

October 15, 2001

VIA FACSIMILE AND U.S. MAIL

George Meyer, Executive Director  
Pease Development Authority  
360 Corporate Drive  
Pease International Tradeport  
Portsmouth, N.H. 03801

### **OPINION**

Dear Mr. Meyer:

You have requested our opinion by letter dated September 25, 2001 regarding a set of proposed rules and/or bylaws (“potential rules”) that you have indicated the Division of Ports and Harbors Advisory Council (“Council”) intends to submit to the Pease Development Authority (“Authority”) for adoption.

By way of background, during the 2001 legislative session, the legislature enacted, and the Governor signed into law, House Bill 543-FN (Chapter 290 Laws of 2001, effective July 1, 2001). HB 543-FN repealed and reenacted RSA Chapter 12-G. Most notably, HB 543-FN established the Division of Ports and Harbors (“Division”) within the Authority. RSA 12-G:43. Under RSA 12-G:42, the Authority is responsible for the “former functions, duties, and responsibilities of the port authority . . . .” The legislature also established the Council within the Division and charged it with the responsibility of “consult[ing] with and advis[ing] the division director with respect to the policy, programs, and goals of the division, the operation of the port, the selection of harbor masters and assistant harbor masters, and the procurement of services of a port terminal operating firm.” RSA 12-G:44, I and III. In addition, the Council has the authority to propose rules to the Authority for adoption. RSA 12-G:44, V.

You pose thirteen questions, the first of which pertains to whether the Authority and the Council are subject to the general supervisory powers of the Attorney General under RSA 7:8. The remaining twelve questions raise issues regarding the substance and procedures relating to the potential rules.

### **Question No. 1**

Are the Authority and the Council “state departments, commissions, boards, bureaus, and officers” subject to the general supervisory powers of the Attorney General and bound to follow his legal advice, including his advice regarding the interpretation of RSA Chapter 12-G? For the reasons that follow, we answer this question in the affirmative.

### **Response to Question 1**

Pursuant to RSA 7:8, the Attorney General exercises general supervisory power over “state departments, commissions, boards, bureaus, and officers.” Whether an entity is governed by RSA 7:8 must be resolved on a case-by-case basis through examination of the enabling legislation creating the entity. Among the factors to be considered are the following: (1) the language of the statute; (2) the constituency for whose benefit the entity was created; and, (3) the long-standing administrative interpretation by the entity. See Opinion of the Attorney General, No. 85-106 (August 15, 1985); see also N.H. Retirement System v. Sununu, 126 N.H. 104, 108-10 (1985).

The Authority’s enabling statute provides that the Authority is a “body politic and corporate of the state . . . deemed to be a public instrumentality, and the exercise by the authority of the powers conferred by [RSA Chapter 12-G are] deemed and held to be the performance of public and essential governmental functions of the state.” RSA 12-G:3, I. The legislature created the Authority to carry out functions relating to the redevelopment of the Pease Air Force Base, that include but are not limited to, obtaining federal approval of the comprehensive conversion and redevelopment plan (“plan”), implementing all aspects of the plan, and taking title in the name of the State to any or all of Pease Air Force Base. RSA 12-G:1. RSA Chapter 12-G does not expressly state whether the legislature intended the Authority to be subject to RSA 7:8. A review of the legislative history, however, reflects a legislative intent to form the Authority as a state agency.

The bill which established the Authority (SB 351-FN) was amended by the House for the express purpose of making the Authority a state agency. The bill, as originally adopted by the Senate, established the Authority as “a body politic and corporate having a distinct legal existence separate from the state and not constituting a department of state government . . . .” Senate Journal, February 1, 1990 p. 236 (setting forth the version of RSA 12-G:3, I as passed by the Senate). When the bill came to the House, however, the Commerce Committee recommended changes to SB 351-FN. “The first important change address[ed] the concern of the Federal Aviation Authority in that it was mandated that the Development Authority be a state agency.” House Journal, March 29, 1990, p. 861. The House addressed the FAA’s concerns by removing the language that described the Authority as an entity

separate and distinct from the State. The final version of the bill established the Authority as “a body politic and corporate of the state” without reference to its having “a distinct legal existence from the state and not constituting a department of state government.” RSA 12-G:3.

Unlike the New Hampshire Retirement System, which benefits a specific group of people, the legislature established the Authority for the benefit of the entire State. As stated by Senator Dupont, a sponsor of SB 351-FN, “this is an opportunity . . . not just for the seacoast area, but for the whole State. I think the economic opportunity there to develop industry or develop new industries will be beneficial not just to Portsmouth and Newington and Strafford County but will be beneficial to the whole State.” Senate Journal, February 1, 1990, p. 229-30. Recognizing the state-wide impact of the bill, the Senate restructured the membership of the Authority. As originally submitted, the bill proposed a nine-member board of directors, with Portsmouth and Newington each having two appointees. Senate Journal, February 1, 1990, p. 256-257. The Senate amended the bill to create a seven-member board of directors, with Portsmouth and Newington having only one appointee each. This amendment, affecting the local-state power balance in the Authority, indicates that the legislature created the Authority for the benefit of a broad constituency.

The long-standing administrative interpretation applied by the Authority lends further support to the interpretation that the Authority is subject to supervision by the Attorney General under RSA 7:8. We understand that the Authority has consistently viewed itself as subject to RSA 7:8, and has sought and followed the advice of this office. The legislature has not interfered with this interpretation, indicating that the administrative construction conforms to the legislative intent. See Sununu, 126 N.H. at 109-110. Indeed, RSA Chapter 12-G stands in stark contrast to other statutes in which the legislature has created entities enjoying a legal existence separate from the State. See e.g. RSA 204-C:2 (Housing Finance Authority is a “body politic and corporate having a distinct legal existence separate from the state and not constituting a department of state government”).

Finally, RSA 12-G:32 requires the Authority to “comply with the requirements of RSA 9:1 through 9:9, relative to the budget.” Those provisions apply to executive branch departments and agencies. RSA 9:1. The inclusion of this requirement in RSA Chapter 12-G further supports the conclusion that the legislature intended the Authority to be subject to RSA 7:8.

The Division and its Council are also subject to supervision by the Attorney General under RSA 7:8. The Division is an “agency of the State.” RSA 12-G:43, I (a). Within the Division is the Council that is created to consult with and advise the Division Director. RSA 12-G:44, III. Chapter 290:1, II transferred all “functions, powers, duties, personnel, records,

and funds of the New Hampshire state port authority advisory board . . . to the Pease development authority, division of ports and harbors . . . .” In advising the Division, the Council performs functions solely related to the Division which is an executive branch agency.

For the foregoing reasons, it is our opinion that the Authority and the Division’s Council are subject to the general supervisory power of the Attorney General under RSA 7:8.

### **Question No. 2**

Do “bylaws” proposed by the Council constitute “rules” governed by the provisions of RSA 541-A?

### **Response to Question 2**

RSA 12-G:44, II states that the Council may “establish bylaws for the management of its affairs within the meaning of this chapter and the laws of the state.” RSA Chapter 12-G does not define the term “bylaws.” Where possible, the plain and ordinary meaning must be ascribed to words used. Appeal of Astro Spectacular, 138 N.H. 298, 300 (1994). The usual and customary meaning of “bylaws” is “regulations, ordinances, rules or laws adopted by an association or corporation or the like for its internal governance.” Black’s Law Dictionary Sixth Edition 201 (1990). Under its plain and ordinary meaning, RSA 12-G:44, II only authorizes the Council to adopt bylaws governing its own internal organization and operation.

The Administrative Procedure Act defines “rule” as,

each regulation, standard, or other statement of general applicability adopted by an agency to (a) implement, interpret, or make specific a statute enforced or administered by such agency or (b) prescribe or interpret an agency policy, procedure or practice requirement binding on persons outside the agency, whether members of the general public or personnel in other agencies.

RSA 541-A:1, XV. Bylaws adopted by the Council neither implement statutes enforced by the Authority, nor do they interpret agency policy binding on persons outside of the agency. As such, the Council’s bylaws do not constitute rules governed by RSA Chapter 541-A.

### **Questions No. 3-5**

Questions No. 3-5 relate to the procedures for adoption of rules under RSA 12-G:44, V and 12-G:42, VIII. The Authority seeks our opinion as to whether rules that the Council intends to submit to the Authority are subject to RSA Chapter 541-A; whether the Council must delineate proposed rules separately from bylaws; and whether the Council must specify the statutory provisions the rules are intended to implement.

### **Response to Questions 3-5**

Pursuant to RSA 12-G:44, V, the Council may propose rules to the Authority for adoption under RSA 12-G:42, VIII. Under RSA 12-G:42, VIII the Authority is authorized to adopt rules pursuant to RSA Chapter 541-A. The language of RSA 12-G:42, VIII is plain and unambiguous, and it requires the Authority to follow the procedures embodied in RSA Chapter 541-A when undertaking rulemaking under RSA 12-G:42, VIII. This includes rules proposed by the Council. RSA 12-G:44, V.

To initiate the rulemaking process under RSA Chapter 541-A, the Authority must file a notice of the proposed rule, and file the text of the rule. See RSA 541-A:3, I and III. In doing so, the Authority must “identify the specific section or sections of state or federal statutes or regulations which the rule is intended to implement . . . .” RSA 541-A:3-a, I.<sup>1</sup> For instance, RSA 12-G:42, VIII(b) authorizes the Authority to adopt rules relative to “Harbors and harbor masters.” A rule adopted under that subparagraph implements RSA 12-G:42, III, which “authorize[s] and empower[s] [the Authority] to appoint and compensate a chief harbor master and harbor masters for communities within the confines of which there are ports, harbors, or navigable tide water of the state . . . .” Likewise, a rule adopted under the catchall subparagraph relative to “[a]ny matter necessary for the proper administration of the division” must also implement a specific statute.

In conclusion, while RSA Chapter 12-G is silent as to whether the Council must identify the implementing statute, as a practical matter, RSA Chapter 541-A requires the Authority to identify the statute when initiating the rulemaking process. If the Authority determines that the Council has failed to provide the Authority with the necessary information to enable the Authority to satisfy the requirements of RSA 541-A:3-a, or to distinguish between bylaws and proposed rules,<sup>2</sup> the Authority may object to the rule on that basis and explain the reasons for objection in their written reply. RSA 12-G:44, V.

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<sup>1</sup> The Authority is further required to “conform to a drafting and procedure manual for rules.” RSA 541-A:8.

<sup>2</sup> The Council need not submit proposed bylaws to the Authority for consideration. Compare RSA 12-G:44, II (“The council shall have the right to establish bylaws . . . .”), with RSA 12-G:44, V (“The council may propose rules

### **Question No. 6**

May the Authority modify or revise any proposed rule submitted by the Council prior to adoption or initiating the rulemaking process under RSA Chapter 541-A? If so, are 4 or 5 affirmative votes of the Pease Development Authority Board ("Board") required for such modification or revision?

### **Response to Question 6**

RSA 12-G:44, V provides as follows:

The council may propose rules to the authority for adoption under RSA 12-G:42, VIII. The authority shall adopt rules proposed by the council unless, within 15 days of their proposal, the authority, by 5 affirmative votes, objects to the adoption of such rules and presents a written reply to the council detailing the reasons for objection.

"It is well established law that the intention of the legislature expressed by the words in the statute itself is the touchstone to its meaning." Corson v. Brown Prods., Inc., 119 N.H. 20, 23 (1979). Nowhere in RSA Chapter 12-G does the legislature allow the Authority to modify or revise a proposed rule submitted by the Council pursuant to RSA 12-G:44, V. RSA 12-G:44, V simply authorizes the Authority to object to the adoption of rules proposed by the Council, by 5 affirmative votes. Accordingly, the Authority cannot modify or revise a proposed rule of the Council. See Appeal of Astro Spectacular, 138 N.H. at 300 (courts can neither ignore the plain language of the legislation nor add words which the lawmakers did not see fit to include).

### **Question No. 7**

RSA 12-G:44, V, states that "[t]he authority shall adopt rules proposed by the council unless, within 15 days of their proposal, the authority . . . objects . . . ." Given the importance of ensuring that the Authority has received the final version of any rules proposed by the Council, the fact that the Board convenes only intermittently, and the short time frame for responding to any such submissions, the Authority interprets this statutory provision to require that any Council rule proposed for adoption by the Authority be submitted to the Board at one of its regularly scheduled and noticed meetings before the 15-

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to the authority for adoption under RSA 12-G:42, VIII." But see RSA 12-G:44, III (the Authority may override any action of the Council by 5 affirmative votes).

day time period for responding is deemed to have commenced. Is this interpretation consistent with your interpretation of RSA 12-G:44, V?

### **Response to Question 7**

RSA 12-G:44, V requires the Authority to respond to rule proposals from the Council “within 15 days of their proposal.” RSA 12-G:44, V. Under tenets of statutory construction, statutes are not to be interpreted in isolation, but in the context of the overall statutory scheme, Appeal of HCA Parkland Med. Ctr., 143 N.H. 92, 94 (1998), and “so as to effectuate their evident purpose.” Quality Carpets, Inc. v. Carter, 133 N.H. 887, 889 (1991) (quotation omitted). A construction is not applied that nullifies, to an appreciable extent, that purpose. See State v. Kay, 115 N.H. 696, 698 (1975).

Under the statutory scheme established in RSA Chapter 12-G, the Authority is managed by a board of 7 members who serve without compensation from the Authority. RSA 12-G:4, I and IV. A minimum of 4 affirmative votes is required for any action of the Board, except for the adoption of land use controls which requires 5 votes, and 4 members of the Board constitute a quorum. RSA 12-G:4, III. Action on proposed rules of the Council under RSA 12-G:44, V is subject to the quorum and vote requirements of RSA 12-G:4, III. Accordingly, to consider and vote on proposed rules of the Council, the Board must act in a properly noticed meeting with sufficient members attending to constitute a quorum.

Construing RSA 12-G:44, V to mean that the 15 day period for the Board to act under the statute commences when the Council actually submits the proposed rule to Authority staff may produce the following consequence: the Council could submit a rule to the Board such that the 15 day period would expire before the Board’s next scheduled meeting. The Council’s proposed rule would then automatically be subject to the commencement of rulemaking without consideration by the Authority. Such a result conflicts with the evident purpose of RSA 12-G:44, V which is to enable the Authority to consider the Council’s proposed rules. Such an interpretation of RSA 12-G:44, V would nullify to an appreciable extent the operation of the statute.

Accordingly, RSA 12-G:44, V must be construed to enable the Authority to meaningfully consider a proposed rule. Adoption of a rule under RSA 12-G:42, VIII (f) setting forth a specific process for submission of the proposed rule to the Authority under RSA 12-G:44, V may be appropriate. Such a rule should establish a reasonable period of time for submission of the proposal to the Board so that the Board has an adequate opportunity to review the proposal. To comply with the statute, the rule may require that the proposal be submitted no more than 15 days before a regularly scheduled and noticed meeting of the Board.

### **Questions No. 8-13**

You have attached to your September 25, 2001 letter a set of proposed directives styled as "Proposed Administrative Bylaws and Rules for the Division Advisory Council." See Attachment 1, hereto. Questions No. 8-13 relate to specific rules and/or bylaws numbered 2-6, and 8 that you have indicated the Council intends to propose to the Authority. The Authority seeks our opinion as to whether these potential rules exceed the rule-making authority provided under RSA 12-G:42, VIII.

### **Response to Questions 8-13**

"Rules adopted by State boards and agencies may not add to, detract from or in any way modify statutory law. The rule-making authority is granted to permit boards to fill in details to effectuate the purpose of the statute." Kimball v. N.H. Board of Accountancy, 118 N.H. 567, 568 (1978) (citations omitted). "If a board, in making a rule, acts beyond the limited discretion granted by a valid enactment, the rule is invalid." Id.

The Authority, acting through its Division, is "responsible for the former functions, duties, and responsibilities of the port authority . . ." RSA 12-G:42. The Authority's powers are broad, and include "every power enumerated in the laws of the state granted to the . . . division, . . . division director, . . . [and] the port authority." RSA 12-G:9. In contrast, the Council's authority is limited to consulting with and advising the Division Director. RSA 12-G:44, III.

Potential rules No. 3 and No. 4 modify and detract from the statutory duties assigned to the Authority under RSA Chapter 12-G. The Council's potential rule No. 3 grants the Council the authority to "review and approve the annual operating budget for the Division . . ." Potential rule No. 4 grants the Council, in part, the authority to "approve the annual budget for the marketing plan." Granting the Council the power to "approve" these Division budgets modifies and conflicts with the legislature's grant of such power and duties to the Authority. RSA 12-G:42; RSA 12-G:9. Accordingly, no source of authority exists for adoption of such rules.

Similarly, potential rule No. 6 modifies and interferes with the statutory duties assigned to the Authority under RSA Chapter 12-G. Potential rule No. 6 requires that the Council and the Portsmouth City Manager's office be notified a number of days prior to the arrival of cargo or passenger vessels at the marine terminal. If literally followed, the rule would be violated whenever the Authority arranged for the arrival of such vessels on short notice. The Authority, through the Division, is charged with planning for the maintenance and development the ports of the State to foster and stimulate commerce and the shipment of



freight through the State's ports, and for performing such other duties and functions relating to the administration, management, and operation of Division property and projects. RSA 12-G:43, I(a) and (f). A rule limiting the Authority's ability to carry out its statutory duty to perform such functions would detract from the legislature's broad grant of duties to the Authority under RSA Chapter 12-G. Accordingly, no source of authority exists for adoption of potential rule No. 6 as it is currently written.

Potential rule No. 8 authorizes the Council to "conduct an annual performance review of the Port Director as it relates to the position's responsibilities as defined in 12-G:43 and as it relates to specific Division Advisory Council Bylaws . . . ." Whether potential rule No. 8 modifies or detracts from the Authority's statutory duties depends on the meaning of the term "annual performance review" as contained in the rule.

The Authority has the exclusive power to direct and control the Division Director. RSA 12-G:43, II establishes the position of Division Director, and provides in pertinent part, as follows:

The director of the division shall be the administrative officer of the division and shall have general and active supervision and direction over the day-to-day business and affairs of the division and its employees, subject, however, to the direction and control of the board and the executive director. The division director shall perform all such other duties as from time to time may be assigned by the board or the executive director.

The Council may review the Division Director's performance and make recommendations to the Authority as long as the Authority's statutory power to direct or control the Division Director does not shift to the Council.<sup>3</sup> Any such review is limited to the Division Director's performance under RSA 12-G:44, III as it relates to the Division Director's role regarding the Council. The Council cannot review the Division Director's performance under RSA 12-G:43 because such a review would detract from the Authority's statutory duty to direct and control the Division Director.

Potential rules No. 2 and No. 4 require the Division Director to provide specific reports to the Council. In addition, potential rule No. 5 authorizes the Council to review and

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<sup>3</sup> As a general matter, records pertaining to internal personnel practices and personnel files whose disclosure would constitute an invasion of privacy are exempt from the Right to Know Law, RSA Chapter 91-A, and remain confidential. RSA 91-A:5, IV. Also, in general, consideration of dismissal, promotion, or compensation of any public employee is handled in a non-public session. RSA 91-A:3, II (a).

George Meyer, Executive Director  
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make recommendations on all contracts. RSA 12-G:9 grants the Authority broad duties and powers, which include but are not limited to, every power granted to the Division. These powers include without limitation “perform[ing] such other duties and functions relating to the administration, management and operation of division property and division projects as are assigned to division by the authority.” RSA 12-G:43, I (f). Insofar as the potential rules modify or detract from the Authority’s exercise of its statutory duties to administer, manage and operate the Division, no source of authority would exist for adoption of the rules. Without more specific information relating to how the Authority administers the Division, we are unable to offer an opinion as to whether these potential rules modify or detract from the Authority’s statutory duties. If the Council submits these rules to the Authority for adoption, and you provide us with more specific and detailed information about the Authority’s administration of the Division as it relates to the subject matters addressed in these rules, we would be happy to further review them.

I trust that this responds to your inquiry. Please do not hesitate to contact us if you have any questions. Thank you.

Very truly yours,

Suzan M. Lehmann  
Assistant Attorney General

Laura E.B. Lombardi  
Attorney

SML:LLL  
Enclosure  
DOC #172675  
OPN-01-00002

cc: William S. Bartlett (via facsimile)  
Chairman of the Board  
Pease Development Authority