument to be that, because DES treated them as abutting owners under RSA 482–A:11, II, it also should have treated them as abutting owners under RSA 482–A:3, XIII(a). We disagree. As noted above, to the extent DES may have treated the Micheles as abutting property owners for purposes of RSA 482–A:11, II, it afforded them more protection than that to which they were entitled. We are aware of no legal principle that would require DES to compound any such error by treating the Micheles as abutting property owners under RSA 482–A:3, XIII(a) as well. On the contrary, DES and the Council correctly determined that the 20–foot setback requirement did not apply in the easement context because the owners of the dominant and servient estates hold *overlapping* rather than *abutting* property interests. Therefore, RSA 482–A:3 XIII(a) is not applicable.[7] The record reflects that the Bremners chose the location of the ***263** dock so as to create the least impact to the shoreline. We hold that the Council did not err in upholding DES's approval of the location of the dock.

IV

For the foregoing reasons, we conclude that the Council did not err in upholding DES's decision to grant a dock permit to the Bremners.

Affirmed.

DALIANIS, C.J., and HICKS, CONBOY, and BASSETT, JJ., concurred.

All Citations

168 N.H. 98, 123 A.3d 255

Footnotes

1 There is some discrepancy as to how much of the shoreline is encompassed in the easement. The exact size is immaterial to the current appeal, and we adopt the 118–foot figure used by DES and the Council.

2 We observe that, although RSA 482–A:3, IV–a would normally exempt a low impact seasonal dock, such as the one at issue, from the permit requirements, the proposed dock must be the only dock on the frontage to qualify for the exemption. The Bremners' dock does not qualify for such an exemption because the Micheles already have a dock on the frontage.

3 Indeed, the issue of whether the Bremners' dock is an unreasonable use of the easement under the common law has already been litigated. In 2014, a superior court found that the Bremners' dock was a reasonable use of the easement but ordered the Bremners to remove their personal property from the easement. The Micheles have not appealed this ruling. The Bremners appealed the decision to the extent that it bars them from leaving certain personal property on the easement, but that issue is not before us today.

4 The Micheles do not contend that the Bremners' dock constitutes a major shoreline structure.

5 The Micheles point to testimony that the Bremners cut down trees from the easement area. This, according to the Micheles, removed a natural screen and caused a community uproar for which the Micheles were blamed. The dock permit, however, did not allow the Bremners to cut down trees. In fact, the Bremners removed the trees before applying for the dock permit. Thus, the tree removal is irrelevant to the issue of whether the permit affected the Micheles' use and enjoyment of their land.

6 The Micheles also argue that the installation of the dock represented a departure from the intensity of use of the easement established by the Bremners' predecessors in title. That argument concerns the parties' relative property rights and not whether the permit violates RSA 482–A:11, II. Therefore, it is outside the scope of the Council's decision, *see Gray,* 143 N.H. at 330, 726 A.2d 1283, and we need not address it.

7 For the same reason, we also reject the Micheles' argument that DES's inconsistent treatment of them under the statutory scheme is indicative of a legislative intent that only fee owners can apply for permits.

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TITLE V
TAXATION

CHAPTER 71-B
BOARD OF TAX AND LAND APPEALS

Section 71-B:1

71-B:1 Board Established. – There is hereby established a board of tax and land appeals, hereinafter referred to as the board, which shall be composed of 3 members who shall be learned and experienced in questions of taxation or real estate valuation and appraisal, or both. At least one member of the board shall be an attorney admitted to practice in New Hampshire. The members of the board shall be full-time employees and shall not engage in any other employment during their terms that is in conflict with their duties as members of the board.

Source. 1973, 544:2. 1982, 42:72. 1994, 393:1. 2011, 224:336, eff. July 15, 2011. 2023, 79:67, eff. July 1, 2023.

TITLE V
TAXATION

CHAPTER 71-B
BOARD OF TAX AND LAND APPEALS

Section 71-B:7

71-B:7 Hearing Procedure. – Whenever the board shall hold hearings, it shall not be bound by the strict rules of evidence adhered to in the superior courts in this state. The board shall introduce into evidence and may take into consideration in determining any question any information obtained through its own investigation, including information obtained by persons employed under RSA 71-B:14. In addition to the provisions of RSA 91-A, the board shall tape record the proceedings of any taxation hearing before it and shall make such tape recording available to the public for inspection and recording from the date of the hearing to a date which is 15 working days after the board has made a final decision on the matter which is the subject of the hearing, or, if an appeal is made from such decision, the date upon which the matter has been finally adjudicated, whichever date is later.

Source. 1973, 544:2. 1975, 341:1. 1983, 313:1, eff. Aug. 17, 1983.

TITLE V
TAXATION

CHAPTER 71-B
BOARD OF TAX AND LAND APPEALS

Section 71-B:12

71-B:12 Appeal. – Decisions of the board may be appealed by either party only in accordance with the provisions of RSA 541 as from time to time amended; provided, however, that there shall be only one appeal allowed per person on each parcel of land until such time as a reassessment has been made.

Source. 1973, 544:2. 1983, 363:1, eff. Aug. 18, 1983.

TITLE V
TAXATION

CHAPTER 71-B
BOARD OF TAX AND LAND APPEALS

Section 71-B:14

71-B:14 Staff. – The board shall have upon its staff at least one review appraiser who shall be a classified state employee and who shall be competent to review the value of property for tax and eminent domain purposes. In addition, the board shall have such clerical and technical staff as may be necessary within the limits of appropriation made therefor.

Source. 1973, 544:2. 2003, 63:1, eff. Jan. 1, 2004. 2019, 346:198, eff. July 1, 2019.

TITLE V
TAXATION

CHAPTER 76
APPORTIONMENT, ASSESSMENT AND ABATEMENT OF TAXES

Abatement

Section 76:16-a

76:16-a By Board of Tax and Land Appeals. –
I. If the selectmen neglect or refuse to so abate, in accordance with RSA 76:16, I(b), any person aggrieved, having complied with the requirements of RSA 74, upon payment of a $65 filing fee, may apply in writing to the board of tax and land appeals. The appeal shall be filed on or before September 1 after the date of notice of tax under RSA 76:1-a, and not afterwards. The board, after inquiry and investigation, shall hold a hearing if requested as provided in this section and shall make such order thereon as justice requires; and such order shall be enforceable as provided hereafter. If the appeal is filed before July 1 the person aggrieved shall state in the appeal to the board the date of the municipality's decision on the RSA 76:16, I(b) application.
II. Upon receipt of an application under the provisions of paragraph I, the board of tax and land appeals shall give notice in writing to the affected town or city of the receipt of the application by mailing such notice to the town or city clerk thereof by certified mail. Such town or city may request in writing a hearing on such application within 30 days after the mailing of such notice and not thereafter. If a hearing is requested by a town or city, the board of tax and land appeals shall, not less than 30 days prior to the date of hearing upon such application, give notice of the time and place of such hearing to the applicant and to the town or city in writing. Nothing contained in this paragraph shall be construed to limit the rights of taxpayers to a hearing before the board of tax and land appeals.
III. The applicant and the town or city shall be entitled to appear by counsel, may present evidence to the board of tax and land appeals and may subpoena witnesses. Either party may request that a stenographic record be kept of the hearing. Any investigative report filed by the staff of the board of tax and land appeals shall be made a part of such record.
IV. In such hearing, the board of tax and land appeals shall not be bound by the technical rules of evidence.
V. Either party aggrieved by the decision of the board of tax and land appeals may appeal pursuant to RSA 71-B:12. For the purposes of such appeal, the findings of fact by the board shall be final. Any such appeal shall be limited to questions of law.
VI. A copy of an order of abatement ordered by the board of tax and land appeals, attested as such by the chairman of the board, if no appeal is taken hereunder, may be filed in the superior court for the county or in the Merrimack county superior court at the option of the board; and, thereafter, such order may be enforced as any final judgment of the superior court.
VII. (a) The board may establish, by rules adopted under RSA 541-A, a small claims procedure to hear property tax appeals under this section as an alternative to full hearings. The rules may modify the procedural, hearing, and decision requirements of RSA 71-B, RSA 541-A, and paragraphs I-VI of this section.
(b) After filing the appeal pursuant to RSA 76:16-a, the taxpayer shall have the option of electing the small claims procedure. If the taxpayer elects the small claims procedure, the appeal shall be heard as a small claim unless the municipality, within 30 days of the board's notice of the taxpayer's election, requests a full hearing.
(c) The quorum for small claims hearings, decisions, and rehearing orders shall be one board member.
(d) The board retains the authority to require small claims to be heard by full hearing.

Source. 1955, 162:1. 1965, 29:1. 1969, 246:1. 1973, 121:1; 544:3. 1977, 563:39. 1982, 42:77. 1988, 1:7, 8. 1989, 408:9. 1991, 386:4, 6. 1992, 175:2; 285:2. 1994, 393:4, 5. 1995, 265:17. 2002, 217:2, eff. May 16, 2002. 2014, 175:2, eff. Sept. 9, 2014.

TITLE LI
COURTS

CHAPTER 498-A
EMINENT DOMAIN PROCEDURE ACT

Condemnation Procedure

Section 498-A:9-a

498-A:9-a Preliminary Objections. –
I. Within 30 days after the return day, any condemnee may file a motion in the office of the board raising preliminary objections to the declaration of taking. The board upon cause shown may extend the time for filing preliminary objection. Preliminary objection shall be limited to and shall be the exclusive method of challenging:
(a) The sufficiency of the security;
(b) Any other procedure followed by the condemnor; or
(c) The necessity, public use, and net-public benefit of the taking.
II. Failure to raise any matters by preliminary objection shall constitute a waiver thereof.
III. Preliminary objection shall state specifically the grounds relied upon.
IV. All preliminary objections shall be raised at one time and in one pleading. They may be inconsistent.
V. The board shall determine promptly all preliminary objections and make such preliminary and final orders and decrees as justice shall require. If preliminary objections are finally sustained, which have the effect of finally terminating the condemnation, the condemnee shall be entitled to damages, including costs and expenses, to be determined by the board in the manner prescribed in RSA 498-A:24. The board may allow amendment or direct the filing of a more specific declaration of taking.

Source. 1981, 493:10. 1982, 42:79. 1995, 194:3. 2006, 324:13, eff. Jan. 1, 2007.

TITLE LI
COURTS

CHAPTER 498-A
EMINENT DOMAIN PROCEDURE ACT

Determination of Just Compensation

Section 498-A:24

498-A:24 Board Action. – Upon receipt of the filing of a declaration of taking, and after any preliminary objections under RSA 498-A:9-a have been concluded, the board shall forthwith fix a time for hearing the parties on the issue of just compensation, and shall give notice thereof to all persons named in the declaration of taking as condemnor and as condemnee, and otherwise as justice may require. Such service shall be made in the manner prescribed in RSA 498-A:4, and shall be given at least 30 days prior to the date set for the hearing. The board may, after notice to all parties, upon its own motion or motion of any party, make such order for consolidation of any of the cases pending before it as justice and convenience requires.

Source. 1971, 526:1. 1981, 493:14. 1982, 42:79. 2005, 171:3, eff. Jan. 1, 2006.

TITLE LI
COURTS

CHAPTER 498-A
EMINENT DOMAIN PROCEDURE ACT

Determination of Just Compensation

Section 498-A:25

498-A:25 Method of Determination. – The board shall proceed to a determination of just compensation and shall hear evidence in that regard offered by the parties. The board shall first determine total compensation to be awarded on account of the taking and, if there is more than one person entitled to compensation, the award shall be apportioned among such persons, to each his proportionate share of the total compensation so found. The board may use its staff appraisers in evaluating a case before it.

Source. 1971, 526:1. 1982, 42:79. 2003, 63:2, eff. Jan. 1, 2004.

TITLE LI
COURTS

CHAPTER 498-A
EMINENT DOMAIN PROCEDURE ACT

Determination of Just Compensation

Section 498-A:27

498-A:27 Appeal on Damages. – Any party, condemnee or condemnor aggrieved by the amount of compensation awarded by the board may, within 20 days after the filing of the report of the board, and not afterwards (unless for good cause shown the superior court extends such time), file in the superior court a petition to have the damages reassessed, and the court shall assess the damages by jury, or by trial without jury if jury trial is waived, and award costs to the prevailing party. The trial in such case shall be de novo. If the sum of estimated just compensation paid to the condemnee pursuant to RSA 498-A:11 exceeds the amount of final judgment, the court shall enter judgment against the condemnee for the amount so paid to him in excess of final judgment.

Source. 1971, 526:1. 1973, 256:11. 1982, 42:79, eff. Dec. 31, 1982.

TITLE LV
PROCEEDINGS IN SPECIAL CASES

CHAPTER 541
REHEARINGS AND APPEALS IN CERTAIN CASES

Section 541:6

541:6 Appeal. – Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal by petition to the supreme court.

Source. 1913, 145:18. PL 239:4. 1937, 107:17; 133:78. RL 414:6.

TITLE LV
PROCEEDINGS IN SPECIAL CASES

CHAPTER 541
REHEARINGS AND APPEALS IN CERTAIN CASES

Section 541:13

541:13 Burden of Proof. – Upon the hearing the burden of proof shall be upon the party seeking to set aside any order or decision of the commission to show that the same is clearly unreasonable or unlawful, and all findings of the commission upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable.

Source. 1913, 145:18. PL 239:11. 1937, 107:24; 133:85. RL 414:13.

TITLE LV
PROCEEDINGS IN SPECIAL CASES

CHAPTER 541-A
ADMINISTRATIVE PROCEDURE ACT

Section 541-A:33

541-A:33 Evidence; Official Notice in Contested Cases. –

I. All testimony of parties and witnesses shall be made under oath or affirmation administered by the presiding officer.

II. The rules of evidence shall not apply in adjudicative proceedings. Any oral or documentary evidence may be received; but the presiding officer may exclude irrelevant, immaterial or unduly repetitious evidence. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidence offered may be made and shall be noted in the record. Subject to the foregoing requirements, any part of the evidence may be received in written form if the interests of the parties will not thereby be prejudiced substantially.

III. Documentary evidence may be received in the form of copies or excerpts if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original.

IV. A party may conduct cross-examinations required for a full and true disclosure of the facts.

V. Official notice may be taken of any one or more of the following:

(a) Any fact which could be judicially noticed in the courts of this state.

(b) The record of other proceedings before the agency.

(c) Generally recognized technical or scientific facts within the agency's specialized knowledge.

(d) Codes or standards that have been adopted by an agency of the United States, of this state or of another state, or by a nationally recognized organization or association.

VI. Parties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.

Source. 1994, 412:1, eff. Aug. 9, 1994.

175 N.H. 456
Supreme Court of New Hampshire.

APPEAL OF Eleonora POROBIC (New Hampshire Board of Tax and Land Appeals)

No. 2021-0289
|
Submitted: June 14, 2022
|
Opinion Issued: October 18, 2022

Synopsis

Background: Taxpayer appealed from decision of the Board of Tax and Land Appeals (BTLA) granting her only a partial abatement of taxes assessed by town.

The Supreme Court, Hantz Marconi, J., held that taxpayer failed to demonstrate that BTLA's decision was unsupported by the evidence.

Affirmed.

****478** Board of Tax and Land Appeals

Attorneys and Law Firms

Cooper Cargill Chant, P.A., of North Conway (Randall F. Cooper on the brief), for the petitioner, Eleonora Porobic.

Donahue, Tucker & Ciandella, PLLC, of Exeter (Brendan A. O'Donnell and Christopher T. Hilson on the brief), for the respondent, Town of Bartlett.

Opinion

HANTZ MARCONI, J.

***458** The petitioner, Eleonora Porobic, appeals a decision of the New Hampshire Board of Tax and Land Appeals (BTLA) granting her only a partial abatement of taxes assessed by the respondent, the Town of Bartlett. We affirm.

I

This case involves a challenge to the Town's 2018 tax assessment of a single-family home located on 0.88 acres of land owned by Porobic. In 2017, the property was assessed at $206,000. In 2018, following the construction of an addition to the house and the clearing of trees, which expanded a view of the mountains, as well as a "full update" of property values in the Town by its new assessing contractor, Avitar Associates of New England, Inc., the property was assessed at $408,400. After the Town denied Porobic's abatement request, she appealed to the BTLA. See RSA 76:16-a (Supp. 2021).

In April 2021, the BTLA held a hearing. During the hearing, Porobic did not challenge the Town's 2018 assessment of the building and improvements (valued at $147,500); rather, she challenged the assessment ****479** of the land (valued at $260,900). Specifically, she objected to the Town's position that the value of the land had increased by $153,000 as a result of the expanded view of the mountains. Porobic submitted an appraisal of the property prepared by Nanci Stone-Hayes, a certified general appraiser, valuing the property at a fair market value of $270,000 (Hayes Appraisal), and argued that she was entitled to an abatement based on that valuation. The Town, however, defended its assessment, arguing that the Hayes Appraisal understated the value of the expanded view. Through David Woodward, a certified property assessor supervisor with Avitar, the Town submitted a comparable sales analysis suggesting a fair market value for ***459** the property of between $425,700 and $499,300. The Town argued that, because its assessment was within this range — once adjusted using the agreed-upon equalization ratio of 89.1% — Porobic's assessment was proportional, and, therefore, her request for an abatement should be denied.

The BTLA found neither party's valuation entirely persuasive. With respect to the Hayes Appraisal, the BTLA noted that, because Porobic did not challenge the assessment of the building and improvements, the Hayes Appraisal would, after deducting that amount, yield an assessment on the land that was *lower* than it had been in the prior tax year. The BTLA observed that "[t]his calculation, in and of itself, casts some doubt on the validity of Ms. Hayes' $270,000 value conclusion as the basis for a finding of disproportionality." Further, the BTLA found that Stone-Hayes' testimony was not credible "insofar as she contended property buyers in the Town would not place a contributory value of more than $25,000 to $30,000 for a property with a view when compared to one without a view." The BTLA found that "a fixed lump sum conclusion about the contributory value of a view is

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implausible, at best," and that "[t]here can be little doubt that [the] view attributes noted by the Town's assessor, such as 'width, depth, distance and subject matter[,]' can affect market value."

Nonetheless, the BTLA determined that, although the Hayes Appraisal understated the property's market value, the Town's assessment overstated it. Recognizing the subjective nature of determining the contributory value of a view, the BTLA used "its judgment and experience, ... weigh[ed] all of the evidence presented, including the photographs and other detailed information in the Avitar manual, the Hayes Appraisal ..., the Town's comparable sales analysis and the testimony at the hearing," and found that "the contributory value of the view in tax year 2018 was $90,000 (instead of the $153,000 shown on the assessment-record card)." (Footnote omitted.) Consequently, the BTLA concluded that Porobic had carried her burden to demonstrate that the property was assessed at a higher percentage of fair market value than the general level of assessment in the Town, and that, as such, she was paying more than her proportional share of taxes. See Shaw's Supermarkets, Inc. v. Town of Windham, 174 N.H. 569, 573, 267 A.3d 419 (2021). Accordingly, the BTLA granted Porobic's request for an abatement, and reduced the property's 2018 assessed value to $345,400. This appeal followed.

II

Before considering the case before us, we briefly reexamine our standard of review. As we have observed, "[a] standard of review lies at the heart of the appellate function." Magee v. Cooper, 174 N.H. 647, 650, 273 A.3d 378 (2021). "It sets forth the amount of deference to be accorded the **480 decision under *460 review." Id. Where, as here, a party appeals a decision of the BTLA, it may be appealed "only in accordance with the provisions of RSA [chapter] 541." RSA 71-B:12 (2012); see also RSA 76:16-a, V ("Either party aggrieved by the decision of the [BTLA] may appeal pursuant to RSA 71-B:12.").

Under RSA chapter 541, the party seeking to set aside the BTLA's decision bears the burden to show that it is "clearly unreasonable or unlawful." RSA 541:13 (2021). The burden of proof, as prescribed by RSA 541:13, instructs, in part, that "all findings of the [BTLA] upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable." Id. However, in appeals from the BTLA — regarding tax abatement — RSA 76:16-a, V specifically provides that "[f]or the purposes of such appeal, the findings of fact by the [BTLA] shall be final. Any such appeal shall be limited to questions of law." RSA 76:16-a, V. Because this is an appeal from a BTLA decision on a request for abatement, RSA 76:16-a, V controls. Dartmouth Corp. of Alpha Delta v. Town of Hanover, 115 N.H. 26, 27-28, 332 A.2d 390 (1975).

We now return to the case before us.

III

Porobic argues that the BTLA erred when it considered the Town's assessment and comparable sales analysis prepared by Avitar, as well as the testimony of its expert, Woodward. She advances numerous challenges to Avitar's assessment and methodology, contending that this evidence is so unreliable that it was unjust and unreasonable for the BTLA to consider it in determining the fair market value of the property.

First, we note that the BTLA is not bound by the technical rules of evidence. See RSA 76:16-a, IV. It was free to consider the Town's assessment and other valuation evidence in determining the property's fair market value. See Paras v. Portsmouth, 115 N.H. 63, 67-68, 335 A.2d 304 (1975) (holding that "all relevant factors to property value should be considered"); Snow v. Sanbornton, 102 N.H. 11, 13, 148 A.2d 664 (1959) (holding that valuation of property by tax assessors is competent evidence in tax abatement cases).

Second, even if we were to assume that Porobic is correct that the Town's assessment methodology is flawed, it is well-established that that is not the pertinent issue in an abatement proceeding. See, e.g., LLK Trust v. Town of Wolfeboro, 159 N.H. 734, 739, 992 A.2d 666 (2010) (holding that disproportionality, and not methodology, is the linchpin in establishing entitlement to an abatement). As we explained in LLK Trust, challenges alleging flaws in the Town's assessment methodology concern the weight to be accorded that evidence and "we defer to the [fact-finder's] judgment on *461 such issues as resolving conflicts in the testimony, measuring the credibility of witnesses, and determining the weight to be given evidence." Id.

Here, the record reflects that the BTLA weighed Porobic's challenges to the Town's methodology, and, after expressly considering all of the evidence before it, including both parties' comparable sales analyses, the BTLA determined that neither the Hayes Appraisal nor the Town's assessment

accurately stated the property's fair market value. Instead, "[u]sing its judgment and experience, including the photographs and other detailed information in the Avitar manual, the Hayes Appraisal presented by the taxpayer, the Town's comparable sales analysis and the testimony at the hearing," the BTLA determined that the contributory value of the view was ****481** $90,000 — not $153,000 as the Town had maintained — and that, therefore, the property's assessed value should have been $345,400.[1]

This it was entitled to do. The determination of fair market value is an issue of fact, and, as the trier of fact, the BTLA was free to accept or reject such portions of the evidence as it found proper, including that of expert witnesses, and was not required to believe even uncontroverted evidence. See Appeal of Pub. Serv. Co. of N.H., 124 N.H. 479, 484, 471 A.2d 1182 (1984) (explaining that, in that case, this court would overturn the BTLA's decision "only if the record reveals that the board did not give proper consideration to all the evidence when making its findings"). Indeed, "[i]n arriving at findings of fact that do not exactly correspond to either party's evidence, but are within the parameters of the conflicting evidence submitted, the [BTLA] merely employs its statutorily countenanced ability to utilize its experience, technical competence and specialized knowledge in evaluating the evidence before it." Appeal of City of Nashua, 138 N.H. 261, 265, 638 A.2d 779 (1994) (quotation omitted); see also RSA 541-A:33, VI (2021) (providing that an administrative agency may utilize its "experience, technical competence, and specialized knowledge" in evaluating evidence); RSA 71-B:1 (requiring BTLA to be composed of members "learned and experienced in questions of taxation or of real estate valuation and appraisal or of both").

In reviewing the BTLA's decision, we accept its factual findings as final and limit our review to questions of law. RSA 76:16-a, V. The standard articulated in RSA 76:16-a, V does not mean that the Board's factual findings are unreviewable, see RSA 76:16-a, V (appeals from decision of the ***462** BTLA are "limited to questions of law"), but rather that such findings will not be disturbed unless clearly made "without evidence." See Kierstead v. Betley Chevrolet-Buick, Inc., 118 N.H. 493, 496-97, 389 A.2d 429 (1978) (the question of sufficient evidence, as opposed to its weight, is dealt with as a matter of law). In addition to her challenge to the Board's weighing of the evidence, which we addressed supra, Porobic also asserts that there is insufficient evidence to support the Board's decision. Such a challenge to the sufficiency of the evidence presents a question of law. Id. at 496, 389 A.2d 429. Accordingly, we will not overturn the BTLA's factual findings if there is any evidence to support them and we will review its decision only for legal error. Here, the record contains the reports of both parties' experts, which, in turn, contain information from several comparable properties. While the BTLA did not credit the experts' ultimate opinions of value, it had before it the raw data on comparable properties on which the experts based their opinions. Thus, the information and values ascribed to these similar properties provided a basis for the BTLA's factual findings and its decision. Based on our review of the record, we conclude that Porobic has failed to demonstrate that the BTLA's decision is unsupported by the evidence or the result of legal error. Accordingly, we affirm its decision.

Affirmed.

MACDONALD, C.J., and HICKS, BASSETT, and DONOVAN, JJ., concurred.

All Citations

175 N.H. 456, 293 A.3d 477

Footnotes

1 To the extent Porobic argues that the BTLA erred because it expressed its valuation finding in terms of assessed value and not fair market value, we are not persuaded. The parties agreed that the equalization ratio was 89.1%; accordingly, a finding expressed in terms of assessed value can easily be converted to fair market value simply by applying that ratio. The valuation finding is the same regardless of how it is expressed.

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(j) The record shall be closed at the conclusion of the hearing unless the board leaves the record open to receive additional evidence or documents requested by the board at the hearing.

(k) Parties planning to have experts, including appraisers, testify at the hearing shall advise the expert to bring their complete file, including all original records and notes.

(l) After the record is closed, it shall not be reopened except as provided in Tax 201.37 or by waiver of the board as provided in Tax 201.41.

Source. #5638, eff 9-1-93; ss by #7068, INTERIM, eff 8-15-99, EXPIRES, 12-13-99; ss by #7153, eff 12-10-99; amd by *#7874-A, eff 4-18-03;* ss by *#8986, eff 9-24-07*; ss by *#10624, eff 6-26-14;* ss by *#13687, eff 7-19-23*

Tax 201.28 Electronic Proceedings.

(a) On its own or upon motion or request, the board may hold any proceeding using telephonic or other electronic means.

(b) The board shall record all such proceedings held under (a) above.

Source. #5638, eff 9-1-93; ss by #7068, INTERIM, eff 8-15-99, EXPIRES, 12-13-99; ss by #7153, eff 12-10-99*;* ss by *#8986, eff 9-24-07*; ss by *#10624, eff 6-26-14;* ss by *#13687, eff 7-19-23*

Tax 201.29 Record and Transcript.

(a) The board shall record all oral proceedings pursuant to RSA 541-A:31, VII. Parties may, at their own expense, arrange to have a stenographer at any hearing.

(b) The recording shall be available for inspection as provided by RSA 71-B:7 and any person shall contact the board to arrange a time for such inspection.

(c) Requests for copies of the recording shall be made in compliance with RSA 71-B:7 and shall be accompanied by the fee stated in Tax 501.01.

(d) Recordings shall be maintained for 45 days following a final decision that was not appealed. If an appeal is taken, recordings shall be maintained until the case is finally adjudicated in accordance with RSA 71-B:7.

(e) Any person wishing a certified transcript shall arrange and pay for the transcription of the recording.

Source. #5638, eff 9-1-93; ss by #7068, INTERIM, eff 8-15-99, EXPIRES, 12-13-99; ss by #7153, eff 12-10-99*;* ss by *#8986, eff 9-24-07*; ss by *#10624, eff 6-26-14;* ss by *#13687, eff 7-19-23*

Tax 201.30 Evidence.

(a) Pursuant to RSA 71-B:7 the board shall not be bound by the strict rules of evidence adhered to in the superior court.

(b) In ruling on objections to evidence presented, the board shall give due regard to the principles behind the rules of evidence and the board's statutory function and purpose.

(c) The board shall exclude irrelevant, immaterial, and unduly repetitious evidence in accordance with RSA 541-A:33, II.

Source. #5638, eff 9-1-93; amd by #6762, eff 7-1-98; amd by #7068, INTERIM, eff 8-15-99, EXPIRES, 12-13-99; ss by #7153, eff 12-10-99*;* ss by *#8986, eff 9-24-07*; ss by *#10624, eff 6-26-14;* ss by *#13687, eff 7-19-23*

Tax 201.31 Exchange and Submittal of Exhibits.

(a) The party offering any exhibit, including appraisals and statistical reports, shall provide one original to be marked, one copy to the other party and 3 copies to the board. These copies shall be provided after the hearing notice, but not less than 14 days before the hearing.

(b) An appraisal or statistical report submitted with the abatement application, the appeal document, or otherwise submitted before the hearing notice shall not constitute compliance with this rule. If a party fails to comply with (a) above, the board shall exclude the appraisal or statistical report.

(c) Additional copies shall not be required for photographs, maps, or other documents that are not easily copied.

(d) If a party fails to supply the correct number of copies, the board shall either return the document for copying by the party or copy the document and bill the party for copying costs.

(e) Any party submitting rebuttal evidence shall provide the required copies in (a) at the time of submittal.

eff 6-26-14; ss by #13711-B, eff 8-2-23

Tax 210.04 Preliminary Objections.

(a) Preliminary objections shall be filed in accordance with RSA 498-A:9-a and RSA 498-A:9-b.

(b) The board shall stay any just compensation proceedings while an RSA 498-A:9-b preliminary objection is pending.

Source. #2943, eff 12-31-84; EXPIRED 12-31-90

New. #5638, eff 9-1-93; ss by #6762, eff 7-1-98; ss by #7153, eff 12-10-99; ss by #7874-B, eff 4-18-03; ss by #8987-A, eff 9-24-07; ss by #9538, eff 9-8-09; ss by #10625-B, eff 6-26-14; ss by #13711-B, eff 8-2-23

Tax 210.05 Damages Deposit.

(a) When paying to the board the damage deposit required by RSA 498-A:11, the condemnor shall file a damage deposit that:

(1) Complies with all applicable Tax 201 rules;

(2) States the deposit amount;

(3) Certifies the deposit is the condemnor's good faith estimate of the just compensation due the condemnee(s) as estimated by a qualified, impartial appraiser in accordance with RSA 498-A:4 and RSA 498-A:11; and

(4) Lists the name and interest of each condemnee along with the recording information from which the interest arises.

(b) The damage deposit may be included in the declaration.

(c) The board shall place all deposits in an account of a local bank, naming as account holders the board and all condemnees.

(d) If the board receives a written request to withdraw the deposit signed by all condemnees, the board shall release the deposit payable to all condemnees or payable to certain condemnees if all condemnees consent to such payment.

(e) If the board receives a written request to withdraw the deposit signed by some but not all condemnees, the board shall:

(1) Notify all condemnees of the request;

(2) Provide all condemnees 10 days to object to the request; and

(3) Either:

a. Release the deposit payable to all condemnees if no objection is filed; or

b. Rule on the request if an objection is filed.

(f) By withdrawing the deposit, the condemnee shall be deemed to have waived all objections and defenses to the action and to the taking of the property except for a claim to greater compensation in accordance with RSA 498-A:11, III.

(g) All deposits of damages which remain unclaimed by a condemnee shall be administered in accordance with RSA 498-A and RSA 471-C.

Source. #5638, eff 9-1-93; ss by #7068, INTERIM, eff8-15-99, EXPIRES, 12-13-99; ss by #7153, eff 12-10-99; ss by #8987-A, eff 9-24-07; ss by #9538, eff 9-8-09; ss by #10625-B, eff 6-26-14; ss by #13711-B, eff 8-2-23

Tax 210.06 Apportionment of Damages. The board shall hold an RSA 498-A:25 hearing on the apportionment of damages if a motion is filed, stating the facts and issues underlying the request.

Source. #5638, eff 9-1-93; ss by #7068, INTERIM, eff 8-15-99, EXPIRES, 12-13-99; ss by #7153, eff 12-10-99; ss by #8987-A, eff 9-24-07; ss by #9538, eff 9-8-09; ss by #10625-B, eff 6-26-14; ss by #13711-B, eff 8-2-23

Tax 210.07 Comparables. Except by board leave, parties shall be limited to no more than 10 comparables per residential property and 20 comparables per nonresidential property. Parties may move for leave, at least 4 weeks prior to the hearing, to use more comparables, and the board shall grant the motion if the moving party has shown the additional comparables are necessary to the party's case and will not be unduly repetitious or burdensome on the board or the other party.

Source. #5638, eff 9-1-93; ss by #7068, INTERIM, eff 8-15-99, EXPIRES, 12-13-99; ss by #7153, eff 12-10-99; ss by #7874-B, eff 4-18-03; ss by #8987-A, eff 9-24-07; ss by #9538, eff 9-8-09; ss by #10625-B,eff 6-26-14; ss by #13711-B, eff 8-2-23

Tax 210.08 Hearings.

TITLE XXX
OCCUPATIONS AND PROFESSIONS

CHAPTER 310
OFFICE OF PROFESSIONAL LICENSURE AND CERTIFICATION

Section 310:10

310:10 Disciplinary Proceedings; Non-Disciplinary Remedial Proceedings. –

I. Disciplinary proceedings shall be open to the public in accordance with RSA 91-A. All non-disciplinary remedial proceedings shall be exempt from the provisions of RSA 91-A, except that the board shall disclose any final remedial action that affects the status of a license, including any non-disciplinary restrictions imposed. The docket file for each such proceeding shall be retained in accordance with the retention policy established by the office of professional licensure and certification.

II. Boards shall conduct disciplinary and non-disciplinary remedial proceedings in accordance with procedural rules adopted by the executive director.

III. The office shall employ sufficient administrative prosecutors qualified by reason of education, competence, and relevant experience to serve as hearing counsel in all disciplinary proceedings before the boards.

IV. The office shall employ sufficient personnel qualified by reason of education, competence, and relevant experience to serve as presiding officer in all disciplinary or non-disciplinary remedial proceedings before the boards. The presiding officer shall have the authority to preside at such hearing and to issue oaths or affirmations to witnesses, rule on questions of law and other procedural matters, and issue final orders based on factual findings of the board.

V. The presiding officer in disciplinary and non-disciplinary remedial proceedings may issue subpoenas for persons, relevant documents and relevant materials in accordance with the following conditions:

(a) Subpoenas for persons shall not require compliance in less than 48 hours after receipt of service.

(b) Subpoenas for documents and materials shall not require compliance in fewer than 15 days after receipt of service.

(c) Service shall be made on licensees and certified individuals by certified mail to the address on file with the office or by hand and shall not entitle them to witness or mileage fees.

(d) Service shall be made on persons who are not licensees or certified individuals in accordance with the procedures and fee schedules of the superior court, and the subpoenas served on them shall be annotated "Fees Guaranteed by the New Hampshire Office of Professional Licensure and Certification."

VI. In carrying out disciplinary or non-disciplinary remedial proceedings, the presiding officer, as defined in RSA 541-A, shall have the authority to hold pre-hearing conferences, which shall be exempt from the provisions of RSA 91-A; to administer oaths and affirmations; and, to render legal opinions and make conclusions of law.

VII. Boards shall be the triers of fact in all disciplinary and non-disciplinary remedial proceedings, and shall determine sanctions, if any.

VIII. At any time before or during disciplinary or non-disciplinary remedial proceedings, complaints may be dismissed or disposed of, in whole or in part:

(a) By written settlement agreement approved by the board, provided that any complainant shall have the opportunity, before the settlement agreement has been approved by a board, to comment on the terms of the proposed settlement; or

(b) Through an order of dismissal for default, for want of jurisdiction, or failure to state a proper basis for disciplinary action.

IX. Disciplinary action taken by the board at any time, and any dispositive action taken after the issuance of a notice of public hearing, shall be reduced to writing and made available to the public. Such decisions shall not be public until they are served upon the parties, in accordance with rules adopted by the executive director.

X. Except as otherwise provided by RSA 541-A:30, the board shall furnish the respondent at least 15 days' written notice of the date, time and place of a hearing. Such notice shall include an itemization of the issues to be heard, and, in the case of a disciplinary hearing, a statement as to whether the action has been initiated by a written complaint or upon the board's own motion, or both. If a written complaint is involved, the notice shall provide the complainant with a reasonable opportunity to intervene as a party.

XI. Neither the office nor the boards shall have an obligation or authority to appoint attorneys or pay the fees of attorneys representing licensees or witnesses during investigations or disciplinary or non-disciplinary remedial proceedings.

XII. No civil action shall be maintained against the office or the board, or any member of the board, office, or its agents or employees, against any organization or its members, or against any other person for or by reason of any statement, report,

communication, or testimony to the board or determination by the board or office in relation to proceedings under this chapter.
XIII. For matters involving individuals identified in mental health records, testimony by client or patients shall be handled with utmost regard for the privacy and protection of their identity from public disclosure.
(a) A client or patient who is not a complainant shall not be compelled to testify at a hearing.
(b) If a client or patient who is not a complainant testifies at a hearing, the identity of the individual shall be screened from the public view and knowledge, although the respondent and attorneys shall be within the view of the client patient. The board may view the client or patient. The public's access to view or information that would identify the client or patient shall be restricted. The hearing may be closed to the public for the duration of the client or patient's testimony, at the board's discretion.
(c) If a complainant client or patient requests the privacy safeguards in subparagraph (b), the presiding officer may make such accommodations.

Source. 2023, 235:8, eff. July 15, 2023.

TITLE XXX
OCCUPATIONS AND PROFESSIONS

CHAPTER 310
OFFICE OF PROFESSIONAL LICENSURE AND CERTIFICATION

Section 310:14

310:14 Rehearing; Appeals. –

I. Any person who has been denied a license or certification by the office or a board shall have the right to a rehearing before the appropriate board. Requests for a rehearing shall be made in writing to the appropriate board within 30 days of receipt of the original final decision.

II. Any person who has been disciplined by a board shall have the right to petition in writing for a rehearing within 30 days of receipt of the original final decision.

III. Appeals from a decision on rehearing shall be by appeal to the supreme court pursuant to RSA 541, except as specified in RSA 674:34 or other applicable statutes. No sanction shall be stayed by the board during an appeal.

Source. 2023, 235:8, eff. July 15, 2023.

CHAPTER Plc 100 ORGANIZATIONAL RULES

PART Plc 101 DEFINITIONS

Plc 101.01 "Board" means "board" as defined in RSA 310:2, I(a), namely "a board, council, commission, committee, or other regulatory body with jurisdiction over professions listed in paragraph II." The term includes the executive director if the board is an advisory board or if the applicable statute does not establish a board.

Source. *#12863, eff 9-4-19*; ss by *#13293, eff 11-24-21*; ss by *#13797, eff 10-26-23* (formerly Plc 101.05)

Plc 101.02 "Executive director" means the executive director of the office of professional licensure and certification or designee.

Source. *#13293, eff 11-24-21*; ss by *#13797, eff 10-26-23* (formerly Plc 101.01)

Plc 101.03 "License" means "license" as defined in RSA 541-A:1, VIII, namely "the whole or part of any agency permit, certificate, approval, registration, charter or similar form of permission required by law."

Source. *#12863, eff 9-4-19; ss by #13293, eff 11-24-21* (formerly Plc 101.02); ss by *#13797, eff 10-26-23* (formerly Plc 101.02)

Plc 101.04 "Office of professional licensure and certification (OPLC)" means the New Hampshire office of professional licensure and certification established by RSA 310.

Source. *#13293, eff 11-24-21;* ss by *#13797, eff 10-26-23* (formerly Plc 101.03)

Plc 101.05 "Office of the executive director" means the legal authority conferred by law on the executive director as implemented by OPLC staff who are not assigned to the division of licensing and board administration or the division of enforcement.

Source. *#13293, eff 11-24-21; 21;* ss by *#13797, eff 10-26-23* (formerly Plc 101.04)

Plc 101.06 "Telephone number" means a 10-digit number that is assigned to a particular telephone and used in making connections to it.

Source. *#13506, eff 12-16-22;* ss by *#13797, eff 10-26-23*

PART Plc 102 DESCRIPTION OF OFFICE

Plc 102.01 Office of Professional Licensure and Certification - Purpose. The OPLC's purpose is to safeguard the public health, safety, welfare, environment, and the public trust of the citizens of the State of New Hampshire by promoting efficiency and economy in the administration of the business processing, recordkeeping, and other administrative and clerical operations of the boards identified in RSA 310:2, II.

Source. *#12863, eff 9-4-19*; ss by *#13293, eff 11-24-21*; ss by *#13797, eff 10-26-23*

Plc 102.02 Authority of the Executive Director.

(a) RSA 310:4, I, authorizes the executive director to:

(1) Employ such clerical or other assistants as are necessary for the proper performance of the office's work;

(2) Make expenditures for any purpose that the executive director determines are reasonably necessary for the proper performance of the OPLC's duties under RSA 310; and

(3) Contract for the services of investigators, presiding officers, legal counsel, and industry experts as necessary and in consultation with the appropriate board.

(b) RSA 310:4, II authorizes the executive director to, among other duties:

(1) Examine applicants, process applications, and issue or deny licenses for all license types, based on objective standards developed by the boards and adopted as rules in accordance with RSA 541-A;

(2) Investigate all complaints of professional misconduct in accordance with RSA 310:9; and

(3) Draft and coordinate rulemaking for all boards in accordance with RSA 541-A, with the advice and recommendations of the boards.

(c) RSA 310:6 authorizes the executive director to adopt rules pursuant to RSA 541-A for:

(1) All fees set forth in RSA 310:5, with the advice and recommendations of the respective board;

(2) Such organizational and procedural rules necessary to administer the boards, including rules governing the administration of complaints and investigations, hearings, disciplinary and non-disciplinary proceedings, inspections, payment processing procedures, and application procedures;

(3) The rate of per diem compensation and reimbursable expenses for all boards;

(4) Rules governing the professionals' health program as set forth in RSA 310:5; and

(5) Temporary licensure of out-of-state health care professionals who present evidence of an active license in good standing from another jurisdiction.

Source. *#12863, eff 9-4-19*; ss by *#13293, eff 11-24-21*; ss by *#13797, eff 10-26-23*

Plc 102.03 Office Hours, Office Location, and Contact Information.

(a) The OPLC is located at 7 Eagle Square, Concord, New Hampshire.

(b) The OPLC's normal business hours, during which it is open to the public, are 8:00 a.m. to 4:00 p.m. on weekdays, excluding days on which state offices are closed in observance of holidays.

(c) Correspondence shall be addressed to the OPLC at:

New Hampshire Office of Professional Licensure and Certification
7 Eagle Square
Concord, NH 03301-4980.

(d) The OPLC's main telephone number is (603) 271-2152.

(e) The OPLC's TDD access number is relay NH 1-800-735-2964.

(f) The OPLC's website URL is www.oplc.nh.gov.

(g) General inquiries may be directed to CustomerSupport@oplc.nh.gov.

Source. *#12863, eff 9-4-19*; ss by *#13293, eff 11-24-21*; ss by *#13797, eff 10-26-23*

Plc 102.04 OPLC Organizational Structure. The OPLC comprises:

(a) The office of the executive director, described in Plc 102.05;

(b) The division of licensing and board administration, described in Plc 102.06; and

(c) The division of enforcement, described in Plc 102.07.

Source. *#12863, eff 9-4-19*; ss by *#13293, eff 11-24-21*; ss by *#13797, eff 10-26-23*

Plc 102.05 Office of the Executive Director. The office of the executive director is responsible for implementing the authority conferred on the executive director by RSA 310 that has not been delegated to the division of licensing and board administration or the division of enforcement, including but not limited to:

(a) Human resource functions;

(b) All business administration and accounting functions, including but not limited to:

(1) Supervision of the purchase of all equipment, materials, supplies, and services;

(2) Management of the agency's fleet vehicles; and

(3) Maintenance of the OPLC's equipment and consumable inventory;

(c) Establishing a retention policy for the retention and disposal of records of the OPLC and the boards; and

(d) Adopting, maintaining, and implementing the rules authorized by RSA 310:6.

Source. *#12863, eff 9-4-19*; ss by *#13293, eff 11-24-21*; ss by *#13797, eff 10-26-23* (formerly Plc 102.06)

Plc 102.06 Division of Licensing and Board Administration.

(a) The division of licensing and board administration supports the licensing and administrative functions of the OPLC and the boards, including but not limited to:

(1) Processing applications for licensure;

(2) Issuing licenses to qualified applicants and referring applicants whose applications cannot be approved to the relevant board;

(3) Notifying licensees of the pending expiration of their licenses as required by RSA 310:8, IV;

(4) Supporting the meetings held by each board, including ensuring that the notice required by RSA 91-A is given;

(5) Supporting adjudicative proceedings initiated in accordance with Plc 200; and

(6) Maintaining the records of each board as required by RSA 91-A.

(b) Except for boards that are advisory boards, the boards are separate and distinct for the purpose of regulating various professions and protecting the public health, safety, welfare, environment, and the public

trust.

Source. *#12863, eff 9-4-19*; ss by *#13293, eff 11-24-21*; ss by *#13797, eff 10-26-23* (formerly Plc 102.04)

Plc 102.07 Division of Enforcement. The division of enforcement supports the compliance, investigative, and disciplinary functions of the OPLC and the boards, including but not limited to:

(a) Conducting inspections of places where regulated professions are practiced to determine compliance with the standards established by the boards, whether in connection with an application for licensure or on an on-going basis;

(b) Conducting inspections of mechanical and electrical installations in locations where the local authority has requested assistance;

€ Reviewing allegations of misconduct to determine whether the allegation is viable and recommending the board dismiss the allegation if it is not viable, in accordance with RSA 310:9, II;

(d) Investigating viable allegations of misconduct, whether on its own initiative or upon receiving a written complaint, in accordance with RSA 310:9, III; and

€ Supporting adjudicative proceedings initiated in accordance with Plc 200.

Source. *#12863, eff 9-4-19*; ss by *#13293, eff 11-24-21*; ss by *#13797, eff 10-26-23* (formerly Plc 102.05)

PART Plc 103 REQUESTS FOR INFORMATION AND ACCESS TO RECORDS

Plc 103.01 Requests for Information or Access to Records.

(a) Requests for access to governmental records pursuant to RSA 91-A:4 shall be made directly to the executive director by sending a request with the information specified in Plc 103.02 either:

(1) Electronically, to righttoknow@oplc.nh.gov; or

(2) By mail or other delivery to the address specified in Plc 102.03(c).

(b) Requests for other records shall be addressed to the executive director or directly to the division that is responsible for the records being requested.

Source. *#12863, eff 9-4-19*; ss by *#13293, eff 11-24-21*; ss by *#13797, eff 10-26-23*

Plc 103.02 Contents of Requests for Access to Records. The request for access to governmental records shall contain as much information as the requestor can provide to reasonably describe the records, including but not limited to:

(a) The type of record(s) sought, such as meeting minutes, orders, or reports;

(b) The date or date range the records were created, such as “April 2021” or “from January 1, 2019 through December 31, 2022”;

(c) The board, specific profession, or topic to which the records relate, for example “the Funeral Board”, “midwives”, or “reports filed with the Legislature or Governor’s Office”; and

(d) If records of a specific licensee are sought, as much information as the requestor has to identify the licensee, including name, location of practice, and license number.

Source. *#13797, eff 10-26-23*

CHAPTER Plc 200 PRACTICE AND PROCEDURE

Statutory Authority: RSA 310-A:1-d, II(h)(2); RSA 541-A:16, I(b)

REVISION NOTE:

Document #13427, effective 8-4-22, readopted with amendments Part Plc 201 through Plc 213 in Chapter Plc 200 and renumbered the rules as Part Plc 201 through Part Plc 211. Document #13391 extensively reorganized the rules within the former Part Plc 201 through Part Plc 213, which had first been filed under Document #12863, eff 9-4-19. Document #13427 also adopted new rules; Part Plc 212 titled "Waiver of Procurement Provisions" and Part Plc 213 titled "Disciplinary Proceedings; License Conditions."

As practice and procedure rules, the rules in Document #13427 will not expire except pursuant to RSA 541-A:17, II.

PART Plc 201 PURPOSE AND SCOPE

Plc 201.01 Purpose.

(a) The purpose of the various proceedings undertaken pursuant to this chapter is to acquire sufficient information to make fair and reasoned decisions on matters within the statutory jurisdiction of the office of professional licensure and certification (OPLC) or other regulatory authority undertaking the proceeding.

(b) The purpose of this chapter is to provide:

(1) Uniform procedures for the conduct of adjudicative proceedings and non-adjudicative proceedings;

(2) Uniform procedures for the submittal, review, and disposition of complaints, rulemaking petitions, requests for explanation of adopted rules, requests for declaratory rulings, waivers of rules, and waivers of procurement provisions under RSA 21-G:37;

(3) Procedures for investigations, settling matters without adjudicative hearings, and disciplinary proceedings; and

(4) Uniform criteria for suspending, revoking, or refusing to issue or renew licenses issued by the regulatory authority.

(c) These rules are intended to supplement the requirements of RSA 541-A and any procedures or criteria expressly set forth in the practice act of a regulatory authority or in RSA 310-A:1-j through RSA 310-A:1-n.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 201.02 Applicability.

(a) The definitions in Plc 202 and rules in Plc 203 shall apply to all administrative proceedings conducted by the by the OPLC or other regulatory authority, as described in Plc 204 through Plc 213, and shall be in addition to applicable requirements of RSA 541-A and the rules set forth in Plc 204 through Plc 213 as applicable to a specific type of proceeding.

(b) This chapter shall apply to the following professions, as regulated directly by the OPLC:

(1) Body art;

(2) Court reporters;

(3) Electrology;

(4) Massage therapy;

(5) Medical imaging and radiation therapy;

(6) Ophthalmic dispensing;

(7) Recreational therapy;

(8) Reflexology, structural integration, and Asian bodywork therapy; and

(9) Respiratory care practice.

(c) This chapter also shall apply to the boards, commissions, and councils listed in RSA 310-A:1-a, I, hereinafter referred to as "supported boards, commissions, and councils", provided that these rules shall not supplant or supersede any procedures expressly set forth in the practice act of the supported board, commission, or council.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

PART Plc 202 DEFINITIONS

Plc 202.01 "Adjudicative proceeding" means "adjudicative proceeding" as defined in RSA 541-A:1, I, reprinted in Appendix B. The term includes "disciplinary proceeding" and "emergency proceeding".

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 202.02 "Appearance" means a written notification to the regulatory authority that a person or a person's representative intends to actively participate in a proceeding.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 202.03 "Applicable law" means the statute(s), rules, standing orders, and case law, if any, under which a profession is regulated in New Hampshire.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 202.04 "Complaint" means a communication of alleged misconduct containing information that, if true, could violate ethical codes or other applicable law.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 202.05 "Data" means all information relevant to an investigation, including but not limited to:

(a) Oral or written descriptions provided by a complainant or witness;

(b) Reports obtained in the course of the investigation;

(c) Maps, charts, drawings, and photographs obtained or created in the course of the investigation;

(d) Audio or video recordings obtained or created in the course of the investigation; and

(e) Computer programs or computer printouts obtained or created in the course of the investigation or otherwise used to analyze other information obtained.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 202.06 "Disciplinary proceeding" means an adjudicative proceeding commenced by a regulatory authority for the purpose of determining whether to suspend, revoke, or refuse to renew a license or to impose other sanctions.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 202.07 "Emergency proceeding" means an adjudicative proceeding initiated by a regulatory authority pursuant to RSA 541-A:30, III, or pursuant to the regulatory authority's practice act if applicable, to address a threat to public health, safety, or welfare that requires emergency action.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 202.08 "Enforcement division" means the division of enforcement of the OPLC established by RSA 310-A:1-a.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 202.09 "Executive director" means the executive director of the OPLC or designee.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 202.10 "File" as a verb means to place a document in the actual possession of a regulatory authority.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 202.11 "File electronically", for other than applications for a license and related documents that can be filed using the on-line licensing portal, means to file a document by:

(a) Using the electronic filing system available at https://www.oplc.nh.gov when it becomes available; or

(b) Until an electronic filing system becomes available, by sending an email with documents attached in portable document format (pdf) in accordance with Plc 203.02 or Plc 204.02, as applicable.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 202.12 "Hearing" means a component of a proceeding, through which the regulatory authority receives testimony, evidence, arguments, or comments, or any combination thereof. The term includes hearings conducted in-person and hearings conducted in-person with remote participation.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 202.13 "Intervenor" means a person allowed by the presiding officer to intervene in an adjudicative proceeding pursuant to RSA 541-A:32.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 202.14 "Investigation" means a gathering of data by a regulatory authority concerning matters within its jurisdiction.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 202.15 "Investigator" means an individual designated by the regulatory authority to conduct an investigation or oversee the activities of the professional conduct investigators, or both.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 202.16 "License" means "license" as defined in RSA 541-A:1, VIII, reprinted in Appendix B.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 202.17 "Licensee" means a person who holds a license, certification, registration, or other form of approval required by law to engage in a profession regulated by the OPLC or a supported board, commission, or council.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 202.18 "Motion" means any request to the presiding officer for an order or ruling directing some act to be done in favor of the participant making the motion, including a statement of justification or reason(s) for the request.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 202.19 "Oral adjudicative hearing" means a trial-type hearing that is part of an adjudicative proceeding and is held at a specific time for the purpose of receiving live testimony from witnesses, together with any evidence and argument that is presented. The term includes oral adjudicative hearings conducted in-person and conducted in-person with remote participation.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 202.20 "Oral public hearing" means a legislative-type hearing that is part of a non-adjudicative proceeding, that is held for the purpose of receiving oral or written comments, or both, from the public. The term includes oral public hearings conducted in-person and conducted in-person with remote participation.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 202.21 "Order" means a document issued by the regulatory authority or a presiding officer to:

(a) Establish procedures to be followed in an adjudicative or non-adjudicative proceeding;

(b) Grant or deny a petition or motion;

(c) Require a person to do something, or to abstain from doing something, as a result of an adjudicative proceeding; or

(d) Determine a person's rights to a license or other privilege established by law.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 202.22 "Participant" means:

(a) For an adjudicative proceeding, a respondent, respondent's representative, intervenor, intervenor's representative, or prosecutor for that adjudicative proceeding; or

(b) For a non-adjudicative proceeding, any person who attends or otherwise participates in the oral public hearing or submits comments in writing on paper or by e-mail, or both.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 202.23 "Participants" means:

(a) For an adjudicative proceeding, all respondent(s), respondent's representative(s), intervenor(s), intervenor's representative(s), and prosecutor(s) for that adjudicative proceeding; or

(b) For a non-adjudicative proceeding, the collective group of individuals who attend or otherwise participate in the public hearing held on the matter or provide comments orally or in writing on paper or by e-mail, or any combination thereof.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 202.24 "Petition" means any request to a regulatory authority seeking an order or any other action for relief other than a license application or a motion.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 202.25 "Practice act" means the statute(s) that confers authority on the OPLC or on a supported board, commission, or council to regulate a specific profession.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 202.26 "Presiding officer" means the individual who has been designated by a regulatory authority to preside over some or all aspects of a proceeding.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 202.27 "Proceeding" means the totality of the handling of a matter, including the initiation, review, hearing, decision, and, if applicable, reconsideration of the matter. A proceeding can be either adjudicative or non-adjudicative.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 202.28 "Prosecutor" means the individual appointed by a regulatory authority to present the evidence collected in an investigation in a proceeding related to licensee misconduct allegations.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 202.29 "Regulatory authority" means the OPLC or a supported board, commission, or council that has the statutory authority to regulate the conduct of persons who are or seek to be licensed in the profession within the regulatory authority's jurisdiction, which in the case of the professions listed in Plc 201.02(b) is the OPLC.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 202.30 "Remote participation" means participating in an in-person hearing via electronic means from a location other than that at which the hearing is being conducted.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 202.31 "Respondent" means:

(a) For purposes of a disciplinary proceeding, the person who holds the license or who has applied for renewal of a license;

(b) For purposes of an administrative fine proceeding, the person against whom the regulatory authority proposes to impose an administrative fine; or

(c) For any other action initiated under Plc 200, the person against whom the regulatory authority proposes to take the action.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 202.32 "Via electronic means" means using a video teleconference electronic meeting platform that enables all participants to communicate with each other contemporaneously, such as, but not limited to, WebEx®, Zoom®, GoToMeeting®, or GoToWebinar®.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 202.33 "Working day" means any Monday through Friday, excluding days on which state offices are closed in observance of holidays.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

PART Plc 203 PROVISIONS APPLICABLE TO ALL PROCEEDINGS

Plc 203.01 Computation of Time.

(a) Unless otherwise specified, all time periods referenced in this chapter shall be calendar days.

(b) Computation of any period of time established in these rules shall begin with the day after the action that sets the time period in motion and include the last day of the period so computed.

(c) For time periods not established in statute, if the last day of the period so computed does not fall on a working day, then the time period shall be extended to include the first working day following.

(d) Time periods established in statute shall be determined as specified in the statute.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 203.02 Filing of Documents with the OPLC or Other Regulatory Authority; Service in Non-Adjudicative Proceedings.

(a) A document shall be considered filed when it is actually received by the regulatory authority to which it is addressed, whether filed electronically or on paper, and facially conforms to applicable rules.

(b) A document that does not, on its face, comply with applicable rules shall not be accepted for filing. In such cases, the sender shall be notified of the deficiencies without prejudice to subsequent acceptance if the deficiencies are corrected and the document is refiled within any applicable time period.

(c) All correspondence, filings, or communications intended for the OPLC shall be addressed to the OPLC in care of the executive director's administrative assistant.

(d) All correspondence, filings, or communications intended for any other regulatory authority shall be addressed to that regulatory authority in care of its board administrator.

(e) Until an electronic filing system becomes available, documents other than applications and appeal-related documents may be filed electronically to customersupport@oplc.nh.gov.

(f) Subject to (g), below, all petitions, motions, exhibits, memoranda, or other documents filed in connection with a request for action by a regulatory authority shall be filed with an original and one copy if filed in hard copy.

(g) Only the original or another single copy shall be filed of:

(1) Transmittal letters;

(2) Requests for public information;

(3) License applications; and

(4) A complaint against a licensee or against a person who is engaging in a regulated profession without the requisite license.

(h) Applications and petitions for rulemaking shall be filed with the regulatory authority without service upon other persons.

(i) Petitions for declaratory ruling shall be filed with the regulatory authority with service on persons who would be directly affected by the ruling, as required by Plc 210.02(c).

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 203.03 Date of Issuance or Filing.

(a) All orders, decisions, notices, or other written correspondence or documents issued by or at the direction of a regulatory authority shall be deemed to have been issued on the date noted on the document.

(b) All correspondence, petitions, applications, requests for findings of fact and conclusions of law, motions, requests for reconsideration, and any other written documents shall be deemed to have been filed with or received by the regulatory authority or, for filings in an adjudicative proceeding, the presiding officer to which it is addressed, on the actual date of receipt by the addressee, as evidenced by a date stamp placed on the document by the addressee in the normal course of business or the date the addressee receives the electronic filing.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

PART Plc 204 COMPLAINTS; INVESTIGATIONS

Plc 204.01 Purpose and Applicability.

(a) The purpose of this part is to establish the procedures that apply to the filing of complaints against a licensee or against a person who is engaging in a regulated profession without the requisite license and the procedures that will be followed to investigate such complaints.

(b) This part shall apply to complaints against individuals and businesses engaged in any of the professions regulated by the OPLC or other regulatory authority.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 204.02 Filing a Complaint.

(a) Individuals wishing to file an official complaint against a licensee or against a person believed to be engaging in a regulated profession without the requisite license shall do so by submitting a written complaint as provided in this part.

(b) Complaints shall be filed:

(1) With the OPLC at Complaints@oplc.nh.gov or directly with the regulatory authority; and

(2) As promptly as reasonably possible after the conduct occurs or is otherwise discovered, so that it is more likely that any relevant records still exist and the recollections of witnesses are more likely to be reliable.

(c) The regulatory authority shall notify the person who is the subject of the complaint of the complaint unless doing so would jeopardize:

(1) The safety of the complainant or any other individual; or

(2) The process of a criminal investigation.

(d) If the OPLC receives a complaint relating to a profession regulated by another regulatory authority or by a board, commission, or council that is not a supported board, commission, or council, the OPLC shall forward the complaint and response, if any, to that board, commission, or council for action under that authority's rules.

(e) All communications of alleged misconduct filed under this part shall:

(1) Contain the information specified in Plc 204.03; and

(2) Be signed and dated by the individual making the complaint or by a duly-authorized representative of such individual, provided that for documents filed electronically, the act of filing shall constitute the signature and the date the transmission is sent shall be the date of the complaint.

(f) The signature on a complaint filed pursuant to this part shall constitute certification that:

(1) The signer has read the complaint;

(2) The signer is authorized to file the complaint;

(3) To the best of the signer's knowledge and belief, there are good grounds to support the complaint; and

(4) The complaint has not been filed for purposes of harassment or delay in any active or contemplated administrative, civil, or criminal proceeding.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 204.03 Required Contents of Complaint. A complaint shall include:

(a) Identification of the profession to which the conduct being complained of relates;

(b) The name of the individual or business that is alleged to have engaged in the conduct complained of;

(c) If known, the type and license number of the license held by such individual or business, if any;

(d) A clear and concise statement of the facts on which the complaint is based, including but not limited to the following for each occurrence of the conduct being complained of:

(1) A description of the specific conduct that forms the basis of the complaint;

(2) The date and time the conduct occurred, provided that if the conduct occurred on more than one occasion, the date and time of the most recent occurrence may be provided with a statement of the overall time frame in which the conduct occurred and the number of times the conduct was repeated;

(3) The location or locations where the conduct occurred; and

(4) Whether there were any other individuals present when any instance of the conduct occurred and, if known, the name of and contact information for each such witness or observer;

(e) Information about the individual who is making the complaint, including:

(1) The complainant's first and last name;

(2) The telephone number including area code and extension, if any, at which the complainant can be reached during normal daytime business hours; and

(3) The complainant's email address and mailing address; and

(f) Whether the complainant has:

(1) Attempted to resolve the complaint with the licensee;

(2) Retained an attorney in the matter, and if so the name, address, email address, and telephone number including area code of the attorney; and

(3) Reported the complaint to any other local, state, or federal agency and if so, the agency's name and the name, email address, and telephone number of a contact to whom the complaint was made, if known.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 204.04 Initiation and Conduct of Investigations.

(a) A regulatory authority shall authorize or conduct such investigations as the regulatory authority deems necessary to examine acts of possible misconduct that come to the regulatory authority's attention through complaints or other means, as provided in RSA 310-A:1-j.

(b) The initiation of an investigation shall not constitute or be deemed to commence a disciplinary proceeding.

(c) The initiation of an investigation shall not constitute an allegation of misconduct against a licensee.

(d) When an investigation occurs, an investigator shall contact such persons, conduct such inspections, and examine such records and other documents as are reasonably necessary to make a recommendation as to whether further action should be taken based on the allegations in question.

(e) Investigations, including those based upon allegations in a complaint, shall be conducted on an ex parte basis.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 204.05 Subpoenas For Investigations.

(a) Subpoenas issued by the executive director for purposes of conducting an investigation shall be issued as provided in RSA 310-A:1-j, IV(d).

(b) Subpoenas issued by any other regulatory authority for purposes of conducting an investigation shall be issued as provided in the authority's practice act or RSA 310-A:1-j, IV(d).

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 204.06 Investigation Reports.

(a) Upon completion of an investigation, the investigator shall:

(1) Make a written report to the regulatory authority of the data gathered as a result of the investigation; and

(2) Provide a recommendation to the regulatory authority as to whether there is a reasonable basis to proceed with a disciplinary proceeding.

(b) As provided in RSA 310-A:1-j, III, the following information obtained during investigations shall be held confidential and shall be exempt from the disclosure requirements of RSA 91-A:

(1) Complaints received by the OPLC or other regulatory authority;

(2) Information and records acquired during an investigation; and

(3) Reports and records made by the investigator or regulatory authority as a result of an investigation.

(c) Investigation reports, exclusive of any legal analyses contained therein, and all data gathered by an investigator shall be provided in any adjudicative proceeding resulting from the investigation to:

(1) The respondent and respondent's representative;

(2) Each intervenor and intervenor's representative; and

(3) The prosecutor.

(d) The regulatory authority shall also provide, upon request, the confidential information gathered in an investigation to:

(1) Law enforcement agencies;

(2) Boards or agencies relating to the respondent's profession in other jurisdictions in which the respondent is licensed or is applying to be licensed;

(3) Investigators and prosecutors in the same or related disciplinary matters;

(4) Expert witnesses or assistants retained by the prosecutor or investigators in the same or related disciplinary matters; and

(5) Persons to whom the licensee has given a release.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

PART Plc 205 SETTLEMENT PROCEDURES; NON-DISCIPLINARY REMEDIAL ACTIONS

Plc 205.01 Purpose and Applicability.

(a) The purpose of this part is to establish the criteria and procedures for settling a matter without the need for an adjudicative hearing.

(b) This part shall apply to any matter in which an investigation determines that there is a basis to proceed with a disciplinary proceeding, subject to the time limitations in RSA 310-A:1-j, VI, reprinted in Appendix C.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 205.02 Definitions.

(a) "Confidential letter of concern" means a non-disciplinary written letter from a regulatory authority to a licensee to draw the licensee's attention to specific acts or omissions that could place the licensee at risk of future disciplinary action if the acts or omissions are repeated or otherwise continue.

(b) "Consent order" means a written order, issued by the regulatory authority with the consent of the licensee, that contains stipulated facts and imposes disciplinary actions that have been consented to by the licensee to resolve specific allegations of licensee misconduct.

(c) "Preliminary agreement not to practice (PANP)" means an agreement between a respondent and a regulatory authority that the respondent will refrain from practicing until any disciplinary proceeding that results from a pending or completed investigation is resolved.

(d) "Treatment program" means a program, including but not limited to a professionals' health program under RSA 310-A:1-e, I-a, in which an individual receives medical or psychological treatment, or both, or another appropriate form of intervention or monitoring, to assist the individual in overcoming a condition that has impaired the individual's ability to practice competently and safely.

(e) "Voluntary surrender" means the relinquishment by a licensee of the right to practice a profession without a formal adjudication of misconduct.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 205.03 Actions Upon Receipt of Investigation Report. Upon the receipt of an investigation report, the regulatory authority shall:

(a) Dismiss the action, if the investigation does not reveal that misconduct occurred;

(b) Dismiss the action and issue a confidential letter of concern, if the investigation shows that:

(1) The licensee's actions constituted misconduct, but occurred under conditions that suggest the licensee would not, under normal circumstances, engage in the conduct and the actions have not been repeated; or

(2) It might not be possible to prove in an adjudicative hearing that the licensee engaged in the actions, even though a reasonable person would conclude, based on the totality of the evidence, including evidence that might not be admissible at a hearing, that the licensee did engage in the actions; or

(c) Commence an adjudicative proceeding.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 205.04 Consent Orders; Review of Proposed Settlement Terms.

(a) If a disciplinary proceeding is initiated and discussions between the prosecutor and the respondent result in an agreement on the facts that constitute the basis for sanction(s) and on the appropriate sanction(s), including but not limited to diversion to a treatment program, voluntary surrender, limitations on the scope of practice, or suspension, the agreement shall be written as a proposed settlement agreement and presented to the regulatory authority for review, as required by RSA 310-A:1-k, III.

(b) If the regulatory authority has questions about the proposed settlement, such as whether the terms are appropriate or whether the respondent understands them, the regulatory authority shall conduct a hearing on the proposed settlement agreement in the same manner and under the same conditions as a prehearing conference.

(c) If the regulatory authority agrees with the terms of the proposed settlement agreement, the regulatory authority shall:

(1) Approve the settlement agreement and issue it as a consent order of the regulatory authority, if the matter did not arise from a complaint; or

(2) If the matter did arise from a complaint, approve the settlement agreement and issue it as a provisional consent order, then proceed in accordance with (d)-(g), below.

(d) To provide the opportunity for comment required by RSA 310-A:1-k, III, if the matter resulted from a complaint, the regulatory authority shall notify the complainant of:

(1) The terms on which the matter is proposed to be resolved; and

(2) The deadline for submitting written comments on the proposed terms, which shall be no sooner than 14 days from the date of the notice.

(e) If notice is provided to a complainant pursuant to (d), above, and no comments are received from the complainant, the consent order shall become final 30 days after issuance under (c)(2), above.

(f) If comments are received from the complainant, the presiding officer shall review the comments and:

(1) If the comments indicate the complainant's agreement with the terms or if the comments do not demonstrate potential fundamental flaws or errors in the proposed terms, approve the proposed settlement agreement, resulting in the consent order becoming final 30 days after issuance under (c)(2), above; or

(2) If the comments demonstrate potential fundamental flaws or errors in the proposed terms, present the comments to the regulatory authority for review, resulting in the consent order not becoming final automatically, provided that for purposes of this section, "fundamental flaws or errors" means mistakes of law or of material fact that, if corrected, would result in the proposed terms being unacceptable given the nature and severity of the actual underlying violation(s).

(g) After reviewing comments received pursuant to (f)(2), above, the regulatory authority shall:

(1) Affirm the provisional consent order, if it determines after further review that no fundamental flaws or errors are present, resulting in the consent order becoming effective as of its confirmation; or

(2) Revoke the provisional consent order and schedule the matter for an adjudicative hearing, if it determines after further review that there are fundamental flaws or errors in the terms.

(h) If the regulatory authority to which comments are submitted pursuant to (f)(2), above, revokes the provisional consent order as a result of the comments and schedules the matter for an adjudicative hearing, the terms of the proposed settlement agreement and provisional consent order shall not be made part of any record and the respondent shall not be bound by any terms of the proposed settlement agreement or provisional consent order.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 205.05 PANP, Voluntary Surrender Not an Admission of Wrongdoing.

(a) A PANP shall not constitute an admission of wrongdoing by the licensee.

(b) The voluntary surrender of a license shall not, in and of itself, constitute an admission of wrongdoing by the licensee.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 205.06 Non-Disciplinary Remedial Actions.

(a) As provided in RSA 310-A:1-k, VII, a regulatory authority "may take non-disciplinary remedial action against any person licensed by it upon finding that the person is afflicted with physical or mental

disability, disease, disorder, or condition deemed dangerous to the public health."

(b) For purposes of this section, the following definitions shall apply:

(1) "Deemed dangerous to the public health" means that the affliction or condition causes the licensee to be incapable of behaving in conformity with accepted professional standards for the profession in which the licensee practices; and

(2) "Unacceptable threat to public health, safety, or welfare" means that the threat posed by the licensee to the life, health, or safety of individuals with whom the licensee interacts in a professional capacity is greater than the licensee's interests in retaining his or her license.

(c) In order to take non-disciplinary remedial action, the regulatory authority shall:

(1) Provide notice and an opportunity for an adjudicative hearing to the licensee; and

(2) Only take the action after making an affirmative finding that:

a. The licensee is afflicted with a physical or mental disability, disease, disorder, or condition deemed dangerous to the public health; and

b. Allowing the licensee to continue to practice would create an unacceptable threat to public health, safety, or welfare.

(d) The action taken by the regulatory authority shall be the least restrictive action that will address the affliction or condition and abate the threat.

(e) The regulatory authority shall take non-disciplinary remedial action as specified in RSA 310-A:1-k, VII(a)-(c), reprinted in Appendix C, provided that the regulatory authority shall revoke the license only if the findings required by (b)(2), above, are made based on clear and convincing evidence.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

PART Plc 206 ADJUDICATIVE PROCEEDINGS

Plc 206.01 Applicability. The rules in Plc 206 shall apply to any proceeding initiated by a regulatory authority under the regulatory authority's specific statutory authority to:

(a) Suspend, revoke, or refuse to renew a license or impose an administrative fine, or both; or

(b) Conduct a hearing to determine whether to issue an initial license.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 206.02 Contact Information Updates Required; Specify Whether Email Service is Acceptable.

(a) Any participant in an adjudicative proceeding and any person who has filed a motion for reconsideration shall maintain a current mailing address, daytime telephone number including area code, and personal e-mail address on file with the presiding officer until completion of the matter.

(b) Each participant other than the prosecutor shall indicate whether or not service of documents using the email address provided will be accepted.

(c) The prosecutor shall accept service via email.

(d) Notices mailed by first class mail, postage prepaid, to the address on file with the presiding officer shall be presumed to have been received by the addressee.

(e) Emails sent to the email address on file with the presiding officer for which no delivery failure notification is received shall be presumed to have been received by the addressee, provided that service of documents under Plc 206.11 shall be by email only if the participant has indicated that service will be accepted by email.

(f) For purposes of this section, "completion of the matter" means the later of:

(1) The date compliance is achieved or the fine is paid, if applicable;

(2) The expiration of the time period allowed by law for appealing the decision, if no appeal is filed within that time; or

(3) The date of the final decision on the last appeal taken.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 206.03 Presiding Officer Appointment and Authority.

(a) All hearings in any adjudicative proceeding initiated by the OPLC shall be conducted by the executive director or designee, sitting as presiding officer.

(b) All hearings in any adjudicative proceeding initiated by any other regulatory authority under this chapter shall be conducted by the individual authorized by that regulatory authority to serve as presiding officer.

(c) The presiding officer shall as necessary:

(1) Regulate and control the course of a hearing;

(2) Facilitate an informal resolution of the subject matter of the hearing;

(3) Administer oaths and affirmations;

(4) Issue or request the regulatory authority to issue subpoenas to compel the attendance of witnesses at hearings or the production of documents, if so authorized by law;

(5) Receive relevant evidence at hearings and exclude irrelevant, immaterial, or unduly repetitious evidence;

(6) Rule on procedural requests, including adjournments or continuances, at the request of a participant or on the presiding officer's own motion;

(7) Question any individual who testifies;

(8) Cause a complete record of any hearing, as described in RSA 541-A:31, VI, to be made; and

(9) Take any other action consistent with applicable law necessary to conduct the hearing and complete the record in a fair and timely manner.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 206.04 Withdrawal of Presiding Officer.

(a) Upon his or her own initiative or upon the motion of any participant, the presiding officer shall, for good cause, withdraw from any proceeding.

(b) If the request to withdraw is made by a participant, the motion shall contain or be accompanied by sworn testimony or other evidence to support the motion.

(c) Good cause shall exist if the presiding officer:

(1) Has a direct interest in the outcome of a proceeding, including but not limited to a financial or family relationship with any participant;

(2) Has made statements or engaged in behavior, other than voting upon matters relevant to the case, that objectively demonstrate that he or she has prejudged the facts of a case; or

(3) Personally believes that he or she cannot fairly judge the facts of a case.

(d) Mere knowledge of the issues, the participants, or any actual or potential witness shall not constitute good cause for withdrawal.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 206.05 Waiver of Rules by Presiding Officer. The presiding officer, upon his or her own initiative or upon the motion of any participant, shall waive any requirement or limitation imposed by this chapter upon reasonable notice to affected persons when the proposed waiver or suspension appears to be lawful, and would be more likely to promote the fair, accurate, and efficient resolution of issues pending before the regulatory authority than would adherence to a particular rule or procedure.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 206.06 Commencement of Adjudicative Proceedings.

(a) Except for emergency proceedings initiated as provided in Plc 206.07, the regulatory authority shall commence an adjudicative proceeding by issuing a notice of hearing to the respondent, the respondent's attorney if known, and the enforcement division, at least 15 days before the first scheduled hearing date or first prehearing conference.

(b) The notice commencing an adjudicative proceeding shall:

(1) Identify the docket number assigned to the matter by the regulatory authority;

(2) Specify the date, time, place, and nature of any hearing that has been scheduled;

(3) Summarize the subject matter of the proceeding and identify the issues to be resolved;

(4) Specify the legislative authority for the proposed action and identify any applicable rules;

(5) Specify the date by which, and the address to which, appearances or motions by participants shall be filed;

(6) Specify the date and time of an initial prehearing conference if one has already been scheduled, together with the telephone number or log-in information to be used to participate in the prehearing conference;

(7) Identify the presiding officer for the proceeding;

(8) Identify any special procedures to be followed;

(9) Identify any confidentiality requirements applicable to the proceeding;

(10) Specify that each respondent has the right to have an attorney represent him or her at the respondent's own expense;

(11) Specify that each participant has the right to have the regulatory authority provide a certified shorthand court reporter at the participant's expense and notify all participants that any such request be submitted in writing at least 10 days prior to the proceeding, as provided in RSA 541-A:31, III(f); and

(12) Contain such other information or attachments as are warranted by the circumstances of the case, including, but not limited to:

a. Orders consolidating or severing issues in the proceeding with other proceedings; and

b. Orders directing the production or exchange of documents.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 206.07 Initiation and Conduct of Emergency Proceedings.

(a) To initiate an emergency proceeding, the regulatory authority shall issue an order that immediately suspends the respondent's license based on:

(1) A determination that there is a reasonable basis to believe that public health, safety, or welfare requires emergency action, if the action is commenced under RSA 541-A:30, III; or

(2) Such determination as is required by the practice act under which the action is commenced.

(b) If a regulatory authority commences an emergency proceeding, the regulatory authority shall conduct an adjudicative hearing within the time specified in the statute upon which the action is based, which for actions commenced under RSA 541-A:30, III is not later than 10 working days after the date of the regulatory authority's order suspending the license, to determine whether to continue the suspension of the respondent's license pending a full adjudication of the matter.

(c) The regulatory authority shall issue a notice of the date, time, and place of the hearing to determine whether to continue the suspension that:

(1) Complies with Plc 206.06(b); and

(2) Includes a statement that offers of proof may be made as provided in Plc 206.23.

(d) A respondent may request the hearing held pursuant to (b), above, to be delayed, which request shall be granted only if the respondent agrees to the emergency suspension remaining in place until the regulatory authority issues its decision after the hearing held pursuant to (b), above.

(e) Except as provided in (f), below, at a hearing held pursuant to (b), above, the prosecutor shall have the burden of proof by a preponderance of the evidence that:

(1) Allowing the respondent to remain in practice pending a full adjudication of the matter poses a threat to public health, safety, or welfare, based on the nature and severity of the alleged violations from which the matter arose; and

(2) The threat to public health, safety, or welfare outweighs the respondent's interests in continuing to practice.

(f) If applicable law establishes different elements of proof, the prosecutor shall have the burden of proof by a preponderance of the evidence on each such element.

(g) The license suspension shall be continued pending a full adjudication of the matter only if the prosecutor meets the burden of proof established in (e) or (f), above, as applicable.

(h) If, as a result of the hearing held pursuant to (b), above, the regulatory authority continues the license suspension pending a full adjudication of the matter, the regulatory authority shall conduct a full evidentiary hearing to determine final disciplinary action within 60 days of the date of the initial emergency suspension unless extended pursuant to (i) or (j), below, provided the license shall remain suspended pending completion of the adjudication.

(i) A full evidentiary hearing to determine final disciplinary action shall only be held more than 60 days after the date of the initial emergency suspension if:

(1) The prosecutor and the respondent agree to delay the proceeding; or

(2) More time is needed to obtain information that is necessary to make a final determination, provided that the hearing shall be held no later than 120 days from the date of the initial emergency suspension unless the information is not available within that time due to:

a. Reasons within the control of the respondent; or

b. The pendency of a criminal prosecution arising from the same circumstances as those on which the administrative proceeding is based.

(j) If a hearing is delayed pursuant to (i), above, the presiding officer shall schedule a prehearing conference to request a status report from the prosecutor and the respondent within 120 days of the initial emergency suspension and at intervals no shorter than 60 days and no longer than 90 days thereafter until a full adjudicative hearing is scheduled.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 206.08 Methods of Proceeding - Generally.

(a) If the participants agree, the regulatory authority shall proceed as follows:

(1) Where facts material to the subject matter of the proceeding are in dispute, but personal observation of the witnesses or the immediate opportunity for cross-examination of witnesses is not required, the proceeding shall, to that extent, consist of the submission of affidavits and memoranda; and

(2) Where no facts material to the subject matter of the proceeding are in dispute the proceeding shall, to that extent, be limited to the submission of memoranda that argue the conclusions the participants wish the regulatory authority to draw from the undisputed facts.

(b) If the participants do not agree to one of the methods of proceeding in (a), above, the matter shall proceed to an oral adjudicative hearing.

(c) For proceedings in any of the professions listed in Plc 201.02(b), the oral adjudicative hearing shall be conducted either by the executive director alone or, if the executive director determines that the expertise of the advisory committee or advisory board members, as applicable, is necessary, by a panel consisting of the executive director and a minimum of 2 members of the relevant advisory committee or advisory board.

(d) For proceedings in any other professions, the oral adjudicative hearing shall be conducted in accordance with applicable law, including but not limited to RSA 310-A:1-l, II, reprinted in Appendix C.

(e) A recording of the hearing shall be taken and preserved. If requested by a participant, the record of the proceeding shall be made by a certified shorthand court reporter at the requestor's expense, pursuant to RSA 541-A:31, VII-a.

(f) If a participant has reason to participate remotely, the participant shall file a motion no later than the deadline for filing a witness list, or as much in advance as possible based on the circumstances, which motion shall be granted if the presiding officer determines that:

(1) The participant has access to equipment necessary to enable remote participation; and

(2) The participant has demonstrated a compelling reason or justification, including but not limited to circumstances beyond the participant's control that impair the participant's ability to attend the hearing in person.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 206.09 Appearances and Representation.

(a) A respondent or the respondent's representative shall file an appearance that includes the following information:

(1) A brief identification of the matter, including the docket number;

(2) A statement as to whether or not the representative is an attorney and, if so, whether the attorney is licensed to practice in New Hampshire;

(3) The respondent's or representative's daytime address, telephone number including area code, and email address; and

(4) Whether the respondent or representative will accept service via email, provided that if the filing does not so indicate, the presiding officer or designee shall contact the individual filing the appearance to find out in lieu of rejecting the filing.

(b) The prosecutor shall file an appearance that identifies:

(1) The matter in which the prosecutor will be appearing; and

(2) A daytime address and telephone number including area code and email address that can be used to contact the prosecutor.

(c) Any changes to the information in (a) or (b), above, shall be filed with the presiding officer, in writing, within 5 working days of the change.

(d) The regulatory authority shall, after providing notice and opportunity for hearing, prohibit an individual from acting as a representative upon a finding that the individual has repeatedly violated rules or orders of the regulatory authority, willfully disrupted proceedings of the regulatory authority, or made material misrepresentations to the regulatory authority or a participant in a proceeding of the regulatory authority.

(e) Any prohibition issued under (d), above, shall apply only to that regulatory authority's proceedings.

(f) Nothing in this section shall be construed to permit the unauthorized practice of law.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 206.10 Filing of Documents; Certain Communications Prohibited.

(a) Documents in an adjudicative proceeding shall be filed in accordance with Plc 203.02, provided that if a presiding officer has been identified, all documents shall be sent to the attention of the presiding officer.

(b) The requirement to file documents with the presiding officer shall not constitute permission for any participant to otherwise communicate with the presiding officer without all participants having prior notice of, and an opportunity to participate in, the communication.

(c) All petitions, motions, and replies filed in the proceeding shall be signed and dated by the proponent of the document or, if the proponent appears by a representative, by the representative.

(d) The signature shall constitute certification that:

(1) The signer has read the document;

(2) The signer is authorized to file the document;

(3) To the best of the signer's knowledge, information, and belief, there are good grounds to support the document; and

(4) The document has not been filed for purposes of delay or harassment in any pending or contemplated administrative, civil, or criminal proceeding.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 206.11 Service of Documents.

(a) All objections, motions, replies, memoranda, exhibits, or other documents filed in an adjudicative proceeding shall be served by the proponent upon all other participants by:

(1) Depositing a copy of the document in the United States mail, first class postage prepaid, addressed to the address of record in the proceeding for the participant being served, no later than the day the document is filed with the presiding officer;

(2) Delivering a copy of the document in hand to the participant being served on or before the date it is filed with the presiding officer; or

(3) Sending a copy of the document to the participant being served on or before the date it is filed with the presiding officer as an attachment to an email addressed to the email address of record, provided that the participant who provided the email address has indicated that service would be accepted in this manner.

(b) Notices, orders, decisions, or other documents issued by the regulatory authority or presiding officer in connection with an adjudicative proceeding shall be served by the issuer upon all participants in the matter by:

(1) Depositing a copy of the document, first class postage prepaid, in the United States mail, addressed to the address of record in the proceeding for the participant being served;

(2) Delivering a copy of the document in hand to the participant being served; or

(3) Sending a copy of the document to the participant being served as an attachment to an email addressed to the email address of record, provided that the participant who provided the email address has indicated that service would be accepted in this manner.

(c) When a respondent's representative or intervenor's representative has filed an appearance, service shall be upon the representative.

(d) Except for exhibits distributed at a prehearing conference or hearing, every document filed with the presiding officer shall be accompanied by a certificate of service, signed by the person making service, attesting to the method and date of service and the person(s) served.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 206.12 Motions and Objections.

(a) Motions and objections shall be in writing unless the nature of the relief requested requires oral presentation upon short notice.

(b) Prior to filing a written motion, the participant filing the motion shall seek concurrence with the relief requested in the motion from the other participant(s), provided however that if the motion would result in a ruling that is adverse to another participant's interests, the moving participant shall not be required to seek concurrence from that participant.

(c) All motions shall state clearly and concisely in separately numbered paragraphs:

(1) The purpose of the motion;

(2) The relief sought by the motion;

(3) The statutes, rules, orders, or other authority authorizing the relief sought by the motion;

(4) The facts claimed to constitute grounds for the relief requested by the motion; and

(5) The signature and date required by Plc 206.10(c).

(d) Objections to motions shall be filed within 10 days after the filing of the motion. Failure to object to a motion within the time allowed shall constitute a waiver of objection to the motion.

(e) Objections to motions shall state clearly and concisely:

(1) The objection or defense of the participant filing the objection to any fact or request in the motion, set forth in separate paragraphs numbered identically to the paragraphs in the original motion;

(2) The action the participant filing the objection wishes the presiding officer to take on the motion;

(3) Statutes, rules, orders, or other authority relied upon to rebut the motion;

(4) Any facts that are additional to or different from the facts stated in the motion; and

(5) The signature and date required by Plc 206.10(c).

(f) Motions shall be decided upon the writings submitted, unless the presiding officer or, in the case of a dispositive motion, the regulatory authority, determines that a hearing is necessary to a full understanding of the motion or objection, or both.

(g) Repetitious motions shall not be submitted.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 206.13 Role of Complainants and Regulatory Authority Staff in Adjudicative Proceedings.

(a) Unless called as a witness or granted intervenor status, a person whose complaint resulted in an adjudicative proceeding shall have no role in the adjudicative proceeding.

(b) Unless called as a witness or serving as the regulatory authority's representative in the adjudicative proceeding or as the presiding officer, staff of the regulatory authority conducting the proceeding shall have no role in the adjudicative proceeding.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 206.14 Intervention.

(a) Any person who is not a respondent, respondent's representative, or prosecutor who wishes to participate in an adjudicative proceeding shall file a motion to intervene.

(b) A motion to intervene shall state with particularity:

(1) The petitioner's interest in the subject matter of the hearing;

(2) Why the interests of the existing participants and the orderly and prompt conduct of the proceeding would not be impaired by allowing the petitioner to intervene; and

(3) Any other reasons why the petitioner should be permitted to intervene.

(c) A motion to intervene shall be granted if the presiding officer finds that:

(1) The petitioner has a substantial interest in the proceeding;

(2) The petitioner requested intervention in accordance with these rules; and

(3) Granting intervention will not prejudice an existing participant or unduly delay the proceeding.

(d) If a motion to intervene is granted, the intervenor shall take the proceeding as he or she finds it and no portion of the proceeding shall be repeated because of the fact of intervention.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 206.15 Consolidation; Severance.

(a) Adjudicative proceedings that involve the same or substantially related issues shall be consolidated for hearing or decision, or both, when fairness, accuracy, and efficiency would be served by such an action.

(b) Consolidation shall be ordered in response to a timely motion from a participant or on the presiding officer's own initiative.

(c) Upon timely motion from a participant or on the presiding officer's own initiative, the presiding officer shall sever one or more issues from a proceeding and dispose of those issues in another proceeding if he or she determines that doing so would materially promote the fairness, accuracy, and efficiency of the proceeding.

(d) The presiding officer shall issue written notice to all participants of any determination to sever or consolidate proceedings.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 206.16 Continuances.

(a) Any participant may make an oral or written motion that a hearing be delayed or continued to a later date or time.

(b) A motion for a delay in the commencement of a hearing or a continuance of a hearing that has already commenced shall be granted if the presiding officer determines that there is good cause to do so.

(c) Good cause shall include:

(1) The unavailability of one or more participants or witnesses necessary to conduct the hearing;

(2) The likelihood that a settlement will make the hearing or its continuation unnecessary; and

(3) Any other circumstances that demonstrate that a delay in commencing the hearing or a continuance of a hearing that has already commenced would assist in resolving the case fairly and efficiently.

(d) If the later date, time, and place are known when the hearing is being delayed or continued, the information shall be stated on the record. If the later date, time, and place are not known at that time, the presiding officer shall as soon as practicable issue a written scheduling order stating the date, time and place of the delayed or continued hearing.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 206.17 Prehearing Conferences.

(a) At any time following the commencement of an adjudicative proceeding, the presiding officer, upon motion or upon his or her own initiative, shall request the participants to attend a prehearing conference when the presiding officer believes that such a conference would aid in the efficient and fair resolution of the proceeding.

(b) The prehearing conference shall be conducted by telephone or via electronic means unless one or more of the participants objects to doing so.

(c) Matters that can be addressed at a prehearing conference shall include:

(1) The distribution of exhibits and written testimony, if any, to the participants;

(2) Opportunities and procedures for simplification of the issues;

(3) Possible amendments to the pleadings;

(4) Opportunities and procedures for settlement;

(5) Possible admissions of fact and authentication of documents to avoid unnecessary proof;

(6) Possible limitations on the number of witnesses and possible limitations on the scheduling of witnesses;

(7) Possible changes to the standard procedures that would otherwise govern the proceeding; and

(8) Other matters that might contribute to the prompt and orderly conduct of the proceeding.

(d) As provided in RSA 310-A:1-k, V, pre-hearing conferences shall be exempt from the provisions of RSA 91-A.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 206.18 Discovery and Disclosure; Identification of Exhibits.

(a) The regulatory authority shall provide for the disclosure of any investigative report or other unprivileged information in the possession of the regulatory authority that is reasonably related to the subject matter of the proceeding.

(b) Parties shall attempt to agree among themselves concerning the mutual exchange of relevant information. If these efforts prove unsuccessful, a participant wishing to initiate discovery against another participant, shall, by motion:

(1) Seek leave to do so; and

(2) Identify the exact type of discovery requested.

(c) Discovery shall be ordered when the participants cannot adequately address specific relevant factual issues at the time fixed for the presentation of evidence, and addressing these issues at a subsequent time would place the requesting party at a material disadvantage.

(d) Subject to (e), below, not less than 14 days before the hearing the participants shall provide to the other participants and to the presiding officer:

(1) A list of all witnesses to be called at the hearing together with a brief summary of their testimony;

(2) A list of all documents and exhibits to be offered as evidence at the hearing; and

(3) A clear and legible copy of each document or exhibit, which shall be sequentially marked and identified as follows:

a. Exhibits from the prosecutor shall be marked with the words “Prosecution Exhibit” followed by a sequential cardinal number, so that the first exhibit is labeled “Prosecution Exhibit 1” and the second is “Prosecution Exhibit 2,” and so on;

b. Exhibits submitted by other participants shall be labeled in the same manner as the prosecutor’s, except they shall be identified by the words “Respondent Exhibit” or “Intervenor Exhibit” as appropriate; and

c. Exhibits submitted by any person not covered by a. or b. above shall be marked as directed by the presiding officer; and

(4) Any requests for changes to standard procedure or other matters concerning conduct of the hearing.

(e) If the proceeding was initiated pursuant to Plc 206.07 relative to emergency proceedings, the time period for providing the items specified in (d)(1)-(4), above, shall be not less than 3 working days before the hearing held pursuant to Plc 206.07(b) to determine whether to continue an emergency suspension pending a full adjudication.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 206.19 Subpoenas for Hearings.

(a) The regulatory authority shall issue subpoenas for the attendance of witnesses or the production of evidence in an adjudicative proceeding in accordance with RSA 310-A:1-k, II or such other authority as is conferred by applicable law.

(b) The participant requesting a subpoena to be issued shall attach a copy of the proposed subpoena to its motion. If the motion is granted, the requesting participant shall be responsible for the service of the subpoena and payment of any applicable witness fee and mileage expenses.

(c) A motion to quash or modify a subpoena shall be entertained from the person to whom the subpoena is directed, if filed no later than one working day before the date specified in the subpoena for compliance therewith. If the presiding officer denies the motion to quash or modify, in whole or in part, the person to whom the subpoena is directed shall comply with the subpoena or any modification thereof, within the balance of time prescribed in the subpoena or within 3 days from the date of the presiding officer's order, whichever is later, unless the presiding officer expressly provides additional time to comply.

(d) The presiding officer shall grant a motion to issue a subpoena or a motion to quash a subpoena if there is a preponderance of evidence to support the motion.

(e) If a person fails to comply with a subpoena issued pursuant to this section, then:

(1) If the person is a licensee, such noncompliance shall constitute misconduct, for which the regulatory authority shall:

a. Impose sanctions specific to any pending proceeding or investigation, including, but not limited to, entry of a default judgment as to some or all of the pending issues that is adverse to the noncompliant participant; or

b. Institute a separate investigation against any non-compliant individual who is subject to the regulatory authority's jurisdiction; or

(2) For all non-compliant persons, the presiding officer shall:

a. Order the proceeding to continue and defer all, or part, of the subpoena enforcement issues;

b. Recommend that the regulatory authority seek judicial relief; or

c. Determine there was just cause for the failure to comply with the subpoena, which shall include:

1. Illness;

2. Accident;

3. Death of a family member; or

4. Other circumstances beyond the control of the non-compliant person.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 206.20 Testimony at an Adjudicative Hearing; Remote Testimony.

(a) All testimony at an adjudicative hearing shall be in accordance with RSA 541-A:33, I.

(b) Any individual offering testimony, evidence, or arguments shall state his or her name and municipality of residence on the record. If the individual is representing another person, the person being represented shall also be identified by name and address.

(c) Except as provided in (d), below, testimony shall be offered in the following order unless otherwise agreed at a prehearing conference or changed in a ruling on a motion:

(1) The prosecutor and such witnesses as the prosecutor calls;

(2) The respondent and such witnesses as the respondent calls; and

(3) Any intervenor(s) and such witnesses as the intervenor(s) call.

(d) At a hearing held pursuant to Plc 206.07(b) to determine whether to continue an emergency suspension pending a full adjudication, the prosecutor shall present first.

(e) Anyone offering testimony shall be subject to cross-examination as provided in Plc 206.21.

(f) Any person included within (c)(1) through (3), above, who wishes to submit written testimony at the hearing in addition to oral testimony shall do so to the presiding officer, provided the person signs and dates such testimony and the presiding officer determines, as required by RSA 541-A:33, II, that the interests of the other participants will not thereby be prejudiced substantially. The participant submitting written testimony shall give a copy of such testimony to each other participant. All participants shall have the opportunity to cross-examine the witness on and offer rebuttal testimony to the written testimony.

(g) If a participant wishes to call as a witness an individual who is not in New Hampshire, the participant may file a motion to allow the individual to testify from a remote location using a video teleconference electronic meeting platform that allows all participants and the presiding officer or regulatory authority to communicate contemporaneously with each other, which motion shall be granted if:

(1) The witness is outside the jurisdiction of New Hampshire but is willing to testify;

(2) The witness has access to an electronic meeting platform that will allow all participants and the presiding officer or regulatory authority to communicate contemporaneously with each other and with the witness;

(3) The testimony to be offered by the witness is material to the moving participant's presentation; and

(4) Either:

a. The other participants will not be materially prejudiced by allowing the witness to testify from a remote location; or

b. Any disadvantage to another participant from allowing remote testimony is outweighed by the disadvantage to the moving participant if remote testimony is not allowed.

(h) The presiding officer shall terminate any comments, questions, or discussions that are not relevant to the subject of the hearing.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 206.21 Inquiry by Presiding Officer or Panel Members; Cross-Examination.

(a) The presiding officer shall make such inquiry of witnesses or participants as he or she believes necessary to develop a sound record for decision.

(b) If the adjudicative hearing is being held by a regulatory authority that is a supported board, commission, or council, or if there is a panel pursuant to Plc 206.08(c) or (d), the presiding officer shall allow the board or panel members to make such inquiries as are necessary for a full understanding of the issues to be determined.

(c) The presiding officer shall allow the participants or their representatives to cross-examine each witness, including any witness allowed to testify from a remote location pursuant to Plc 206.20(g), at the conclusion of the testimony of the witness.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 206.22 Evidence.

(a) Receipt of evidence shall be governed by RSA 541-A:33.

(b) Evidence that is relevant and material to the subject matter of the adjudicative proceeding in which it is offered and that will reasonably assist the presiding officer and regulatory authority to determine the truth shall be admissible.

(c) The presiding officer shall exclude irrelevant, immaterial, or unduly repetitious evidence.

(d) Whenever necessary for a full and fair consideration of the matter, the presiding officer shall take official notice in accordance with RSA 541-A:33, V.

(e) If a document or other exhibit has not been pre-marked as required by Plc 206.18, the presiding officer or designee shall mark each item accepted as an exhibit with a number or other notation to identify the exhibits in a sequential manner.

(f) If the original of a document is not readily available, the documentary evidence shall be received in the form of copies or excerpts.

(g) All documents, materials, and objects admitted into evidence at an adjudicative hearing and all written testimony submitted for the hearing shall be made available during the course of the hearing for examination by any participant.

(h) Any participant who objects to a ruling of the presiding officer regarding evidence or procedure made during an adjudicative hearing shall state the objection and the grounds therefor at the time the ruling is made. Any participant who objects to a ruling of the presiding officer regarding evidence or procedure made at a time other than during an adjudicative hearing shall file a written objection to the ruling in the form of a motion within 5 working days of the date of the ruling. Nothing herein shall be construed as independent authorization for interlocutory appeal of rulings of the presiding officer on issues of evidence or procedure.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 206.23 Offers of Proof.

(a) An offer of proof shall be based on a sworn, written affidavit that details the facts and circumstances the offering participant wishes to prove.

(b) An offer of proof shall only be made if the individual who swore to the truth of the statements in the affidavit is:

(1) Present for the hearing in which the offer of proof is made;

(2) Sworn in under oath or affirmation; and

(3) Subject to cross-examination.

(c) A participant may rebut an offer of proof with an offer of proof that is subject to the conditions specified in (b), above.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 206.24 Burden and Standard of Proof.

(a) Subject to (c) through (g), below, the person asserting the affirmative of a proposition shall have the burden of proving the truth of that proposition by a preponderance of the evidence.

(b) Without limiting the generality of (a), above, the person filing a motion shall have the burden of persuading the presiding officer or, for any dispositive motion, the regulatory authority, that the motion should be granted.

(c) In a disciplinary hearing, the prosecutor shall have the overall burden of proof by a preponderance of the evidence, unless (f), below, applies.

(d) In a hearing held pursuant to Plc 206.07(b) to determine whether to continue an emergency suspension pending a full adjudication, the prosecutor shall have the burden of proof as stated in Plc 206.07(e) or (f), as applicable.

(e) Subject to (f), below, in a hearing to determine whether to issue a license, the applicant shall have the overall burden of proving that he or she meets the qualifications established in applicable law by a preponderance of the evidence.

(f) In a hearing held pursuant to RSA 332-G:13 relative to determining whether an applicant or potential applicant is disqualified by reason of a criminal record, the regulatory authority shall have the burden of proof on the factors listed in RSA 332-G:13, VI(b) by clear and convincing evidence.

(g) In any disciplinary proceeding, license revocation shall be imposed only if all elements of the misconduct on which the revocation would be based are either admitted by the respondent or proven by clear and convincing evidence.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 206.25 Failure to Attend or Participate in the Hearing.

(a) For purposes of this section, “party” means:

(1) The prosecutor or the respondent, in any disciplinary proceeding; or

(2) The applicant, in any hearing held to determine whether the applicant is qualified to receive a license.

(b) A party shall be in default if the party:

(1) Has the overall burden of proof;

(2) Has received the notice given as required by Plc 206.06; and

(3) Fails to attend the hearing.

(c) If a party is in default under (b), above, the matter shall be dismissed unless there is just cause shown for failure to attend. Just cause shall include illness, accident, the death of a family member, or other circumstance beyond the control of the party that prevented the party from attending the hearing.

(d) If a party who does not have the overall burden of proof fails to attend the hearing after having received the notice given as required by Plc 206.06, the testimony and evidence of any other parties or intervenors shall be received and evaluated.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 206.26 Reconvening of Adjudicative Hearings.

(a) If a hearing is held in a participant's absence pursuant to Plc 206.25, the participant may file a motion within 10 days after the date of the hearing to reconvene the hearing.

(b) The motion to reconvene the hearing shall include an explanation of why the participant did not attend the hearing and why the participant did not notify the presiding officer in advance of the hearing, which explanation shall be supported by affidavits or other evidence.

(c) If the submitted evidence shows that good cause exists to explain the participant's failure to appear at the hearing and to explain the participant's failure to notify the presiding officer in advance of the hearing, the hearing shall be reconvened and testimony and evidence offered by the participant shall be received.

(d) For purposes of this section, good cause shall be limited to circumstances beyond the control of the participant that render the participant unable to attend the hearing and unable to notify the presiding officer in advance of the hearing.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 206.27 Proposed Findings of Fact and Conclusions of Law.

(a) Participants may submit proposed findings of fact or conclusions of law.

(b) If proposed findings of fact or conclusions of law are submitted, each requested finding or conclusion shall be set forth in a separately numbered paragraph.

(c) The presiding officer shall direct any participant to submit proposed findings of fact or conclusions of law if the presiding officer finds such a submission will clarify the pertinent facts or more specifically identify the applicable law.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 206.28 Deliberations and Decisions.

(a) For cases in which the OPLC is the regulatory authority, the following shall apply:

(1) If the adjudicative hearing was held with a panel pursuant to Plc 206.08(c), the panel members may sit for deliberations with the presiding officer and offer recommendations for the final disposition of the case or any pending motions;

(2) Notwithstanding (1), above, the executive director shall have sole and exclusive authority to decide on the final disposition of the case; and

(3) A final adjudicative order shall take effect on the date it is served on the respondent and the enforcement division pursuant to Plc 206.11(b).

(b) For cases conducted by a regulatory authority other than the OPLC, the following shall apply:

(1) The members of the regulatory authority who were present for the adjudicative hearing shall participate in the deliberations and offer recommendations for the final disposition of the case or any pending motions;

(2) Notwithstanding (1), above, if the adjudicative hearing was conducted with a panel of members, a quorum of the regulatory authority shall have sole and exclusive authority to decide on the final disposition of the case; and

(3) A final adjudicative order shall take effect on the date it is served on the respondent and the enforcement division pursuant to Plc 206.11(b).

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 206.29 Motion for Reconsideration or Rehearing.

(a) Motions for reconsideration or rehearing shall be filed within 30 calendar days after service of a final adjudicative order.

(b) The motion shall:

(1) Clearly identify points of law or fact that the movant asserts the regulatory authority has overlooked or misapprehended;

(2) Contain such argument in support of the motion as the movant desires to present; and

(3) Be served by the movant on all other participants in accordance with Plc 206.11.

(c) No answer to a motion for reconsideration shall be required, but any answer or objection filed shall be delivered to the regulatory authority within 5 working days following receipt of service of the motion for reconsideration.

(d) The motion shall be granted if the movant demonstrates by a preponderance of the evidence that:

(1) The law was applied incorrectly;

(2) The facts on which the decision is based are not supported by the record; or

(3) Another compelling reason exists to reconsider the matter, including but not limited to new material evidence becoming available or material evidence that was offered was improperly excluded.

(e) If the petition is not filed within the time specified in (a), above, or if the movant does not meet the standard for granting the motion specified in (d), above, then:

(1) The motion shall be denied; and

(2) An order denying the motion shall be:

a. Served on the participants in accordance with Plc 206.11; and

b. Effective on the date it is served.

(f) If the motion is not denied, the presiding officer shall forward the motion and any response(s) received to the regulatory authority for consideration.

(g) The regulatory authority shall issue a decision on reconsideration after fully considering the motion and any responses thereto, which reconsideration shall include a hearing on the issues identified in the motion if the regulatory authority determines a hearing to be necessary to a full consideration of the issues.

(h) A final order upon reconsideration shall be:

(1) Served on the participants in accordance with Plc 206.11; and

(2) Effective on the date it is served.

(i) Successive petitions for reconsideration or rehearing shall not be permitted.

(j) The filing of a motion for reconsideration shall not stay any order.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 206.30 Stay of Orders Pending Appeal Prohibited By Statute.

(a) Pursuant to RSA 310-A:1-n, I, any person who has been refused a license or certification by a regulatory authority or who has been disciplined by a regulatory authority "shall have the right to petition for a rehearing within 30 days after the original final decision."

(b) Pursuant to RSA 310-A:1-n, II, appeals from a decision on rehearing shall be by appeal to the supreme court pursuant to RSA 541.

(c) Pursuant to RSA 310-A:1-n, III, no sanction shall be stayed by the regulatory authority during an appeal.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 206.31 Records of Decisions. The regulatory authority shall keep a final decision in its records for at least 5 years following its date of issuance, unless the director of the division of records management of the department of state sets a different retention period pursuant to rules adopted under RSA 5:40 or approves a different retention schedule.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

PART Plc 207 NON-ADJUDICATIVE PROCEEDINGS

Plc 207.01 Purpose and Applicability.

(a) The purpose of this part is to provide uniform procedures for the conduct of non-adjudicative proceedings, in particular oral public hearings.

(b) This part shall apply to proceedings conducted by a regulatory authority to:

(1) Adopt, readopt, amend, or repeal rules, referred to as rulemaking; or

(2) Provide information to the public and receive comments from the public in any other matter that is not an adjudicative proceeding covered by Plc 206.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 207.02 Notice of Oral Public Hearing. Notice of the date, time, and place of an oral public hearing shall be given as follows:

(a) For a rulemaking hearing held pursuant to RSA 541-A:3, IV, by publication as specified in RSA 541-A:6, together with notice required by RSA 91-A if the regulatory authority is subject to the open meeting provisions of that statute;

(b) For any other oral public hearing conducted by or on behalf of the executive director, by such means as the executive director determines will notify those persons likely to be interested in the most cost-effective manner; or

(c) For any other oral public hearing conducted by or on behalf of a regulatory authority that is subject to the open meeting provisions of RSA 91-A, as required in that statute.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 207.03 Attendance of Regulatory Authority at Hearings on Proposed Rules.

(a) As required by RSA 541-A:11, II, for rules proposed by a regulatory authority that is a board or commission, each hearing on proposed rules shall be attended by a quorum of its members.

(b) As required by RSA 541-A:11, II, for rules proposed by the OPLC, each hearing shall be attended by the executive director or a designee who is knowledgeable in the particular subject area of the proposed rules.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 207.04 Presiding Officer for Oral Public Hearings.

(a) The presiding officer for a non-adjudicative proceeding for the OPLC shall be the executive director or designee who is knowledgeable in the subject area of the subject of the hearing.

(b) The presiding officer for an oral public hearing for any other regulatory authority shall be the individual designated by that regulatory authority for that proceeding.

(c) The presiding officer at an oral public hearing shall:

(1) Call the hearing to order;

(2) Identify the subject matter of the hearing and, if the hearing is to receive comments on proposed rules, provide copies of the rules upon request;

(3) Cause a recording of the hearing to be made, if a recording is deemed necessary to preserve the offered testimony, provided that if a recording is not made then the presiding officer or designee shall prepare written notes to summarize the testimony;

(4) Recognize those who wish to be heard;

(5) If necessary, establish limits pursuant to Plc 207.06; and

(6) Take any other action consistent with applicable statutes and rules necessary to conduct the proceeding and complete the record in a fair and timely manner, including but not limited to:

a. Effecting the removal of an individual who speaks or acts in a manner that is personally abusive or otherwise disruptive to the hearing;

b. Postponing or moving the hearing; and

c. Adjourning or continuing the hearing.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 207.05 Public Access and Participation.

(a) Non-adjudicative hearings shall be open to the public, and members of the public shall be entitled to attend and to testify if they so choose, subject to the limitations of Plc 207.06.

(b) Subject to (c), below, each individual who wishes to testify shall be asked to write on the speaker's list:

(1) His or her full name and municipality of residence or, if testifying on behalf of an organization or other person, the municipality in which the organization or other person is located; and

(2) The name of each organization or other person the speaker is representing, if any.

(c) If the number of people attending the hearing is small enough that a list is not needed to ensure that everyone who wishes to testify is provided an opportunity to do so, a speaker's list shall not be required, provided that each individual who testifies shall orally provide the information specified in (b), above.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 207.06 Limitations on Public Testimony. The presiding officer at an oral public hearing shall:

(a) Refuse to recognize for speaking or revoke the recognition of any individual who:

(1) Speaks or acts in an abusive or disruptive manner;

(2) Fails to keep comments relevant to the subject matter of the hearing; or

(3) Restates more than once what he or she has already stated; and

(b) Limit presentations on behalf of the same entity to no more than 3, provided that all those representing such entity may enter their names and municipality of residence into the record as supporting the position of the entity.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 207.07 Postponing, Continuing, or Moving an Oral Public Hearing.

(a) A hearing on proposed rules shall be postponed only in accordance with RSA 541-A:11, IV.

(b) An oral public hearing held for any other purpose shall be postponed if:

(1) The weather is so inclement that it is reasonable to conclude that people wishing to attend the hearing will be unable to do so;

(2) The presiding officer is ill or unavoidably absent and no other individual can be designated to serve as the presiding officer;

(3) A quorum of the regulatory authority is necessary but is not present;

(4) Postponement will facilitate greater participation by the public; or

(5) The presiding officer finds there is other good cause to do so, such as but not limited to conditions existing in the building or locality where the hearing is being held that pose an unreasonable risk to the health or safety of those who wish to attend the hearing.

(c) A hearing on proposed rules shall be moved to another location only in accordance with RSA 541-A:11, V.

(d) An oral public hearing held for any other purpose shall be moved to another location if the original location is not able to accommodate the number of people who wish to attend the hearing or otherwise becomes unavailable, provided that the regulatory authority shall provide notice of the change in location in the manner that is most likely to be seen by those wishing to attend the hearing, including posting a notice on the regulatory authority's website.

(e) A hearing on proposed rules shall be continued past the scheduled time or to another date only in accordance with RSA 541-A:11, III.

(f) An oral public hearing held for any other purpose shall be continued past the scheduled time or to another date if:

(1) The time available is not sufficient to give each individual who wishes to speak a reasonable opportunity to do so; or

(2) The capacity of the room in which the hearing is to be held does not accommodate the number of people who wish to attend and it is not possible to immediately move the hearing to another location.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 207.08 Closing the Hearing and the Record.

(a) The presiding officer shall close the oral public hearing when he or she determines that no one has further questions or comments that are relevant to the subject of the hearing.

(b) At an oral public hearing other than a rulemaking hearing, if additional time is requested to submit written testimony or supplemental information that the presiding officer determines to be relevant to the subject of the hearing, the presiding officer shall designate a specific time period for the record to remain open to receive such information.

(c) For rulemaking hearings, the record shall remain open until the date specified in the notice published pursuant to RSA 541-A:6 unless extended pursuant to RSA 541-A:11.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

PART Plc 208 RULEMAKING PETITIONS

Plc 208.01 Applicability. The rules in this part shall apply to any petition submitted to a regulatory authority pursuant to RSA 541-A:4.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 208.02 Filing of Rulemaking Petition.

(a) Any person wishing to file a petition to adopt, amend, or repeal a rule in title Plc shall file the original and one copy of the petition with the executive director, provided that only the original or other single copy shall be required if the petition is filed electronically.

(b) Any person wishing to file a petition to adopt, amend, or repeal a rule in a title assigned to any other regulatory authority shall file the original and one copy of the petition with that regulatory authority, provided that only the original or other single copy shall be required if the petition is filed electronically.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 208.03 Content of Petition for Rulemaking. A petition to adopt, amend, or repeal a rule shall contain the following:

(a) The name of each person requesting the adoption, amendment, or repeal of the rule, with an e-mail address for the person;

(b) If the person making the request is other than an individual, the name, daytime telephone number including area code, and email address of the individual who can be contacted regarding the petition;

(c) Whether the person is asking the regulatory authority to adopt, amend, or repeal a rule;

(d) A clear and concise statement of why the petitioner wants the regulatory authority to undertake the action requested;

(e) If the petition is to adopt a rule or to amend an existing rule, the text of the proposed or amended rule or a statement of the particular results intended by the petitioner to flow from the implementation of the proposed or amended rule;

(f) If the petition is to amend or repeal an existing rule, identification of the particular rule sought to be amended or repealed; and

(g) Such other information or argument as the petitioner believes would be useful to the regulatory authority in deciding whether to commence a rulemaking proceeding.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 208.04 Burden of Persuasion for Rulemaking Petitions. The petitioner shall have the burden of persuasion relative to demonstrating that the criteria for denying the petition specified in Plc 208.05(e) are not met.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 208.05 Disposition of Petition for Rulemaking.

(a) Within 30 days of the submission of a petition to the executive director, the executive director shall:

(1) Determine whether to grant or deny the petition; and

(2) Notify the petitioner of the decision in writing sent to the email address provided in the petition.

(b) If the petition is submitted to a regulatory authority that is a supported board, commission, or council, then within 30 days after the first meeting of the regulatory authority held after receipt of the petition, the regulatory authority shall:

(1) Determine whether to grant or deny the petition; and

(2) Notify the petitioner of the decision in writing sent to the email address provided in the petition.

(c) As required by RSA 541-A:4, I, if the petition is denied, the notice sent pursuant to (a)(2) or (b)(2), above, shall specify the reason(s) for the denial.

(d) If the petition is granted, the regulatory authority shall commence a rulemaking as required by RSA 541-A:4, I, reprinted in Appendix C.

(e) A denial shall be based upon a finding by the executive director or other regulatory authority, as applicable, that:

(1) The proposed action is not consistent with established standards of practice of the profession being regulated or the purpose and intent of the statute being implemented;

(2) The regulatory authority lacks rulemaking authority over the issue(s) in the petition; or

(3) The proposed action is not in the best interests of affected persons or is contrary to legislative intent.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

PART Plc 209 EXPLANATION OF ADOPTED RULES

Plc 209.01 Requests for Explanation of Adopted Rules.

(a) Any interested person may, within 30 days of the final adoption of a rule, request a written explanation of that rule by making a written request to the regulatory authority that adopted the rule.

(b) A request submitted pursuant to (a), above, shall include:

(1) The name and address of the person making the request and, if the requestor is an entity, the name, address, and email address of the individual authorized by the entity to make the request; and

(2) Identification of the specific rule for which an explanation is sought.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 209.02 Response to Request for Explanation.

(a) The regulatory authority that adopted the rule shall provide a written response within 90 days of receiving a request in accordance with Plc 209.01 if no board meeting is required or within 60 days of the regulatory authority's first meeting after receiving the petition.

(b) The response required by (a), above, shall:

(1) Concisely state the meaning of the rule adopted;

(2) Concisely state the principal reasons for and against the adoption of the rule in its final form; and

(3) State why the regulatory authority overruled any arguments and considerations presented against the rule, if any were presented.

(c) If the regulatory authority is a supported board, commission, or council, the response shall reflect the consensus of a quorum of its members.

(d) If the executive director determines that the technical expertise of an advisory board or advisory committee is needed to respond to a request for explanation, the executive director shall consult with the advisory board or advisory committee.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

PART Plc 210 DECLARATORY RULINGS

Plc 210.01 Purpose.

(a) The purpose of this part is to establish a mechanism whereby a person who is uncertain of the applicability of a particular statute implemented by a regulatory authority or rule adopted by the regulatory authority may request a decision in advance of taking an action that might be subject to such statute or rule.

(b) This part shall not be used to circumvent other established methods of adjudication, such as an appeal, in cases where the regulatory authority has already made a determination, such as by issuing or denying a license or by initiating a disciplinary action.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 210.02 Filing of Petition for Declaratory Ruling.

(a) Any person seeking a declaratory ruling from the executive director shall file a written petition for declaratory ruling that meets the requirements of Plc 210.03 with the executive director in accordance with Plc 203.02.

(b) Any person seeking a declaratory ruling from any other regulatory authority shall file a written petition for declaratory ruling that meets the requirements of Plc 210.03 with that regulatory authority in accordance with Plc 203.02.

(c) If the ruling sought by the petition would directly affect a person other than the person filing the petition, the person filing the petition shall serve the petition on each other affected person by:

(1) Depositing a copy of the petition in the United States mail, first class postage prepaid, addressed to the person being served, no later than the day the petition is filed with the regulatory authority; or

(2) Delivering a copy of the petition in hand to the person being served on or before the date it is filed with the regulatory authority.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 210.03 Contents of Petition for Declaratory Ruling; Signature Required.

(a) A petition for declaratory ruling shall contain:

(1) The name and mailing address of the petitioner and, if the petitioner is filing electronically or is filing on paper but agrees to receive the notice under Plc 210.04(b) and a response by email, the email address to which the notice and response should be sent;

(2) The exact ruling being requested;

(3) Each statutory and factual basis for the ruling, set forth in separately numbered paragraphs; and

(4) Any supporting affidavits or memoranda of law.

(b) The petition shall be signed by the individual(s) submitting the petition or, if the petition is filed on behalf of an entity, by a duly-authorized representative of the entity, provided that if the petition is filed electronically, the act of submitting the petition shall constitute a signature.

(c) The signature(s) shall constitute a certification that:

(1) The signer has read the petition;

(2) The signer is authorized to file the petition;

(3) To the best of the signer's knowledge and belief, there are good grounds to support the petition; and

(4) The petition has not been filed for purposes of delay or harassment in any pending or contemplated administrative, civil, or criminal proceeding.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 210.04 Processing of Petition for Declaratory Ruling.

(a) Within 25 days of receipt by the executive director of a petition for declaratory ruling, the executive director shall review the petition to determine:

(1) Whether additional information or explanation is needed from the petitioner; and

(2) Whether the complexity of the petition, including but not limited to the issue(s) in question and the legal implications thereof, will cause the executive director to seek assistance from the department of justice.

(b) Within 25 days of the first meeting held by any other regulatory authority after receipt by the regulatory authority of a petition for declaratory ruling, the regulatory authority shall review the petition to determine:

(1) Whether additional information or explanation is needed from the petitioner; and

(2) Whether the complexity of the petition, including but not limited to the issue(s) in question and the legal implications thereof, will cause the regulatory authority to seek assistance from the department of justice.

(c) The executive director or other regulatory authority, as applicable, shall notify the petitioner in writing of the results of its review under (a) or (b), above.

(d) If additional information or explanation is needed from the petitioner, the notice sent pursuant to (c), above, shall:

(1) Identify the information or explanation needed; and

(2) Establish a deadline for the petitioner to provide the information or explanation, which shall be no sooner than 25 days after the date of the notice.

(e) If the executive director or other regulatory authority, as applicable, will be seeking assistance from the department of justice, the notice sent pursuant to (c), above, shall inform the petitioner of the anticipated amount of time that will be needed to obtain such assistance.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 210.05 Action on Petition for Declaratory Ruling.

(a) Subject to (c), below, the executive director shall make a decision on the petition and, if the petition is not denied, issue a declaratory ruling in writing within 60 days of:

(1) Receipt of the petition, if no additional information or explanation from the petitioner or assistance from the department of justice is needed;

(2) Receipt of all additional information and explanations requested from the petitioner pursuant to Plc 210.04(d); or

(3) Receipt of advice from the department of justice, if advice is requested.

(b) Subject to (c), below, any other regulatory authority shall make its decision on the petition and, if the petition is not denied, issue a declaratory ruling in writing within 60 days of the authority's first meeting after:

(1) Receipt of the petition, if no additional information or explanation from the petitioner or assistance from the department of justice is needed;

(2) Receipt of all additional information and explanations requested from the petitioner pursuant to Plc 210.04(d); or

(3) Receipt of advice from the department of justice, if advice is requested.

(c) If additional information is requested from the petitioner and is not received in time for a decision to be made and declaratory ruling issued within 60 days of receipt of the petition, the regulatory authority shall request the petitioner to agree to an extension as provided in RSA 541-A:29, IV. If the petitioner does not agree to an extension and a reasoned decision cannot be made without the information requested from the petitioner, the petition shall be denied and no declaratory ruling shall be issued.

(d) If advice from the department of justice is requested and is not expected to be received within 60 days of receipt of the petition, the regulatory authority shall request the petitioner to agree to an extension as provided in RSA 541-A:29, IV. If the petitioner does not agree to an extension, the regulatory authority shall make a decision within 60 days of receipt. If the decision is to deny the petition, no declaratory ruling shall be issued.

(e) A copy of each declaratory ruling shall be filed with the director of legislative services as required by RSA 541-A:16, II(b).

(f) A copy of each declaratory ruling or denial of a petition shall be:

(1) Sent to the petitioner by first class mail, or by email if the petitioner filed electronically or filed on paper but provided an email address and agreed to receive the decision via email; and

(2) Sent to any other person who was served pursuant to Plc 210.02(c) in the same manner as service was made.

(g) If the executive director determines that the technical expertise of an advisory board or advisory committee is needed to respond to a petition for a declaratory ruling, the executive director shall consult with the advisory board or advisory committee.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

PART Plc 211 WAIVER OF RULES

Plc 211.01 Petitions for Waiver of Rules.

(a) Any participant in a non-adjudicative proceeding or otherwise affected by the rules in Plc 200 et seq. who wishes to request a waiver of a rule in Plc 200 et seq. shall proceed in accordance with this section.

(b) Waiver requests made in conjunction with an adjudicative proceeding shall be in the form of a motion that is filed and handled in accordance with Plc 206.12.

(c) A petition to waive a rule filed under this section shall:

(1) Be directed to the presiding officer if one has been designated, or to the regulatory authority if no presiding officer has been designated;

(2) Be in written form, unless made in response to a matter asserted for the first time at an oral public hearing or on the basis of information that was not received in time to prepare a written request prior to the hearing at which the request is made; and

(3) Be included in the record of the proceeding if in writing, or recorded in full in the record of the hearing if made at an oral public hearing.

(d) A petition for a waiver shall include a clear and concise statement of the reason(s) why the waiver is being sought, including an explanation that addresses:

(1) The economic and operational consequences to the petitioner of complying with the rule as written;

(2) Whether the requested waiver is necessary because of any neglect or misfeasance on the part of the petitioner;

(3) Whether waiver of the rule would harm or otherwise operate to the disadvantage of any third person(s); and

(4) Any additional information the petitioner believes provides good cause for waiving the rule.

(e) If examination of the petition reveals that other persons would be substantially affected by the proposed relief, the regulatory authority shall:

(1) Require the petitioner to serve the petition on such persons; and

(2) Advise such persons of their right to reply to the petition.

(f) The petitioner shall provide such further information or participate in such evidentiary or other proceedings as are ordered by the regulatory authority after reviewing the petition and any replies received.

(g) If a request for waiver is made orally at an oral public hearing and the presiding officer finds that additional information is needed in order for the request to be fully and fairly considered, the presiding officer shall direct the requestor to submit the request in writing, with supporting information as specified in (d), above, within 3 working days of the date of the oral request. If other participants in the proceeding wish to respond to the request, the response(s) shall be filed no later than 7 calendar days after the request is filed.

(h) If a request for waiver is made orally at an oral public hearing on proposed rules and the time period(s) specified in (g), above, fall after the deadline specified for the submittal of written comments, the regulatory authority shall extend the deadline as provided in RSA 541-A:11, III.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 211.02 Decisions on Waiver Requests.

(a) The presiding officer or regulatory authority, as applicable, shall rule upon a waiver request after full consideration of all factors relevant to the request.

(b) A regulatory authority shall waive a rule upon its own motion by providing affected persons with notice and an opportunity to be heard, and after issuing an order that finds that good cause has been shown.

(c) For the purposes of this section, good cause shall be determined with reference to the rule for which the waiver is sought.

(d) If good cause is not specifically defined in the rule for which a waiver is sought, good cause shall be deemed to exist if:

(1) Compliance with the rule cannot be achieved due to circumstances beyond the control of the person requesting the waiver and waiving the rule will not materially prejudice any other person;

(2) Compliance with the rule would cause operational or economic consequences, or both, to the person requesting the waiver that outweigh any disadvantage caused to any other person(s) by granting the waiver; or

(3) Compliance with the rule would otherwise be counterproductive to the purpose of the proceeding in which the waiver is sought, given the specific circumstances of the proceeding and the reason(s) for the waiver request.

(e) If the executive director determines that the technical expertise of an advisory board or advisory committee is needed to respond to a petition for a waiver, the executive director shall consult with the advisory board or advisory committee.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

PART Plc 212 WAIVER OF PROCUREMENT PROVISIONS

Statutory Authority: RSA 21-G:37, V

Plc 212.01 Purpose. The purpose of this part is to establish the circumstances constituting an emergency or loss of funding for purposes of waiving the requirements of RSA 21-G:37, I - IV, as contemplated by RSA 21-G:37, V.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 212.02 Applicability. Unless otherwise specified, Plc 212 shall apply to the procurement of goods and services by a regulatory authority using a request for bid (RFB), request for application (RFA), request for proposal (RFP), or similar invitation.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 212.03 Definitions.

(a) "Emergency situation" means a natural, technological, or human made situation, condition, or set of circumstances, that has caused or is determined by the regulatory authority to be likely to threaten public health or safety and:

(1) Impedes or diminishes the regulatory authority's ability to provide materials or services necessary to protect public health or safety from the effects of such situation, condition, or set of circumstances;

(2) Inhibits or interrupts the continuity of services provided by the regulatory authority; or

(3) Prevents the regulatory authority from complying with any state or federal statute, rule, or regulation.

(b) "Request for application (RFA)" means "request for application" as defined in RSA 21-G:36, III, as reprinted in Appendix B.

(c) "Request for bid (RFB)" means "request for bid" as defined in RSA 21-G:36, IV, as reprinted in Appendix B.

(d) "Request for proposal (RFP)" means "request for proposal" as defined in RSA 21-G:36, V, as reprinted in Appendix B.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 212.04 Waiver of Requirements.

(a) The regulatory authority shall waive any or all of RSA 21-G:37, II - IV for any RFA, RFB, RFP, or similar invitation if the waiver is necessary to:

(1) Prevent the loss of federal or other funds subject to recapture; or

(2) Prevent or mitigate an emergency situation as defined in Plc 212.03(a).

(b) The regulatory authority shall post the information required by RSA 21-G:37, II and III as soon as practicable after the emergency situation that gave rise to the need for the waiver has been mitigated.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

PART Plc 213 DISCIPLINARY PROCEEDINGS; LICENSE CONDITIONS

Plc 213.01 Definitions. For purposes of this part, the following definitions shall apply:

(a) "Applicant" means a person who has applied for a license to practice in New Hampshire, prior to a final decision being made on the application;

(b) "Chronic non-complier" means a person who:

(1) Has committed, within 3 years of the date of application or of the violation(s) for which a disciplinary proceeding has been initiated, as applicable:

a. More than 2 violations that remain uncorrected after a regulatory authority has notified the respondent, in writing, of the violations and the need to correct them, which demonstrates that the respondent is unable or unwilling to comply with applicable requirements; or

b. More than 3 violations that are corrected by the respondent after a regulatory authority has notified the respondent, in writing, of the violations and the need to correct them, but recur with a frequency that demonstrates that the respondent is unable or unwilling to maintain compliance with applicable requirements; or

(2) Has been the subject, within 3 years of the date of the application or of the violation(s) for which a disciplinary proceeding or show cause hearing on an application has been initiated, as applicable, of 2 or more administrative or civil enforcement actions or one criminal enforcement action that have not been overturned on appeal for violations of any applicable law pertaining to any of the respondent's activities; and

(c) "Regulatory authority" means, unless specifically limited to New Hampshire:

(1) "Regulatory authority" as defined in Plc 202; and

(2) Any comparable authority in any other jurisdiction in which a licensee is authorized to practice.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 213.02 Grounds for Denying an Initial License Application. In addition to such grounds for denying an initial license application as are identified in the rules that are specific to the license for which an application was filed, the following shall constitute good cause to deny a license application:

(a) The applicant owes any fees to a regulatory authority, unless the fees are being paid in accordance with a payment schedule and the applicant is current with all payments;

(b) The applicant owes any administrative fines to a regulatory authority, unless the fines are being paid in accordance with a payment schedule and the applicant is current with all payments;

(c) The applicant has failed to comply with any order issued by a regulatory authority, unless the applicant is complying in accordance with a compliance schedule and is current with all items;

(d) The applicant owes any civil or criminal penalties imposed as a result of a judicial action taken to enforce any statute or rule implemented by a regulatory authority, unless the penalties are being paid in accordance with a payment schedule and the applicant is current with all payments;

(e) The applicant has failed to comply with any civil or criminal restoration or restitution order imposed as a result of a judicial action taken to enforce any statute or rule implemented by a regulatory authority, unless the applicant is complying in accordance with a compliance schedule and is current with all items; or

(f) The applicant is a chronic non-complier.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 213.03 Grounds for Suspension, Revocation, or Refusal to Renew. In addition to such grounds for suspending, revoking, or refusing to renew a license as are identified in the rules that are specific to the license at issue, the following shall constitute good cause to suspend, revoke, or refuse to renew a license:

(a) The licensee owes any fees to a regulatory authority, unless the fees are being paid in accordance with a payment schedule and the license holder is current with all payments;

(b) The licensee owes any administrative fines to a regulatory authority, unless the fines are being paid in accordance with a payment schedule and the license holder is current with all payments;

(c) The licensee has failed to comply with any order issued by a regulatory authority, unless the license holder is complying in accordance with a compliance schedule and is current with all items;

(d) The licensee owes any civil or criminal penalties imposed as a result of a judicial action taken to enforce any statute or rule implemented by a regulatory authority, unless the penalties are being paid in accordance with a payment schedule and the license holder is current with all payments;

(e) The licensee has failed to comply with any civil or criminal restoration or restitution order imposed as a result of a judicial action taken to enforce any statute or rule implemented by a regulatory authority, unless the license holder is complying in accordance with a compliance schedule and is current with all items; or

(f) The licensee is a chronic non-complier.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 213.04 Burden of Persuasion.

(a) This section shall apply to:

(1) Any proceeding to determine whether to impose sanctions, including suspension, revocation, refusal to renew, and imposition of administrative fines, based on conduct for which a licensee has been disciplined in another jurisdiction; and

(2) Any proceeding to determine whether to deny a license application based on conduct that resulted in another jurisdiction denying a license to an applicant.

(b) In a proceeding that is subject to this section, the licensee or applicant, as applicable, shall bear the burden of persuasion by a preponderance of the evidence that the individual's conduct in another jurisdiction does not constitute grounds to impose sanctions or deny licensure, as applicable, in New Hampshire.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 213.05 Determination to Deny a License Application or to Suspend, Revoke, or Refuse to Renew a License.

(a) The determination of whether to deny a license application or to suspend, revoke, or refuse to renew a license shall be made in accordance with the procedural rules specific to the type of license at issue.

(b) If the respondent has not already had the opportunity to contest, through an adjudicative proceeding, the prior violation(s) on which the New Hampshire regulatory authority proposes to base a decision to deny a license application or to suspend, revoke, or refuse to renew a license, the respondent shall

have the opportunity to contest or otherwise explain such prior violation(s) through an adjudicative proceeding prior to a final decision being made.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

Plc 213.06 License Conditions.

(a) The New Hampshire regulatory authority shall include conditions in a license whenever it determines that such conditions are necessary to:

(1) Provide greater assurance that the licensee will comply with applicable law; or

(2) Minimize the potential for harm to public health, safety, or welfare from any violations of applicable requirements.

(b) Any conditions so added shall relate directly to the activity for which the license is issued and shall be no more than reasonably necessary to achieve the criteria in (a), above.

(c) The determination of whether such conditions are reasonably necessary shall be made based on:

(1) The nature and scope of the license being issued; and

(2) The compliance history of the applicant, including whether the applicant is a chronic non-complier.

(d) The licensee may appeal any conditions included in a license pursuant to this section in accordance with existing appeal routes established under applicable law.

Source. (See Revision Note at chapter heading for Plc 200) *#13427, eff 8-4-22*

APPENDIX

Rule	**Specific State Statute the Rule Implements**
Plc 101	RSA 310
Plc 102	RSA 310; RSA 541-A:16, I(a)
Plc 103	RSA 310; RSA 91-A:4
Plc 200 (see below for additional or more specific statutes)	RSA 541-A:16, I(b)
Plc 204	RSA 310-A:1-d, II(h)(2); RSA 310-A:1-j
Plc 206	RSA 541-A:16, I(b)(2); RSA 541-A:30-a; RSA 541-A:33
Plc 206.07	RSA 541-A:30, III
Plc 206.14	RSA 541-A:32
Plc 206.19	RSA 310-A:1-k, II
Plc 207	RSA 541-A:16, I(b)(3)

Plc 208	RSA 541-A:16, I(c)
Plc 209	RSA 541-A:11, VII
Plc 210	RSA 541-A:16, I(d)
Plc 211	RSA 541-A:22, IV
Plc 212	RSA 21-G:37, V
Plc 213	RSA 310-A:1-d, II(d)

APPENDIX B: STATUTORY DEFINITIONS

RSA 541-A:1

I. “Adjudicative proceeding” means the procedure to be followed in contested cases, as set forth in RSA 541-A:31 through RSA 541-A:36.

IV. “Contested case” means a proceeding in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after notice and an opportunity for hearing.

VIII. “License” means the whole or part of any agency permit, certificate, approval, registration, charter or similar form of permission required by law.

RSA 21-G:36

III. “Request for application (RFA)” means an invitation to submit an offer to provide identified services to an agency where the amount of funding available and the particulars of how the services are to be provided are defined by the agency and where the selection of qualifying vendors will be according to identified criteria as provided in RSA 21-I:22-a and RSA 21-I:22-b.

IV. “Request for bid (RFB)” means an invitation to submit an offer to provide specified commodities or services to an agency at a price proposed by the bidder where selection is based on the lowest price meeting or exceeding specifications as stated in the bid.

V. “Request for proposal (RFP)” means an invitation to submit a proposal to provide specified goods or services, where the particulars of the goods or services and the price are proposed by the vendor and, for proposals meeting or exceeding specifications, selection is according to identified criteria as provided in RSA 21-I:22-a and RSA 21-I:22-b.

APPENDIX C: STATUTORY PROVISIONS

310-A:1-j Investigations.

…

VI. Allegations of professional misconduct shall be brought within 5 years from the time the office reasonably could have discovered the act, omission or failure complained of, except that conduct which resulted in a criminal conviction or in a disciplinary action by a relevant licensing authority in another jurisdiction may be considered by the board without time limitation in making licensing or disciplinary decisions if the conduct would otherwise be a ground for discipline. The board may also consider licensee conduct without time limitation when the ultimate issue before the board involves a pattern of conduct or the cumulative effect of conduct which becomes apparent as a result of conduct which has occurred within the 5-year limitation period prescribed by this paragraph.

310-A:1-k Disciplinary Proceedings; Remedial Proceedings.

…

VII. Boards, councils, and commissions may take non-disciplinary remedial action against any person licensed by it upon finding that the person is afflicted with physical or mental disability, disease, disorder, or condition deemed dangerous to the public health. Upon making an affirmative finding after notice and an opportunity for a hearing, the board, council, or commission may take non-disciplinary remedial action:

(a) By suspension, limitation, or restriction of a license for a period of time as determined reasonable by the board.

(b) By revocation of license.

(c) By requiring the person to submit to the care, treatment, or observation of a physician, counseling service, health care facility, professional assistance program, or any combination thereof which is acceptable to the board.

310-A:1-l Hearings, Decisions and Appeals. –

…

II. Notwithstanding any other provision of law, allegations of misconduct or lack of professional qualifications that are not settled shall be heard by the board, council, or commission, or a panel of the board, council, or commission with a minimum of 3 members appointed by the chair of the board or other designee. Any member of the board, or other person qualified to act as presiding officer and duly designated by the board, shall have the authority to preside at such hearing and to issue oaths or affirmations to witnesses, rule on evidentiary and other procedural matters, and prepare a recommended decision. In the case of a hearing before a panel, the presiding officer shall prepare a recommended decision for the board, council, or commission, which shall determine sanctions.

541-A:4 Petition for Adoption of Rules. –

I. Any interested person may petition an agency to adopt, amend, or repeal a rule. Within 30 days of receiving the petition, or 30 days after the next scheduled meeting of a board, commission, or group receiving the petition, the agency shall determine whether to grant or deny the petition and notify the petitioner. If the agency decides to deny the petition, the agency shall notify the petitioner of its decision in writing and shall state its reasons for denial. If the agency grants the petition, it shall notify the petitioner and commence the rulemaking proceeding by requesting a fiscal impact statement pursuant to RSA 541-A:5 within 120 days of receipt of the petition and continuing the proceeding as specified in RSA 541-A:3.

Report Non-Compliance

Report concerns about a licensee or licensed business.

The Office of Professional Licensure and Certification (OPLC) is responsible for the enforcement of regulatory requirements for qualifying NH licensed professionals and businesses. This oversight ensures public safety and efficacy of practicing licensed professions and businesses.

File a Complaint:

- Complete and submit an Enforcement Complaint Form

Any person(s) who feels or has evidence that a qualifying licensee or licensed business is in violation of their profession's rules and regulations or demonstrates unethical practices.

What happens when a complaint is filed?

- The complaint is received by the OPLC Enforcement Unit.
- An OPLC investigation is conducted.
- When a complaint is supported by substantiating facts or evidence, it is presented to the appropriate Board for the qualified licensee or business for further review and enforcement.

Responding to a Complaint:

- Licensee Notification Letter is sent by the OPLC Enforcement Unit to the licensee along with a copy of the complaint, requesting a written response to the allegations in the complaint.
- The Licensee's written response can be sent by:
  - Email attachment to: complaints@oplc.nh.gov.
  - United States Postal Service or,
  - Other Postal delivery service such as Fed Ex, DHL or United Parcel Service (UPS).
- The OPLC Enforcement Unit opens an investigation.
- The complaint with investigation findings is submitted to the appropriate Board for a ruling.

The Board's Review:

- The Board will review the matter in a non-public session at a scheduled Board meeting. The Board may:
  - Dismiss the complaint.
  - Dismiss the complaint with a Letter of Concern (which is confidential and not disciplinary).
  - Vote to move forward with the disciplinary process.

Petition for Rehearing Form:

- Universal Petition for Rehearing

OPLC Home

Portable Document Format (.pdf) . Visit nh.gov for a list of free .pdf readers for a variety of operating systems.

TITLE III
TOWNS, CITIES, VILLAGE DISTRICTS, AND UNINCORPORATED PLACES

CHAPTER 33-A
DISPOSITION OF MUNICIPAL RECORDS

Section 33-A:3-a

33-A:3-a Disposition and Retention Schedule. –
The municipal records identified below shall be retained, at a minimum, as follows:
I. Abatements: 5 years.
II. Accounts receivable: until audited plus one year.
III. Aerial photographs: permanently.
IV. Airport inspections-annual: 3 years.
V. Airport inspections-daily, including fuel storage and vehicles: 6 months.
VI. Annual audit report: 10 years.
VII. Annual reports, town warrants, meeting and deliberative session minutes in towns that have adopted official ballot voting: permanently.
VIII. Archives: permanently.
IX. Articles of agreement or incorporation: permanently.
X. Bank deposit slips and statements: 6 years.
XI. Blueprints-architectural: life of building.
XII. Bonds and continuation certificates: expiration of bond plus 2 years.
XIII. Budget committee-drafts: until superseded.
XIV. Budgets: permanently.
XV. Building permits-applications and approvals: permanently.
XVI. Building permits-lapsed: permanently.
XVII. Building permits-withdrawn, or denied: one year.
XVIII. Capital projects and fixed assets that require accountability after completion: life of project or purchase.
XIX. Cash receipt and disbursement book: 6 years after last entry, or until audited.
XX. Checks: 6 years.
XXI. Code enforcement specifications: permanently.
XXII. Complaint log: expiration of appeal period.
XXIII. Contracts-completed awards, including request for purchase, bids, and awards: life of project or purchase.
XXIV. Contracts-unsuccessful bids: completion of project plus one year.
XXV. Correspondence by and to municipality-administrative records: minimum of one year.
XXVI. Correspondence by and to municipality-policy and program records: follow retention requirement for the record to which it refers.
XXVII. Correspondence by and to municipality-transitory: retain as needed for reference.
XXVIII. Current use applications and maps: until removed from current use plus 3 years.
XXIX. Current use release: permanently.
XXX. Deed grantee/grantor listing from registry, or copies of deeds: discard after being updated and replaced with a new document.
XXXI. Deferred compensation plans: 7 years.
XXXII. Underground facility damage prevention forms: 4 years.
XXXIII. Dredge and fill permits: 4 years.
XXXIV. Driveway permits and plans: permanently.
XXXV. Easements awarded to municipality: permanently.
XXXVI. Elections-federal elections: ballots and absentee ballot applications, affidavit envelopes, and lists: by the town clerk until the contest is settled and all appeals have expired or at least 22 months after the election, whichever is longer.
XXXVII. Elections-not federal: ballots and absentee ballot applications, affidavit envelopes, and lists: by the town clerk until the contest is settled and all appeals have expired or at least 60 days after the election, whichever is longer.

XXXVIII. Elections-challenge affidavits by the town clerk: until the contest is settled and all appeals have expired or 22 months after the election, whichever is longer.
XXXIX. Elections-ward maps: until revised plus 1 year.
XL. Emergency medical services run reports: 10 years.
XLI. Equipment maintenance: life of equipment.
XLII. Excavation tax warrant and book or list: permanently.
XLIII. Federal form 1099s and W-2s: 7 years.
XLIV. Federal form 941: 7 years.
XLV. Federal form W-1: 4 years.
XLVI. Fire calls/incident reports: 10 years.
XLVII. Grants, supporting documentation: follow grantor's requirements.
XLVIII. Grievances: expiration of appeal period.
XLIX. Health-complaints: expiration of appeal period.
L. Health-inspections: 3 years.
LI. Health-service agreements with state agencies: term plus 7 years.
LII. Health and human services case records including welfare applications: active plus 7 years.
LIII. Inspections-bridges and dams: permanently.
LIV. Insurance policies: permanently.
LV. Intent to cut trees or bushes: 3 years.
LVI. Intergovernmental agreements: end of agreement plus 3 years.
LVII. Investigations-fire: permanently.
LVIII. Invoice, assessors: permanently.
LIX. Invoices and bills: until audited plus one year.
LX. Job applications-successful: retirement or termination plus 20 years.
LXI. Job applications-unsuccessful: current year plus 3 years.
LXII. Labor-public employees labor relations board actions and decisions: permanently.
LXIII. Labor union negotiations: permanently or until contract is replaced with a new contract.
LXIV. Ledger and journal entry records: until audited plus one year.
LXV. Legal actions against the municipality: permanently.
LXVI. Library:
(a) Registration cards: current year plus one year.
(b) User records: not retained; confidential pursuant to RSA 201-D:11.
LXVII. Licenses-all other except dog, marriage, health, and vital records: duration plus 1 year.
LXVIII. Licenses-dog: current year plus one year.
LXIX. Licenses-dog, rabies certificates: disposal once recorded.
LXX. Licenses-health: current year plus 6 years.
LXXI. Liens-federal liens upon personal property, other than IRS liens: permanently.
LXXII. Liens-hospital liens: 6 years.
LXXIII. Liens-IRS liens: one year after discharge.
LXXIV. Liens-tax liens, state liens for support of children: until court order is lifted plus one year.
LXXV. Liens-tax liens, state meals and rooms tax: until release plus one year.
LXXVI. Liens-tax sale and record of lien: permanently.
LXXVII. Liens-tax sales/liens redeemed report: permanently.
LXXVIII. Liens-Uniform Commercial Code leases: lease term plus 4 years; purge all July 1, 2007.
LXXIX. Liens-Uniform Commercial Code security agreements: 6 years; purge all July 1, 2007.
LXXX. Meeting minutes, tape recordings: keep until written record is approved at meeting. As soon as minutes are approved, either reuse the tape or dispose of the tape.
LXXXI. Minutes of boards and committees: permanently.
LXXXII. Minutes of town meeting/council: permanently.
LXXXIII. Minutes, selectmen's: permanently.
LXXXIV. Motor vehicle-application for title: until audited plus one year.
LXXXV. Motor vehicle-titles and voided titles: sent to state division of motor vehicles.
LXXXVI. Motor vehicle permits-void and unused: until audited plus one year.
LXXXVII. Motor vehicle permits and registrations-used: current year plus 3 years.
LXXXVIII. Municipal agent daily log: until audited plus one year.
LXXXIX. Notes, bonds, and municipal bond coupons-cancelled: until paid and audited plus one year.
XC. Notes, bonds, and municipal bond coupon register: permanently.
XCI. Oaths of office: term of office plus 3 years.

XCII. Ordinances: permanently.
XCIII. Payrolls: until audited plus one year.
XCIV. Perambulations of town lines-copy kept by town and copy sent to secretary of state: permanently.
XCV. Permits or licenses, pole: permanently.
XCVI. Personnel files: retirement or termination plus 20 years.
XCVII. Police, accident files-fatalities: 10 years.
XCVIII. Police, accident files-hit and run: statute of limitations plus 5 years.
XCIX. Police, accident files-injury: 6 years.
C. Police, accident files-involving arrests: 6 years.
CI. Police, accident files-involving municipality: 6 years.
CII. Police, accident files-property damage: 6 years.
CIII. Police, arrest reports: permanently.
CIV. Police, calls for service/general service reports: 5 years.
CV. Police, criminal-closed cases: statute of limitations plus 5 years.
CVI. Police, criminal-open cases: statute of limitations plus 5 years.
CVII. Police, motor vehicle violation paperwork: 3 years.
CVIII. Police, non-criminal-internal affairs investigations: upon the retirement or termination of the subject officer plus 20 years, except that the municipality shall follow the retention period for non-criminal internal affairs investigations as set forth in any applicable union or collective bargaining agreement in effect as of July 1, 2021 until such agreement expires, at which time the 20-year retention period in this paragraph shall apply.
CIX. Police, non-criminal-all other files: closure plus 3 years.
CX. Police, pistol permit applications: expiration of permit plus one year.
CXI. Property inventory: 5 years.
CXII. Property record card: current and last prior reassessing cycle.
CXIII. Property record map, assessors: until superceded.
CXIV. Property tax exemption applications: transfer of property plus one year.
CXV. Records management forms for transfer of records to storage: permanently.
CXVI. Road and bridge construction and reconstruction, including highway complaint slips: 6 years.
CXVII. Road layouts and discontinuances: permanently.
CXVIII. Scenic roads: permanently.
CXIX. School records: retained as provided under RSA 189:29-a.
CXX. Septic plan approvals and plans: until replaced or removed.
CXXI. Sewer system filtration study: permanently.
CXXII. Sign inventory: 7 years.
CXXIII. Site plan review: life of improvement plus 3 years.
CXXIV. Site plan review-lapsed: until notified that planning board action and appeal time has expired plus one year.
CXXV. Site plan review-withdrawn or not approved: appeal period plus one year.
CXXVI. Special assessment (betterment of property): 20 years.
CXXVII. Street acceptances: permanently.
CXXVIII. Street signs, street lights and traffic lights-maintenance records: 10 years.
CXXIX. Subdivision applications-lapsed: until notified that planning board action and appeal period has expired plus one year.
CXXX. Subdivision applications-successful and final plan: permanently.
CXXXI. Subdivision applications-withdrawn, or not approved: expiration of appeal period plus one year.
CXXXII. Subdivision applications-working drafts prior to approval: expiration of appeal period.
CXXXIII. Summary inventory of valuation of property: one year.
CXXXIV. Tax maps: permanently.
CXXXV. Tax receipts paid, including taxes on land use change, property, resident, sewer, special assessment, and yield tax on timber: 6 years.
CXXXVI. Tax-deeded property file (including registered or certified receipts for notifying owners and mortgagees of intent to deed property): permanently.
CXXXVII. Time cards: 4 years.
CXXXVIII. Trust fund:
(a) Minutes and quarterly reports, in paper or electronic format: permanently.
(b) Bank statements, in paper or electronic format: 6 years after audit.
CXXXIX. Vehicle maintenance records: life of vehicle plus 2 years.
CXL. Voter checklist-marked copy kept by town pursuant to RSA 659:102: 7 years.
CXLI. Voter registration:

(a) Forms, including absentee voter registration forms: until voter is removed from checklist plus 7 years.
(b) Same day, returned to undeclared status, form and report from statewide centralized voter registration database: 7 years.
(c)(1) Party change form: until voter is removed from checklist plus 7 years.
(2) List of undeclared voters from the statewide centralized voter registration database: 7 years.
(d) Forms, rejected, including absentee voter registration forms, and denial notifications: 7 years.
(e) Qualified voter affidavit: until voter is removed from checklist plus 7 years.
(f) Verifiable action of domicile document: until voter is removed from checklist plus 7 years.
(g) Overseas absentee registration affidavit: until voter is removed from checklist plus 7 years.
(h) Absentee ballot voter application form in the federal post card application format, for voters not previously on the checklist: until voter is removed from checklist plus 7 years.
(i) Absentee ballot affidavit envelope for federal post card applicants not previously on the checklist: until voter is removed from checklist plus 7 years.
(j) Notice of removal, 30-day notice: until voter is removed from checklist plus 7 years.
(k) Report of death: until voter is removed from checklist plus 7 years.
(l) Report of transfer: until voter is removed from checklist plus 7 years.
(m) Undeliverable mail or change of address notice from the United States Postal Service: until voter is removed from checklist plus 7 years.
CXLII. Vouchers and treasurers receipts: until audited plus one year.
CXLIII. Warrants-land use change, and book or list: permanently.
CXLIV. Warrants-property tax, and lists: permanently.
CXLV. Warrants-resident tax, and book or list: permanently.
CXLVI. Warrants-town meeting: permanently.
CXLVII. Warrants-treasurer: until audited plus one year.
CXLVIII. Warrants-utility and betterment tax: permanently.
CXLIX. Warrants-yield tax, and book or list: permanently.
CL. Welfare department vouchers: 4 years.
CLI. Work program files: current year plus 6 years.
CLII. Writs: expiration of appeal period plus one year.
CLIII. Zoning board of adjustment applications, decisions, and permits-unsuccessful: expiration of appeal period.
CLIV. Intent to excavate: completion of reclamation plus 3 years.
CLV. Election return forms, all elections: permanently.
CLVI. Affidavits of religious exemption: until voter is removed from checklist plus 7 years.

Source. 2005, 187:3, eff. Aug. 29, 2005. 2006, 119:2-5, eff. May 12, 2006. 2010, 172:1-3, eff. Aug. 16, 2010; 191:1, eff. Aug. 20, 2010. 2012, 113:1, eff. May 31, 2012; 284:13, eff. Sept. 1, 2015. 2014, 319:1, eff. Sept. 30, 2014. 2015, 4:1, eff. July 4, 2015. 2017, 205:15, eff. Sept. 8, 2017. 2018, 247:1, 2, eff. Aug. 11, 2018. 2021, 227:2, eff. July 1, 2021.

TITLE VI
PUBLIC OFFICERS AND EMPLOYEES

CHAPTER 91-A
ACCESS TO GOVERNMENTAL RECORDS AND MEETINGS

Section 91-A:4

91-A:4 Minutes and Records Available for Public Inspection. –

I. Every citizen during the regular or business hours of all public bodies or agencies, and on the regular business premises of such public bodies or agencies, has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies, including minutes of meetings of the public bodies, and to copy and make memoranda or abstracts of the records or minutes so inspected, except as otherwise prohibited by statute or RSA 91-A:5. In this section, "to copy" means the reproduction of original records by whatever method, including but not limited to photography, photostatic copy, printing, or electronic or tape recording.

I-a. Records of any payment made to an employee of any public body or agency listed in RSA 91-A:1-a, VI(a)-(d), or to the employee's agent or designee, upon the resignation, discharge, or retirement of the employee, paid in addition to regular salary and accrued vacation, sick, or other leave, shall immediately be made available without alteration for public inspection. All records of payments shall be available for public inspection notwithstanding that the matter may have been considered or acted upon in nonpublic session pursuant to RSA 91-A:3.

II. After the completion of a meeting of a public body, every citizen, during the regular or business hours of such public body, and on the regular business premises of such public body, has the right to inspect all notes, materials, tapes, or other sources used for compiling the minutes of such meetings, and to make memoranda or abstracts or to copy such notes, materials, tapes, or sources inspected, except as otherwise prohibited by statute or RSA 91-A:5.

III. Each public body or agency shall keep and maintain all governmental records in its custody at its regular office or place of business in an accessible place and, if there is no such office or place of business, the governmental records pertaining to such public body or agency shall be kept in an office of the political subdivision in which such public body or agency is located or, in the case of a state agency, in an office designated by the secretary of state.

III-a. Governmental records created or maintained in electronic form shall be kept and maintained for the same retention or archival periods as their paper counterparts. Governmental records in electronic form kept and maintained beyond the applicable retention or archival period shall remain accessible and available in accordance with RSA 91-A:4, III. Methods that may be used to keep and maintain governmental records in electronic form may include, but are not limited to, copying to microfilm or paper or to durable electronic media using standard or common file formats.

III-b. A governmental record in electronic form shall no longer be subject to disclosure pursuant to this section after it has been initially and legally deleted. For purposes of this paragraph, a record in electronic form shall be considered to have been deleted only if it is no longer readily accessible to the public body or agency itself. The mere transfer of an electronic record to a readily accessible "deleted items" folder or similar location on a computer shall not constitute deletion of the record.

IV. (a) Each public body or agency shall, upon request for any governmental record reasonably described, make available for inspection and copying any such governmental record within its files when such records are immediately available for such release.

(b) If a public body or agency is unable to make a governmental record available for immediate inspection and copying the public body or agency shall, within 5 business days of a request:

(1) Make such record available;

(2) Deny the request; or

(3) Provide a written statement of the time reasonably necessary to determine whether the request shall be granted or denied and the reason for the delay.

(c) A public body or agency denying, in whole or part, inspection or copying of any record shall provide a written statement of the specific exemption authorizing the withholding of the record and a brief explanation of how the exemption applies to the record withheld.

(d) If a computer, photocopying machine, or other device maintained for use by a public body or agency is used by the public body or agency to copy the governmental record requested, the person requesting the copy may be charged the actual cost of providing the copy, which cost may be collected by the public body or agency. No cost or fee shall be charged for the inspection or delivery, without copying, of governmental records, whether in paper, electronic, or other form. Nothing in this

section shall exempt any person from paying fees otherwise established by law for obtaining copies of governmental records or documents, but if such fee is established for the copy, no additional costs or fees shall be charged.
V. In the same manner as set forth in RSA 91-A:4, IV, any public body or agency which maintains governmental records in electronic format may, in lieu of providing original records, copy governmental records requested to electronic media using standard or common file formats in a manner that does not reveal information which is confidential under this chapter or any other law. If copying to electronic media is not reasonably practicable, or if the person or entity requesting access requests a different method, the public body or agency may provide a printout of governmental records requested, or may use any other means reasonably calculated to comply with the request in light of the purpose of this chapter as expressed in RSA 91-A:1. Access to work papers, personnel data, and other confidential information under RSA 91-A:5, IV shall not be provided.
VI. Every agreement to settle a lawsuit against a governmental unit, threatened lawsuit, or other claim, entered into by any political subdivision or its insurer, shall be kept on file at the municipal clerk's office and made available for public inspection for a period of no less than 10 years from the date of settlement.
VII. Nothing in this chapter shall be construed to require a public body or agency to compile, cross-reference, or assemble information into a form in which it is not already kept or reported by that body or agency.

Source. 1967, 251:1. 1983, 279:2. 1986, 83:5. 1997, 90:2. 2001, 223:2. 2004, 246:2. 2008, 303:4. 2009, 299:1, eff. Sept. 29, 2009. 2016, 283:1, eff. June 21, 2016. 2019, 107:1, eff. Jan. 1, 2020; 163:2, eff. Jan. 1, 2020 at 12:01 a.m.

TITLE XII
PUBLIC SAFETY AND WELFARE

CHAPTER 170-G
SERVICES FOR CHILDREN, YOUTH AND FAMILIES

General Provisions

Section 170-G:8-a

170-G:8-a Record Content; Confidentiality; Rulemaking. –

I. The case records of the department consist of all official records, regardless of the media upon which they are retained, created by the department of health and human services in connection with a report received pursuant to RSA 169-C:29, or cases brought under RSA 169-B, 169-C, 169-D, or 463, or services provided to the child or family without a court order pursuant to RSA 170-G:4, including intake and assessment reports, service or case plans, case logs, termination reports and a list of persons or entities providing reports to the department or services to the child or family. Such records do not include:

(a) Records created as part of an action brought pursuant to RSA 170-B or 170-C.

(b) Records submitted to or maintained by the courts, or records created by third parties, such as psychologists, physicians, and police officers, even if such records are prepared or furnished at the request of the department. Requests for access to court records and records created by third parties may be made directly to the court or to the third party who created the record. Nothing in this section shall restrict or limit access to records filed pursuant to RSA 169-C:12-b.

(c) Reports contained in the central registry of abuse and neglect reports maintained pursuant to RSA 169-C:35.

(d) The name of a person who makes a report of suspected abuse or neglect of a child pursuant to RSA 169-C:29, or any information which would identify the reporter.

II. The case records of the department shall be confidential.

(a) The department shall provide access to the case records to the following persons unless the commissioner or designee determines that the harm to the child named in the case record resulting from the disclosure outweighs the need for the disclosure presented by the person requesting access:

(1) The child named in the case record.

(2) The parent of the child named in the case record, as defined in RSA 169-C:3, XXI.

(3) The guardian or custodian of the child named in the case record.

(4) Another member of the family of the child named in the case record, if disclosure is necessary for the provision of services to the child or other family member.

(5) Employees of the department and legal counsel representing employees of the department for the purpose of carrying out their official functions.

(6) Persons made parties to judicial proceedings in New Hampshire relative to the child or family, whether civil or criminal, including the court with jurisdiction over the proceeding, any attorney for any party, and any guardian ad litem appointed in the proceeding.

(7) A grand jury, upon its determination that access to such records is necessary in the conduct of its official business.

(8) The relevant county.

(9) Another state's child welfare agency or other government entity, or any law enforcement agency, including local and out-of-state law enforcement agencies, that requires the information in order to carry out its responsibility under law to protect children from abuse or neglect, including the investigation of child fatalities. For the purposes of this subparagraph, the term "law enforcement agency" shall include the attorney general, a county attorney, a county sheriff, the state police, and any local police department.

(b) The department shall disclose information from case records or provide access to case records to the following persons or entities, if such information or access is not harmful to the child and is necessary in order to enable the person or entity requesting information or access to evaluate or provide services, treatment or supervision to the child named in the case record or to the family:

(1) A person or entity requested by the department or ordered by the court to perform an evaluation or assessment on or to create a service plan for the child named in the case record, the child's family, or an individual member of the child's family.

(2) A person or entity requested by the department or ordered by the court to provide services to the child named in the case record or the child's family.

(3) The superintendent of schools for the school district in which the child named in the case record is then, or will, according to the child's case plan, be attending school.
(4) The person or entity with whom the child resides, if that person is not the child's parent, guardian, or custodian.
(5) The child's primary health care provider.
(6) A licensed medical practitioner who is overseeing the use of psychotropic medication prescribed to the child.
III. The commissioner shall adopt rules, pursuant to RSA 541-A, governing the procedures regulating access to all of the records of the department. Such rules shall contain provisions relative to:
(a) Access to case records by persons named in paragraph II of this section.
(b) Access to case records by a physician who has examined a child who the physician reasonably suspects may be abused or neglected.
(c) [Repealed.]
(d) Access to case records by a state official who is responsible for the provision of services to children and families, or a legislative official who has been statutorily granted specific responsibility for oversight of enabling or appropriating legislation related to the provision of services to children and families, for the purposes of carrying out their official functions, provided that no information identifying the subject of the record shall be disclosed unless such information is essential to the performance of the official function, and each person identified in the record or the person's authorized representative has authorized such disclosure in writing.
(e) Access to case records by a person conducting a bona fide research or evaluation project, provided that no information identifying the subject of the record shall be disclosed unless such information is essential to the purpose of the research, each person identified in the record or an authorized representative has authorized such disclosure in writing, and the department has granted its approval in writing.
(f) Access to case records by any person making a report of suspected child abuse or neglect pursuant to RSA 169-C:29, provided that such disclosure is limited to information about the status of the report under investigation, or information reasonably required to protect the safety of such person.
(g) Access to all other records of the department which are not case records as defined in paragraph II.
IV. Additional access to case records and all other records of the department shall be granted pursuant to the terms of a final order issued by a court of competent jurisdiction.
V. It shall be unlawful for any person entrusted with information from case records to disclose such records or information contained in them. Notwithstanding the previous sentence, it shall not be unlawful for a parent or child to disclose case records or the information contained in them to persons providing counsel to the child or family. It shall be unlawful for any person who receives case records or the information contained in them from a parent or a child to disclose such records or information. Any person who knowingly discloses case records or information contained in them in violation of this paragraph shall be guilty of a misdemeanor.
VI. Notwithstanding the foregoing:
(a) Any person who is entitled to access a case record pursuant to this section may share such information with any other person entitled to access pursuant to this section, unless the commissioner or a designee shall specifically prohibit such additional disclosure in order to prevent harm to a child.
(b) Nothing in this section shall be construed to require access to any records in violation of the order of a court of competent jurisdiction.
(c) Nothing in this section shall be construed to prevent a parent, guardian, immediate family member, or their counsel from releasing any records with the name of the child redacted.

Source. 1985, 367:10. 1993, 355:8. 1994, 212:2. 1995, 310:143, 175, 181, 183. 2009, 47:1, eff. July 21, 2009. 2016, 202:2, 3, eff. Aug. 5, 2016. 2019, 45:3, eff. Jan. 1, 2020. 2021, 182:10, eff. Jan. 1, 2022. 2022, 272:69, eff. June 24, 2022.

TITLE XXVI
CEMETERIES; BURIALS; DEAD BODIES

CHAPTER 290
BURIALS AND DISINTERMENTS

Custody of Remains of Deceased Persons

Section 290:16

290:16 Definitions. –
In this subdivision:
I. "At-need funeral arrangements" means funeral arrangements made after death.
II. "Custody and control" means the right to make all decisions, consistent with applicable laws, regarding the handling of a dead body, including but not limited to possession, at-need funeral arrangements, final disposition, and disinterment.
III. "Estranged" means living in separate residences and having a relationship characterized by hostility or indifference.
IV. "Next-of-kin" means a person having the following relationship to the subject, in the following order of priority:
(a) The spouse.
(b) An adult son or daughter.
(c) A parent.
(d) An adult brother or sister.
(e) An adult grandchild.
(f) An adult niece or nephew who is the child of a brother or sister.
(g) A maternal grandparent.
(h) A paternal grandparent.
(i) An adult aunt or uncle.
(j) An adult first cousin.
(k) Any other adult relative in descending order of blood relationship.
V. "Subject" means the person whose remains are placed in the custody and control of another person pursuant to this section.

Source. 1996, 283:18, eff. Jan. 1, 1997.

TITLE LIX
PROCEEDINGS IN CRIMINAL CASES

CHAPTER 611-B
OFFICE OF THE CHIEF MEDICAL EXAMINER

Section 611-B:21

611-B:21 Autopsy and Investigative Reports. –

I. The medical examiner shall charge a reasonable fee for each autopsy report made available upon request. Such fee shall be credited to the medico-legal investigation fund established under RSA 611-B:28.

II. Homicide autopsy reports shall be made available only to the department of justice unless a written release is provided by the department of justice.

III. Except as provided otherwise by law and in rules adopted by the chief medical examiner pursuant to RSA 541-A, autopsy reports, investigative reports, and supporting documentation are confidential medical records and, as such, are exempt from the provisions of RSA 91-A. Copies of such documents may be made available to the next of kin, a law enforcement, prosecutorial, or other governmental agency involved in the investigation of the death, the decedent's treating physician, and a medical or scientific body or university or similar organization for educational or research purposes. Autopsy reports, investigative reports, and supporting documents shall not otherwise be released without the authorization of next of kin.

IV. For any autopsy conducted pursuant to RSA 126-A:5, V, a report of any autopsy requested by the commissioner of health and human services shall be provided to the commissioner's quality assurance program and any autopsy findings, test results, reports, or any other information pertaining to the autopsy shall be treated by the department of health and human services in accordance with the quality assurance program under RSA 126-A:4, IV. The copy of the report provided to the department under this section shall be privileged and confidential as provided in RSA 126-A:4, IV(b), except that the medical examiner may forward a copy of the report to the department of justice if the medical examiner finds that the cause of death may be attributable to criminal conduct, or may otherwise disclose the report in accordance with this statute.

Source. 2007, 324:1, eff. Sept. 14, 2007.

Office of Legislative Services
Administrative Rules

WHAT IS THE OFFICIAL VERSION OF A RULE?

There is no official publisher of the complete *New Hampshire Code of Administrative Rules*. The Office of Legislative Services, Administrative Rules does not publish rules. Each agency publishes its own rules. But RSA 541-A:15, I specifies an "official version" of a rule.

Once an agency adopts and files a rule in hard copy with the Administrative Rules office pursuant to RSA 541-A, the Administrative Rules office enters the text into the Administrative Rules word processing database and assists the agency in preparing an edited version of the rule in an 8 1/2 x 11-inch camera-ready format for publication. Editing includes insertion of tables of contents, headers and footers, and Administrative Rules annotations called source notes and revision notes. Each agency is required by the Director of the Office of Legislative Services to publish all of its effective rules in this camera-ready format. See RSA 541-A:15, I and I-a and Chapter 5 and Appendix I of the New Hampshire Drafting and Procedure Manual for Administrative Rules.

Pursuant to 1998, 346, for rules filed and effective after August 25, 1998, the "as-filed" rule remains the "official version" of the rule unless or until the agency "certifies" that the camera-ready rule is the same in substance as originally filed. If the agency certifies, then this certified rule becomes the official version, and the Administrative Rules office places the text of the certified rule online in Agency Administrative Rules.

Online Copies of Rules from the Administrative Rules Web Site

An effective rule will not appear on Agency Administrative Rules until the agency certifies the rule as described above. Expired rules are deleted or their source notes marked "Expired" once their expiration is known to the Administrative Rules office. If an existing rule has been amended or superseded by a later filing, the online rule will not be updated until the agency certifies the updated rule. See How to Double-Check the On-Line Rule to determine if the online rule is current. The online rule text, including text of the Administrative Rules office's editorial work, such as source notes, revision notes, and tables of contents, is otherwise identical with the certified, official version of the rule. However, the rules as they appear on the Administrative Rules web site are NOT the official version under RSA 541-A since the format of online rules is not exactly the same as the official version, the online rule text may have been amended or superseded by a later filing that has not yet been certified and placed online, and online rules may have expired. See How to Double-Check the On-Line Rule.

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Agencies, legislators, and the public may request a copy of the official version of currently effective rules from the Administrative Rules office.

Mailing and Office Address:

Office of Legislative Services Administrative Rules
25 Capitol Street, Room 219
Concord, NH 03301-6312

Phone / Fax:

Tel. (603) 271-3680
Fax (603) 271-7871
TDD Access: Relay NH 1-800-735-2964 or dial 711 (in NH)

Email: adminrules@leg.state.nh.us

Cost of Copies from the Administrative Rules Office

Format	Cost
Hard Copy	*$.20 per page for the public, but no charge to legislators or N. H. state agencies.
E-Mail	No charge, but available only for certified rules.
Website	See above.

*Make checks payable to "Treasurer, State of New Hampshire."

Director's Copy of a Rule with an Affidavit

Upon an oral or written request for evidentiary purposes, the Administrative Rules office will prepare an affidavit signed by the Director or the Director's designee with a hard copy of the "official version" of effective rules, or a copy of expired rules. The affidavit in this sense "certifies" that the attached is a true copy of the rule. The affidavit will be either notarized or signed by a Justice of the Peace. There is no charge for this service to an agency or a legislator. The charge to others is $.20 per page for each rule.

Agencies

Each agency must maintain a file of its own currently effective rules in the official version open to the public. See RSA 541-A:14, IV and RSA 541-A:15, I. An agency may charge the actual cost of preparing a copy. See RSA 541-A:11, VI. These rules are also public records and must be open and available as required by RSA 91-A:4, IV, the Right-to-Know Law.

State Library

The State Library receives the "official version" of rules, both as-filed and as certified, declaratory rulings, and agency filing histories from the Administrative Rules office. It may also have unofficial publications of rules from private publishers. Several state agencies also place rules on the "Webster" web site maintained by the State Library at nh.gov. The Office of Legislative Services, Administrative Rules, makes no representation regarding the accuracy of rules published by private publishers or of rules placed by an agency on the "Webster" web site. For copies, requests shall be made to:

New Hampshire State Library
Reference and Information Services
20 Park Street
Concord, NH 03301-6314

Tel. (603) 271-2144, 271-2239
Fax (603) 271-2205
TDD Access: Relay NH 1-800-735-2964 or dial 711 (in NH)

N.H. Law Library

The N. H. Law Library at the State Supreme Court receives from the Administrative Rules office the same rules and other documents as the State Library. For copies or questions, requests shall be made to:

John W. King New Hampshire Law Library
Supreme Court Building
One Charles Doe Drive

Concord, NH 03301

Tel. (603) 271-3777
Fax (603) 513-5450
E-mail: lawlibrary@courts.state.nh.us
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157 N.H. 72
Supreme Court of New Hampshire.

Paul McNAMARA and another
v.
Barry R. HERSH and another.

No. 2007–225.
|
Argued: Jan. 31, 2008.
|
Opinion Issued: April 4, 2008.

Synopsis

Background: Homeowners brought declaratory judgment action against town and owners of abutting lot, alleging that building permit issued abutting owners' predecessors in title was unlawful and void. The Superior Court, Belknap County, Smukler, J., dismissed plaintiffs' petition. Homeowners appealed.

[Holding:] The Supreme Court, Duggan, J., held that homeowners were not excused from exhausting their administrative remedies.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (10)

[1] **Appeal and Error** Failure to State Claim, and Dismissal Therefor

In reviewing a motion to dismiss, the standard of review is whether the allegations in the petitioners' pleadings are reasonably susceptible of a construction that would permit recovery.

10 Cases that cite this headnote

[2] **Pretrial Procedure** Construction of pleadings

On a motion to dismiss, the court assumes the petitioners' pleadings to be true and construes all reasonable inferences in the light most favorable to them.

10 Cases that cite this headnote

[3] **Appeal and Error** Failure to State Claim, and Dismissal Therefor

In reviewing an order granting a motion to dismiss, the appellate court engages in a threshold inquiry that tests the facts in the petition against the applicable law, and if the allegations constitute a basis for legal relief, the appellate court must hold that it was improper to grant the motion to dismiss.

11 Cases that cite this headnote

[4] **Zoning and Planning** Exhaustion of administrative remedies; primary jurisdiction

Ordinarily, under requirement of exhaustion of administrative remedies, challenges to decisions regarding building permits must first be made to the local zoning board of adjustment, and if a party is dissatisfied with the result from the local zoning board of adjustment, the party may then appeal to the superior court. RSA 674:33, 676:5, 677:3, 677:4.

1 Case that cites this headnote

[5] **Zoning and Planning** Exhaustion of administrative remedies; primary jurisdiction

The legislature enacted a scheme that ordinarily requires exhaustion of administrative remedies when challenging decisions regarding building permits in order to give the local zoning board the first opportunity to pass upon any alleged errors in its decisions, so that the court may have the benefit of the board's judgment in hearing the appeal. RSA 674:33, 676:5, 677:3, 677:4.

1 Case that cites this headnote

[6] **Administrative Law and Procedure** Exhaustion of Administrative Remedies

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Generally, parties must exhaust their administrative remedies before appealing to the courts.

1 Case that cites this headnote

[7] **Administrative Law and Procedure** Nature and purpose

The rule generally requiring exhaustion of administrative remedies is based on the reasonable policies of encouraging the exercise of administrative expertise, preserving agency autonomy, and promoting judicial efficiency.

4 Cases that cite this headnote

[8] **Declaratory Judgment** Statutory remedy

A petitioner need not exhaust administrative remedies, and may bring a declaratory judgment action to challenge the decisions of municipal officers and boards, when the action raises a question that is peculiarly suited to judicial rather than administrative treatment, and no other adequate remedy is available.

3 Cases that cite this headnote

[9] **Administrative Law and Procedure** Constitutional or legal questions

Municipal Corporations Proceedings concerning construction and validity of ordinances

Judicial treatment may be particularly suitable, as exception to rule generally requiring exhaustion of administrative remedies, when the constitutionality or validity of an ordinance is in question or when the agency at issue lacks the authority to act, since those are the types of legal issues as to which specialized administrative understanding plays little role.

1 Case that cites this headnote

[10] **Declaratory Judgment** Statutory remedy

Question raised in homeowners' declaratory judgment petition, which was whether building permit issued to abutting landowners' predecessors in interest violated town ordinance that allowed building on only ten percent of the land, was not a question that was peculiarly suited to judicial treatment or resolution, and thus, homeowners were not excused from exhausting their administrative remedies. RSA 674:33, 676:5, 677:3, 677:4.

1 Case that cites this headnote

Attorneys and Law Firms

****19** Sheehan Phinney Bass + Green, P.A., of Manchester (Robert H. Miller, on the brief and orally), for the petitioners.

Rath, Young and Pignatelli, P.C., of Concord (Andrew W. Serell, on the brief and orally), and Donahue, Tucker & Ciandella, PLLC, of Portsmouth (Christopher L. Boldt, on the brief and orally), for the respondents.

Opinion

DUGGAN, J.

***73** The petitioners, Paul and Barbara McNamara, appeal a decision of the Superior Court (*Smukler,* J.) dismissing their declaratory judgment petition against the respondents, Barry and Terry Hersh and the Town of Sanbornton (Town). We affirm.

The McNamaras allege the following. The Hershes own a lot on Broadview Drive in Sanbornton. The McNamaras own an abutting lot. On January 12, 2005, the Town Board of Selectmen issued a building permit to the Hershes' predecessors in title to construct a new residence. The Town Board of Selectmen later transferred the building permit to the Hershes. On June 15, 2005, the McNamaras purchased their home, not knowing that a building permit had been issued on the abutting lot. The Hershes began to construct their residence in mid-October 2005. The McNamaras never appealed the decision to issue the building permit to the local zoning board of adjustment. *See* RSA 674:33, I–III (1996); RSA 676:5 (1996).

****20** On August 21, 2006, the McNamaras sought a declaratory judgment that the building permit was unlawfully issued and thus void. Their primary argument was that the local ordinance only permitted building on ten percent of

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the land, but the permit allowed building on thirteen percent of the land. The Town moved to dismiss, arguing that the McNamaras had failed to exhaust their administrative remedies. The trial court ruled in the Town's favor, and this appeal followed.

[1] [2] [3] In reviewing a motion to dismiss, "our standard of review is whether the allegations in the [petitioners'] pleadings are reasonably susceptible of a construction that would permit recovery." *K & B Rock Crushing v. Town of Auburn,* 153 N.H. 566, 568, 904 A.2d 697 (2006) (quotation omitted). We assume the McNamaras' pleadings to be true and construe all reasonable inferences in the light most favorable to them. *Id.* We then engage in a threshold inquiry that tests the facts in their petition against the applicable law, and if the allegations constitute a basis for legal relief, we must hold that it was improper to grant the motion to dismiss. *Konefal v. Hollis/Brookline Coop. School District,* 143 N.H. 256, 258, 723 A.2d 30 (1998).

[4] [5] The central issue in this case is whether the McNamaras' declaratory judgment action was barred because they failed to exhaust their administrative remedies. Ordinarily, challenges to decisions regarding building permits must first be made to the zoning board of adjustment. *See* RSA 674:33; RSA 676:5; RSA 677:3 (1996). Should a party be dissatisfied with the result from the local zoning board, the party may then appeal to the superior court. *See* RSA 677:4 (Supp.2007). The legislature enacted this ***74** scheme to give the local zoning board the "first opportunity to pass upon any alleged errors in its decisions so that the court may have the benefit of the board's judgment in hearing the appeal." *Robinson v. Town of Hudson,* 154 N.H. 563, 567, 914 A.2d 239 (2006) (citation omitted). Here, the McNamaras did not follow this statutory procedure. They argue, however, that they need not have done so because their challenge to the building permit raises a pure question of law. We disagree.

[6] [7] [8] [9] Generally, parties must exhaust their administrative remedies before appealing to the courts. *See Metzger v. Brentwood,* 115 N.H. 287, 290, 343 A.2d 24 (1975). This rule is "based on the reasonable policies of encouraging the exercise of administrative expertise, preserving agency autonomy and promoting judicial efficiency." *Bradley v. City of Manchester,* 141 N.H. 329, 331–32, 682 A.2d 1194 (1996) (quotation omitted). However, this rule, as applied, is flexible, and recognizes that exhaustion is not required under some circumstances. *Metzger,* 115 N.H. at 290, 343 A.2d 24. In limited situations, it is unnecessary to "burden local legislative bodies and [zoning boards] with the responsibility for rulings on subjects that are beyond their ordinary competence." *Blue Jay Realty Trust v. City of Franklin,* 132 N.H. 502, 509, 567 A.2d 188 (1989). Thus, a petitioner need not exhaust administrative remedies and may bring a declaratory judgment action to challenge the decisions of municipal officers and boards when the action raises a question that is "peculiarly suited to judicial rather than administrative treatment and no other adequate remedy is available." *Olson v. Town of Litchfield,* 112 N.H. 261, 262, 296 A.2d 470 (1972). Judicial treatment may be particularly suitable when the constitutionality or validity of an ordinance is in question or when the agency at issue lacks the authority to act. *Metzger,* 115 N.H. at 290, 343 A.2d 24. These are the types of legal ****21** issues "as to which specialized administrative understanding plays little role." *Ashland School Dist. v. N.H. Div. for Children,* 141 N.H. 45, 47–48, 681 A.2d 71 (1996).

For example, in *Pheasant Lane Realty Trust v. City of Nashua,* 143 N.H. 140, 141, 720 A.2d 73 (1998), the City of Nashua sought to issue a supplemental tax bill on the subject property. Pheasant Lane Realty Trust argued that the city lacked the authority to do so. *Pheasant Lane Realty Trust,* 143 N.H. at 141, 720 A.2d 73. On appeal, we held that whether the City had the authority to issue a supplemental assessment presented a question of statutory interpretation better suited for judicial review. *Id.* at 142, 720 A.2d 73. Accordingly, we ruled that Pheasant Lane Realty Trust was not required to exhaust administrative remedies. *Id.* Similarly, we held in *Porter v. Town of Sandwich,* 153 N.H. 175, 176, 891 A.2d 521 (2006), that questions regarding whether the city's assessment violated an agreement and/or a statute were better suited for judicial review, and thus exhaustion was not required. *Id.* at 175–76, 891 A.2d 521.

***75** In *Blue Jay Realty Trust,* the petitioners challenged the validity of amendments to the city's zoning ordinance by filing a declaratory judgment petition. *Blue Jay Realty Trust,* 132 N.H. at 503, 567 A.2d 188. On appeal, we held that the petitioners need not exhaust their administrative remedies because "the charges of invalidity raised by th[e] petition require[d] determinations of statutory and constitutional law, not customarily passed upon by city councils." *Id.* at 509, 567 A.2d 188; *see also Ashland School Dist.,* 141 N.H. at 47–48, 681 A.2d 71 (holding that statutory provisions setting forth financial obligations of local school districts did not require administrative appeal); *Metzger,* 115 N.H. at 291, 343 A.2d 24 (holding that whether closed town road was "public right

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of way" was narrow legal question that did not require an application for a rehearing before appeal to superior court).

By contrast, in *Property Portfolio Group, LLC v. Town of Derry,* 154 N.H. 610, 616–17, 913 A.2d 750 (2006), we held that an abutter's challenge to the procedural irregularities of the planning board's decision did not raise a question of law, but rather contested the planning board's exercise of administrative discretion, and thus exhaustion was required. The issues raised by the abutter were better suited for administrative treatment, as the administrative authority had the ability to consider and weigh all the facts presented. *See id.* at 617, 913 A.2d 750; *see also Konefal,* 143 N.H. at 259, 723 A.2d 30 (holding that because the petitioner's claims required resolution of disputed fact, they were questions of administrative discretion and required her to exhaust her administrative remedies).

We also note that in some limited circumstances even constitutional challenges to zoning ordinances may require a party to exhaust its administrative remedies before bringing a declaratory judgment petition. *See Town of Auburn v. McEvoy,* 131 N.H. 383, 384, 553 A.2d 317 (1988). For example, in *McEvoy,* the defendant McEvoy conveyed a subdivision lot to the Town in 1979 in compliance with a zoning ordinance later held to be unconstitutional in *J.E.D. Associates, Inc. v. Town of Atkinson,* 121 N.H. 581, 432 A.2d 12 (1981). *McEvoy,* 131 N.H. at 384, 553 A.2d 317. After being made aware of this decision, the defendants sought to apply it to their subdivisions. *Id.* The Town refused. *Id.* We held that the failure of the defendant to appeal the 1979 planning board order within thirty days precluded relief. *Id.* at 385, 553 A.2d 317. We noted that although the constitutionality of a zoning ****22** ordinance is an issue peculiarly suited for judicial review, "the legislature obviously expressed an intent to endue such an order with finality." *Id.* The Town had a great interest in the finality of the order out of fairness to the third parties who later purchased the lots. *Id.* Because the constitutional challenge was not raised in an appeal to the planning board in 1979, the defendant was not then entitled to raise the issue five years later. *Id.* at 388, 553 A.2d 317.

[10] ***76** The only question raised in the McNamaras' declaratory judgment petition, whether a building permit complies with the ordinance, is not a question that is peculiarly suited to judicial treatment or resolution. *Olson,* 112 N.H. at 262, 296 A.2d 470. This is a question that is routinely resolved by the local zoning board. The McNamaras are not challenging the validity or constitutionality of the Town's zoning ordinance, nor do they argue that the Town lacked statutory authority to issue a permit. Rather, the alleged error is that the permit violates the ordinance, an error that is within the power of the zoning board to correct. The McNamaras' proper remedy, therefore, was to appeal to the zoning board. Here, "exact compliance" with the statutory procedure would have allowed the board "to reassess the facts and to use its expertise to reach a different conclusion," which may have obviated the need for judicial review. *Metzger,* 115 N.H. at 291, 343 A.2d 24. Even if the issue the McNamaras wished to raise was peculiarly suited to judicial resolution, they still would not be allowed to bring a declaratory judgment petition after the appeal period expired, as that would undermine the finality of the Town Board's decision and leave the Hershes subject to uncertainty as to their rights. *See McEvoy,* 131 N.H. at 385, 553 A.2d 317.

The trial court specifically found that "[t]he McNamaras could have appealed the issuance of this building permit within a reasonable time after they discovered that the building permit had been issued. They failed to do so." On appeal the McNamaras do not challenge this ruling. Thus, to allow the McNamaras to bring their declaratory judgment petition directly to superior court "would serve neither the purpose of the statute[s] nor the policies behind the exhaustion rule." *Metzger,* 115 N.H. at 290, 343 A.2d 24. Accordingly, we hold that the trial court did not err in dismissing the McNamaras' declaratory judgment petition.

Affirmed.

BRODERICK, C.J., and DALIANIS, GALWAY and HICKS, JJ., concurred.

All Citations

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