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February 5, 2014

David Stack, Town Manager
Town of Bow
Bow Town Hall
10 Grandview Road
Bow, NH 03304

(Via e-mail only)

Re: Regulation of Essential Facilities

Dear David:

You have requested my opinion as to the level of authority that the State Fire Marshal's office may exercise over the use and occupancy of certain municipal or other governmentally owned buildings, including those deemed "essential" for purposes of emergency response. In preparation for providing this information to you, I have reviewed what I believe are the relevant State statutes (including the State Fire Code which is adopted by statute) and all other relevant sources. I have also discretely consulted with representatives of the Attorney General's office and the Fire Marshal's office on this point.

The conclusion of my review is that the Fire Marshal's office has very broad powers with regard to the use and occupancy of virtually any building in the State, and that those powers are virtually unquestionable when it comes to buildings that are used for residential purposes, even if the primary use is otherwise and even if the residential use is limited. For example, RSA 21-P:II (copy enclosed) in subsection (c) charges the Department of Safety (in which is located the Fire Marshal's office) with "assuring fire, building and equipment safety." You will note that there is no limitation on this language. Similar sweeping powers are bestowed on the fire marshal directly by RSA 153:4-a (I and related sections), a copy of which is also attached. The language includes buildings "in which numbers of peoples work, live or congregate from time to time for any purpose". Again, there are no exceptions stated. The State Fire Code, codified at Department of Safety regulations as Section 6000, restates and amplifies on the above at Section 6002.01, including specific enforcement authority (see, for example, subsections (b)(10) and (14).

David Stack, Town Manager

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Perhaps the breadth of that office's authority is best summarized with reference to RSA 153:14, II(a) which states in part that the Fire Marshal or authorized officers "may inspect *all* buildings...and premises within their jurisdiction...and that whenever a condition is found that is "deem(ed) hazardous to life or property, the officers shall order the hazardous condition to be removed or remedied by written order." (Emphasis added). The remedy may extend to facility closure.

Finally, as mentioned above, I did have some direct communication with State authorities on this issue and they expressed no doubt whatsoever as to the Fire Marshal's authority (perhaps understandable) but also expressed a lack of knowledge concerning any exceptions made for essential facilities in these particular cases.

As always, please feel free to contact me should you have questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "Paul T. Fitzgerald", enclosed within a large, loopy oval shape.

Paul T. Fitzgerald

PTF/src

Enclosures

CONFIDENTIALITY STATEMENT

This is a **confidential** communication between attorney and client and is not to be considered part of any public record; nor is it to be divulged to the public without the prior written consent of the client.

TITLE I

THE STATE AND ITS GOVERNMENT

CHAPTER 21-P

DEPARTMENT OF SAFETY

General Provisions

Section 21-P:2

21-P:2 Establishment; General Functions. –

I. There is established the department of safety, an agency of the state, under the executive direction of a commissioner of safety.

II. The department of safety, through its officials, shall be responsible for the following general functions:

- (a) Enforcing the criminal law.
- (b) Administering and enforcing laws relative to motor vehicles and drivers.
- (c) Assuring fire, building, and equipment safety.
- (d) Promoting vehicle and highway safety.
- (e) Administering and enforcing laws relative to emergency medical services.
- (f) Administration and enforcement of the motor vehicle road toll laws.
- (g) Homeland security and emergency management.
- (h) Statewide enhanced 911 and emergency telecommunications services.
- (i) Operation of the fire academy and firefighter training programs.

Source. 1987, 124:1. 1999, 345:2. 2008, 358:2, eff. Sept. 9, 2008.