STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket Number 2017-00008

SAN-KEN HOMES, INC.,

APPELLANT,

V.

NEW HAMPSHIRE ATTORNEY GENERAL, CONSUMER PROTECTION AND ANTITRUST BUREAU,

APPELLEE.

RULE 7 APPEAL OF FINAL DECISION OF THE HILLSBOROUGH SUPERIOR COURT SOUTHERN DISTRICT

BRIEF OF APPELLANT, SAN-KEN HOMES, INC.

Attorneys for the Appellant:
Bernstein, Shur, Sawyer & Nelson, P.A.

Michael A. Klass, Esq., #18947
mklass@bernsteinshur.com
670 N. Commercial Street, Suite 108
P.O. Box 1120
Manchester, NH 03105
603-623-8700

Oral Argument by: Michael A. Klass, Esq.

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QUESTIONS PRESENTED ON APPEAL

1. Whether the trial court erred in applying a "clear preponderance" standard of review (thereby conferring substantial deference to the Bureau) as opposed to reviewing the Bureau's underlying decision "as justice may require" consistent with the language of RSA 356-A:14?

   Appellant's Trial Memorandum (Feb. 29, 2016) at 6-7; App. at 88.

2. Whether the trial court erred in determining that San-Ken was a successor subdivider whose subdivision lots required registration or exemption under RSA 356-A, notwithstanding that San-Ken purchased only nine lots at foreclosure sale?

   Appellant's Trial Memorandum (Feb. 29, 2016) at 10-13, App. at 92.

3. Whether the trial court erred in determining that the Bureau was authorized under RSA 356-A to require San-Ken to complete certain subdivision infrastructure improvements above and beyond what was required by the local planning board?

   Appellant's Trial Memorandum (Feb. 29, 2016) at 13-15, App. at 95.

4. Whether the trial court erred in impermissibly expanding the jurisdiction of the Bureau into matters explicitly reserved by statute for local planning boards, in contravention of established law and practice and in a manner that would result in severe and unintended consequences?

   Appellant's Trial Memorandum (Feb. 29, 2016) at 14-15, App. at 95.

STATEMENT OF THE CASE AND FACTS

This is an appeal objecting to certain efforts of the New Hampshire Office of the Attorney General, Consumer Protection and Antitrust Bureau ("Bureau"), by which the Bureau has unreasonably and unlawfully taken the position of a super planning board. Appellant San-Ken Homes, Inc. ("San-Ken" or "Appellant") appeals a conditional Certificate of Exemption issued by the Bureau, under RSA 356-A (the Land Sales Full Disclosure Act

and herein generally referenced as the "Act"),[1] concerning nine lots within a sixteen-lot subdivision ("Subdivision") located in the Town of New Ipswich ("Town"). Appellant contends that the trial court erred when it determined that San-Ken was a successor subdivider merely by purchasing nine lots in the Subdivision at foreclosure sale. Thus, San-Ken should not have been required to register those nine lots with the Bureau at the onset. Appellant also contends that the Bureau lacks the statutory authority to require San-Ken to make certain road improvements beyond those approved by the Town. In demanding that San-Ken improve the Subdivision's private road beyond what was required by the Town of New Ipswich Planning Board ("Planning Board"), the Bureau unlawfully acted outside of its limited jurisdiction and into matters that are exclusively reserved by state statute for local planning boards. Because the Bureau acted outside of its jurisdiction, its requirement that San-Ken further improve the Subdivision's road is unreasonable, unlawful, and should be removed as a condition of exemption under the Act.

The Subdivision and its Amendment

By deed recorded with the Hillsborough County Registry of Deeds ("Registry") on December 5, 2005, the Subdivision's developer (an entity unrelated to Appellant)—112 Chestnut Street, LLC ("112 Chestnut")—took title to certain property located in New Ipswich that now comprises the Subdivision. Certified Record ("CR") at 69. At the same time, 112 Chestnut granted a mortgage to TD Banknorth, N.A. encumbering title to such property. CR

[1] Generally stated, the Act imposes conveyancing restrictions upon subdivisions greater than fifteen lots pending satisfactory review by the Bureau into the developer. Before a subdivider may convey such land, he or she must provide the Bureau with various information concerning the proposed financing, development plan, and related advertisements in order to provide assurances to prospective purchasers. See N.H. Admin. Rules, Jus 1300 et seq. Subdivisions smaller than or equal to fifty lots in size may request an exemption from registration under the Act, as opposed to full registration, pursuant to RSA 356-A:3.

at 469, 488. Thereafter, 112 Chestnut obtained various state and local land use permits, including from the Planning Board, allowing for the development of the property into the Subdivision, which consisted of a total of 16 lots. CR at 588-589, 634-647.

The Subdivision was accepted and approved by the Planning Board on June 7, 2006. CR at 474. The Subdivision contains a single private roadway known as Old Beaver Road ("Private Road"), which provides access from the Subdivision's lots to the adjacent public way. CR at 111. Under cover letter dated August 11, 2006, 112 Chestnut applied with the Bureau for Exemption from Registration pursuant to RSA 356-A:3, II. CR at 463. The Bureau issued a Certificate of Exemption concerning the Subdivision dated October 27, 2006, and such certificate was recorded with the Registry on November 1, 2006 at Book 7762, Page 2345. CR at 674-675.

Thereafter, 112 Chestnut constructed the Private Road but did not install a second topcourse of asphalt on the road's surface. CR at 5. That said, in its current form, the Road exceeds DOT minimum standards in width and paving and provides safe access to the Subdivision's lot owners. CR at 5. During its ownership of the Subdivision, 112 Chestnut conveyed seven of the lots within the Subdivision to third parties. CR at 4. Before San-Ken's involvement in the matter, the Town discharged a portion of the bond that 112 Chestnut posted to secure the performance of the Road and then allowed the remaining security to expire. CR at 2, 5.

Upon default of the conditions set forth in 112 Chestnut's mortgage, its mortgagee foreclosed on the remaining portion of the Subdivision by foreclosure sale held on May 13, 2014. CR at 65, 67. By Foreclosure Deed recorded with the Registry on June 19, 2014 at Book 8668, Page 996, San-Ken purchased its nine lots within the Subdivision. CR at 61.

After its application for a building permit was denied by the Town, CR at 42, San-Ken sought to modify the Subdivision conditions to accept the Road as it existed. CR at 186-189. The modification included certain repairs and maintenance required by the Planning Board. Id. On September 17, 2014, at a duly noticed and well-attended public hearing, the Planning Board agreed with San-Ken and amended the Subdivision by modifying its prior conditions of approval ("Subdivision Amendment"). CR at 186-189. In part, the Subdivision Amendment stated that:

> 2. The existing road constructed within the subdivision (with one course of asphalt), is satisfactory as a private road, with no second asphalt course required, subject to the following improvements to be performed within 90 days from the date of this approval by and at the expense of the owner of the 9 remaining unimproved lots in the subdivision (presently San-Ken Homes, Inc.):
>
> -fix cracks by cleaning and filling
> - seal coat the entire road
> - repair all potholes
>
> * * * *
>
> 4. No further security will be required by the Planning Board for any future road or infrastructure improvements.

CR at 189. Notably, despite the attendance of neighboring land owners at the September 17, 2014 public hearing, and importantly, no court appeal was taken of the Subdivision Amendment, and San-Ken timely satisfied all conditions of the Subdivision Amendment. CR at 27. As such, at that time: (1) the Private Road was complete and fully compliant in the eyes of the Town by and through the Planning Board; (2) no further bonding related to the Road was required; and (3) having not been appealed, the Subdivision Amendment was a final and binding decision of the Planning Board. CR at 27, 189.

Registration Under the Act

Notwithstanding the above, the Bureau required Appellant to apply for registration (or exemption) under the Act, as to its nine lots, under the theory that San-Ken was a successor subdivider. CR at 426-428. Under protest, but in an attempt to free its nine lots from the conveyancing restrictions of the Act, on November 20, 2014 San-Ken filed its application for exemption with the Bureau, pursuant to RSA 356-A:3. CR at 217, 217, 254-263, 386. As the application process unfolded, the Bureau informed San-Ken that a condition of approval would be that San-Ken was required to modify the Subdivision beyond what was required by the Town by installing and paying all costs for a topcoat on the Private Road ("Road Improvement"). CR at 812. While San-Ken was willing to pay for its proportional share of a topcoat upgrade, it objected to being forced to pay for the upgrades that should have been borne by the other lot owners in proportion to each owner's interest in the Subdivision. CR at 11. The Bureau's position unreasonably mandates that San-Ken bear all of the upgrade costs, notwithstanding that it does not own all of the Subdivision's lots.

In order to allow San-Ken to move forward with the development and sale of its lots despite the Bureau's condition requiring San-Ken to further improve the Road, San-Ken and the Bureau entered into a Road Escrow Agreement whereby San-Ken agreed to provide the Bureau with a performance bond in the amount of $50,106.00 for the purposes of securing the Road Improvement as demanded by the Bureau. CR at 73-74, 812-820. This compromise was intended to allow San-Ken to seek judicial relief on the disputed issues, while providing reasonable assurances to the Bureau that the Road Improvement would take place if the Bureau's legal position was ultimately upheld. CR at 691, 812-814. By Certificate of

Exemption dated May 1, 2015 and recorded with the Registry that same day, the Bureau exempted San-Ken's nine lots under RSA 356-A. CR at 77. This appeal followed.

Appeal to the Trial Court

After the appeal was commenced with the trial court, certain neighbors who participated in the Subdivision Amendment public hearings, but who chose not to appeal, sought to intervene in this case. App. at 78. The neighbor's Motion to Intervene was denied by this Court (Garfunkel, J.) under Notice dated November 25, 2015. Id. A hearing on the merits was then held on March 3, 2016, with an Order issued dated June 21, 2016 ("June 21, 2016 Order")

In the June 21, 2016 Order, the trial court (Ignatius, J.) acknowledged that the standard of review for an appeal filed under the Act is not fully set forth in the statute, which states that "[a]ny person aggrieved by a decision or action of the attorney general may, by petition, appeal from said decision or action to the superior court for review. The superior court may affirm, reverse, or modify the decision or action of the attorney general as justice may require." June 21, 2016 Order at 7 (quoting RSA 356-A:14, I). Ultimately, however, the trial court found that the standard of review applicable in an appeal under the Act required substantial deference to the Bureau and further held that the court would "not overturn the Bureau's determination unless a clear preponderance of the evidence demonstrates the order is unjust or unreasonable." June 21, 2016 Order at 8.

After ruling on the applicable standard of review, the trial court moved to the issue of the Bureau's determination that San-Ken was a "successor subdivider" under the Act. In this context, the trial court observed that the Act does not establish a threshold number of units that make a buyer a successor subdivider. Id. at 6. Moreover, upon questioning, the Bureau

admitted that under its interpretation of the Act, "an owner of two lots, and conceivable even one lot, could be considered a successor subdivider." Id. The trial court also observed that there were "no statutory provisions or administrative rules establishing when a purchaser is a successor subdivider." Id. Notwithstanding such findings, the trial court ruled in favor of the Bureau and determined that San-Ken failed to demonstrate by a clear preponderance of the evidence that the Bureau's determination was unjust or unreasonable. Id. at 9.

Finally, the trial court addressed the Bureau's condition of approval that required San-Ken to make infrastructure improvements beyond what was required by the Planning Board. On this issue, the trial court found no authority that would authorize the Bureau to require the Road Improvement. Id. at 9. The trial court further acknowledged the lack of evidence that the Bureau had ever before attempted to impose infrastructure requirements beyond those required by the local municipality. Id. at 10. As such, the trial court found by a clear preponderance that the Bureau's Road Improvement requirement was unjust and unreasonable and reversed such requirement. Id.

On July 5, 2016, the Bureau moved for partial reconsideration of the trial court's June 21, 2016 Order, seeking reconsideration as to the trial court's Road Improvement finding. App. at 128. In its request for partial reconsideration, the Bureau argued in part that the Act confers concurrent jurisdiction to the Attorney General over subdivision control in the state of New Hampshire and that the Bureau was authorized to require additional infrastructure to "protect purchasers." App. at 130. Notably, the particular purchasers that the Bureau is focused on in this case are not prospective buyers of subdivision lots, but rather the seven existing owners who purchased lots from 112 Chestnut. App. at 132-133. The trial court agreed with the Bureau that the existence of prior purchasers justified the Road Improvement

condition and granted its motion for partial reconsideration, thereby upholding the road improvement condition imposed by the Bureau. October 14, 2016 Order at 4-5.[2]

This appeal followed, by virtue of the Notice of Appeal filed on January 6, 2017.

SUMMARY OF ARGUMENT

The trial court erred when it applied the incorrect legal standard. San-Ken filed this appeal pursuant to RSA 356-A:14, which requires a trial court to rule "as justice may require." While case law on the matter is sparse, such phrase is used by courts in other contexts, which provides guidance in the case at bar, and establishes that the use of the phrase is intended to confer discretion on the trial court without benefit to either party. Rather than rule on this appeal "as justice may require," the trial court deferred to the Bureau and erroneously applies a "clear preponderance" standard of review that applies in appeals under RSA 541. Had the legislature wished for RSA 541's legal standard to apply in context of RSA 356-A, it would have stated as such (as it has done in other administrative schemes).

The trial court further erred in extending deference to the Bureau's interpretation of the Act and its rules. As this is a matter of statutory construction, this Court will apply a *de novo* review standard. Moreover, the Bureau's interpretation of the Act in this case, which seeks to protect existing buyers, is contrary to the purpose of the Act which is to protect prospective homeowners. Finally, the Bureau's interpretation does not warrant deference as it was articulated for the first time as part of this litigation.

The trial court also erred in finding Appellant to be a successor subdivider under the Act. San-Ken purchased only nine lots at a foreclosure sale, after the developer had already

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[2] Appellant subsequently filed a motion for reconsideration to clarify its obligations with respect to the required road improvements. The trial court (Ignatius, J.) ruled in favor of such motion and the issues raised therein are not relevant to the instant appeal. See December 9, 2016 Order; App. at 148.

conveyed seven lots to third parties. As such, San-Ken does not "stand in the same relation" of the developer and should not be deemed a successor subdivider. Neither the Act nor the Bureau's rules provide guidance on when a purchase of lots will be deemed to be a successor subdivider. As such, the Bureau is forced to apply this provision on an ad-hoc basis in a manner that does not provide reasonable notice. Moreover, given that San-Ken only had rights to nine lots, it could not "offer or convey" more than 15 lots. As such, San-Ken is exempted from registration under the at pursuant to RSA 356-A:3, I(a).

The trial court erred in upholding the Bureau's Road Improvement condition and in finding that the Act establishes an exclusive but concurrent regulatory scheme that allows both planning boards and the Bureau to regulate subdivision infrastructure. The Bureau lacked statutory authority to require the Road Improvement. The general principal of "protecting purchasers" does not justify the Bureau's demand for additional subdivision road improvements. Rather, through Title LXIV, the legislature has enacted a comprehensive and detailed regulatory scheme by which local land use boards govern planning and zoning. RSA 674 specifically delegates the exclusive power to regulate subdivisions to local planning boards.

Well-established canons of statutory interpretation further support Appellant's interpretation of the Act. The trial court's error is further evident when the Act is viewed in context and in a manner that avoids needless contradiction with other statutes. Moreover, because Title LXIV establishes a detailed statutory scheme, it controls over the Act's mere general reference. Not only does the Bureau's suggested interpretation of the Act result in absurd results, it also renders the statute unconstitutional and impermissibly vague.

Finally, the potential consequences of the Bureau's interpretation are real and far-reaching. In an established system that currently provides finality and stability, the Bureau seeks to effectively interject a new, two-prong regulatory scheme. Applicants will be forced to answer to both planning boards and the Bureau as to subdivision approvals. Nothing in the Act accounts for a setup as theoretically exists under the Bureau's interpretation of the Act, which would lead to absurd and unjust results. The legislature cannot have intended such market and regulatory chaos.

In light of the above, the trial court erred in upholding the Bureau's determination that San-Ken is a so-called successor subdivider and that it could impose the Road Improvement as a condition of registration under the Act. As such, the trial court's decisions on appeal should be reversed and remanded.

ARGUMENT

I. Standard of Review.

As the issues raised in this appeal involve the interpretation of statutes, this Court applies a de novo standard of review. Woodview Dev. Corp. v. Town of Pelham, 152 N.H. 114, 116 (2005).

> [This Court is] the final arbiters of the legislature's intent as expressed in the words of the statute considered as a whole. . . . We first examine the language of the statute, and, where possible, ascribe the plain and ordinary meanings to the words used. . . . When a statute's language is plain and unambiguous, we need not look beyond it for further indication of legislative intent, and we will not consider what the legislature might have said or add language that the legislature did not see fit to include.

Id. (internal citations omitted). "We do not examine a particular statutory provision in isolation, but read it in concert with all associated sections." Sanborn Reg'l Sch. Dist. v. Budget Comm. of Sanborn Reg'l Sch. Dist., 150 N.H. 241, 242 (2003). "When interpreting

two statutes which deal with a similar subject matter, we . . . . construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statute." Id. (quoting Pennelli v. Town of Pelham, 148 N.H. 365, 366 (2002)). If two statutory provisions conflict, the specific statute controls over the more general one. Id. (citing Appeal of Plantier, 126 N.H. 500, 510 (1985)).

II. The Trial Court Erred in Conferring Substantial Deference to the Bureau and in Requiring Appellant to Provide a Clear Preponderance of Evidence Demonstrating that the Bureau's Actions were Unjust or Unreasonable.

To begin, the trial court erred when it applied RSA 541's standard of review in context of an appeal filed under the Act. San-Ken lodged its appeal with the trial court pursuant to RSA 356-A:14, I, which states that "[a]ny person aggrieved by a decision or action of the attorney general may, by petition, appeal from said decision or action to the superior court for review. The superior court may affirm, reverse, or modify the decision or action of the attorney general as justice may require." Section 14 of the Act further requires that a copy of the underlying record must be transmitted to the superior court (RSA 356-A:14, III) and allows the record to be supplemented with additional evidence upon leave from the court. RSA 356-A:14, IV. The Act's plain language empowers the trial court with the authority to rule on any appeal "as justice may require." Notably, however, the Act does not provide that the reviewing court show substantial deference to the Bureau, and the Act does not require that an appellant satisfy a "clear prepouderance" standard of review. In applying standards that are not provided for in the Act, the trial court erred as a matter of law.

This inquiry is complicated by the fact that minimal case law exists interpreting the Act and that no case law exists interpreting RSA 356-A:14's legal standard. That said, the phrase "as justice may require" (or variants thereof) is used by courts in other judicial

settings, which provides guidance in the instant matter. In context of RSA 76:17 (regarding tax abatements), the phrase "as justice requires" "has been held to confer jurisdiction upon the superior court to issue equitable orders . . ." Tau Chapter of Alpha XI Delta Fraternity v. Town of Durham, 112 N.H. 233, 236 (1972). "[T]he phrase 'as the court may deem just' in RSA 525:3 [concerning allowance of costs] has been held to authorize the superior court to exercise reasonable discretion in deciding as a question of fact whether justice required the granting of a motion for costs where they are allowable." Id. (citing Medico v. Almasy, 108 N.H. 324 (1967)). See also LSP Ass'n v. Town of Gilford, 142 N.H. 369, 373 (1997) (referring to the phrase as conferring "broad discretion and equitable powers upon the superior court to abate taxes."). The phrase was touched upon in context of RSA 281:14, regarding the allocation of costs incurred by workman's compensation employee action against a third party. See Del Rio v. N. Blower Co., 574 F.2d 23, 28 (1st Cir. 1978). There, the First Circuit looked to the words "as justice may require" to confirm that the court's duty was to simply act fairly in its duty to apportion costs. Id. New York state courts have interpreted the phrase more directly, which is also instructive.

> The phrase "as justice requires" means "that there are no 'as matter of law' requirements one way or the other as to those matters which are to be dealt with in the discretion of the courts, on all the facts" . . . . It grants the court a broad discretion, but not one unrelated to the facts . . . . What it grants is a judicial discretion, which though it "is a phrase of great latitude * * * never means the arbitrary will of the judge" . . . . Rather, it vests in the court "a discretion which is not to be exercised arbitrarily, and which is subject to review in the Court of Appeals, but only as to whether or not it has been abused and not on its merits" . . . .

Matter of Estate of Greatsinger, 67 N.Y.2d 177, 181 (1986) (internal citations omitted) (analyzing the phrase in context of an award of attorneys' fees resulting from a New York will contest) (emphasis added).

None of these cases suggest that a court charged with ruling on the basis of justice should defer to one party over the other. Rather, the common thread is that discretion lies with the court. In this case, rather than make a decision as "justice may require," the trial court erred when it applied the standard of review applicable in administrative appeals governed by RSA 541. See June 21, 2016 Order at 7-8 (citing Appeal of Stetson, 138 N.H. 293, 295 (1994)).[3] See also RSA 541:13 (stating in part that (1) the burden of proof is on the party appealing a decision of the commission; (2) all findings of the commission are deemed lawful and reasonable; (3) and requiring affirmance unless the court is satisfied by a clear preponderance of the evidence that such order is unjust or unreasonable).

Moreover, the framework of the Act is inconsistent with RSA 541's general framework. For one, RSA 541 includes procedural elements that are simply not part of the Act. The most telling difference is the fact that RSA 541 requires an appealing party to file a motion for rehearing with the "commission" as a prerequisite for a direct appeal to the this Court. See RSA 541:3, 6. See also In re Walsh (New Hampshire Bd. of Tax & Land Appeals), 156 N.H. 347, 351 (2007) ("In an administrative appeal pursuant to RSA chapter 541, the appealing party must first file a motion for rehearing setting forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable.") (quoting Appeal of Coffey, 144 N.H. 531, 533 (1999)). Rather than require a rehearing request followed by an appeal to this Court, the Act allows direct appeals to the trial court by an aggrieved party. Another difference between the Act and RSA 541 is that

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[3] Stetson involved an appeal of a Department of Labor Compensation Appeals Board decision to this Court regarding the denial of workers' compensation benefits. 138 N.H. at 294-295 (citing RSA 541:13).

additional evidence is prohibited on appeal in most cases pursuant to RSA 541:14, whereas it may be introduced before the trial court upon leave pursuant to RSA 356-A:14, IV.

Certainly, had the legislature intended RSA 541 and its legal standards and procedures to apply to the Act, it would have stated as such, as it has done in other instances where the legislature has specifically cross-referenced RSA 541 within an administrative scheme. See, e.g., RSA 151:4, VII (regarding licenses issued by the department of health and human services); RSA 365:21 (regarding the procedure for rehearings and appeals in context of public utilities). In the Act, however, the legislature chose to empower the trial courts to act on the basis of justice and omitted any references to RSA 541. It is a well-established that courts will not "consider what the legislature might have said or add language that the legislature did not see fit to include." Woodview Dev. Corp. v. Town of Pelham, 152 N.H. 114, 116 (2005). Moreover, where the legislature has specifically cross-referenced RSA 541 in certain administrative appeals, its decision not to reference RSA 541 in context of the Act is telling and demonstrates that RSA 541 was not intended to apply in the instant matter. See State v. Etienne, 163 N.H. 57, 73 (2011) (stating that "the expression of one thing in a statute implies the exclusion of another," which "is strengthened where a thing is provided in one part of the statute and omitted in another.").

Finally, the Bureau deserves no deference in its interpretation of the Act or its rules in this case. For one, as discussed above, this appeal involves statutory construction which is reviewed on appeal *de novo*. Woodview Dev. Corp. v. Town of Pelham, 152 N.H. 114, 116 (2005). Second, deference in this case is not warranted given that its interpretation is contrary to the language of the statute and the purpose of the Act. See Appeal of Old Dutch Mustard Co., Inc., 166 N.H. 501, 506 (2014). Here, and as argued by the Bureau in its trial

memorandum, the purpose of the Act's application process is to require registration of a subdivider before allowing the sale of lots, which is personal to the seller and for the benefit of future buyers. See App. at 106-111. In other words, the focus of any application under the Act is prospective. That the purpose of the Act is prospective is evident in a 2016 news release issues by the Bureau, which stated in part:

> The Consumer Protection Bureau of the Attorney General's Office registers most condominium developments and real estate subdivisions ***in an effort to protect prospective buyers***. The Bureau thoroughly reviews financing, development plan, and sales advertisements as well as consumer disclosures to try to ensure that subdividers have the financial and logistical capability to follow through on their promises to home buyers. The Land Sales Full Disclosure Act protects consumers by requiring subdividers to disclose information ***to prospective home buyers*** about the costs and timeline for promised capital improvements, such as streets or drainage systems. The Act also provides consumers with the guaranteed right to rescind their purchase contract within five days. ***The Bureau's jurisdiction does not extend to disputes involving existing homeowners or condominium associations.***

News Release, February 11, 2016, https://www.doj.nh.gov/media-center/press-releases/2016/20160211-land-sales-disclosure.htm (last visited June 13, 2017) (emphasis added).[4] In this case, the stated basis for the Road Improvement is to protect the interest of certain existing homeowners. Because the Bureau's interpretation here is contrary to the purpose of the Act, which is to protect prospective homeowners, deference is not justified. Similarly, courts will not defer to an agency where the interpretation is plainly incorrect, as is the case here. Appeal of Levesque, 136 N.H. 211, 213 (1992). Finally, the record is absent of any provisions of the Act, the related rules, or any other evidence indicating that the Bureau has ever before taken the position that it may require an applicant to modify a subdivision

[4] This release is further notable for the fact that it acknowledges that the Bureau's jurisdiction does not extend to disputes involving existing homeowners. This statement is directly contrary to the position that the Bureau takes in this case where the agency justifies the Road Improvement condition on the basis of the existing homeowners.

approval for the benefit of existing homeowners as part of its authority under the Act. See June 21, 2016 Order at 10. As the Bureau's position appears to have developed in concert with the instant litigation, deference to such position is not appropriate. Cf. Sullivan v. Colvin, No. 14-CV-06-JL, 2015 WL 1097404, at *2 (D.N.H. Mar. 11, 2015) (noting that First Circuit courts "give no special 'deference' to the interpretation that an agency gives its rules solely in the context of litigation.).

In light of the above, the trial court erred in applying a mistaken standard or review. As such, the trial court decisions should be reversed.

III. The Trial Court Erred in Finding San-Ken to be a Successor Subdivider Under RSA 356-A.

In addition to applying an incorrect standard of review, the trial court also erred when it determined that Appellant was a successor subdivider under the Act and was, thus, required to register its nine lots with the Bureau. June 21, 2016 Order at 9-10. RSA 356-A:1, V defines a "subdivider" as

> a person who is an owner of subdivided land or one who offers it for disposition. Any successor of the person referred to in this paragraph who comes to stand in the same relation to the subdivided lands as his predecessor did shall also come within this definition; . . .

Here, the record is clear that (1) San-Ken purchased nine of the Subdivision's lots at foreclosure sale; (2) the other seven lots were sold to bona fide third parties before San-Ken's purchase; and (3) the Subdivision's Road was already constructed prior to San-Ken's purchase without the creation of a Homeowner's Association. CR at 4, 27, 61, 189. As such, San-Ken cannot "stand in the same relation" to the Subdivision, as compared to how 112 Chestnut did. Whereas 112 Chestnut owned the fee interest in the property that is now the Subdivision, and all of the related ownership rights to all lots, San-Ken simply purchased a

portion of those rights at a foreclosure sale. For the purposes of the Act, San-Ken stands in the shoes of 112 Chestnut no more or no less than each of the owners of the other seven lots, and should be treated no differently. As such, San-Ken is not a subdivider subject to the Act.

Moreover, it is important to recall that San-Ken's interest in the Subdivision is limited to nine lots. As such, the plain language of RSA 356-A:3, I(a) exempts those lots from registration under the Act. RSA 356-A:3, I(a) states, in relevant part, that the Act "shall not apply to any offer or disposition of: (a) Subdivided lands if not more than 15 lots, parcels, units or interests are included in such subdivided lands; . . ."[5] In this case, because seven lots within the Subdivision were conveyed to third parties prior to 2014, Appellant is only able to "offer or dispose" their nine lots. As the fifteen-lot threshold is not triggered, the plain language of the Act does not require registration of San-Ken's lots.

The Bureau will likely argue that because the Subdivision was originally sixteen lots, San-Ken must register under the Act, regardless of how many lots they purchased. This position relies upon the Act's expansive definition of the term "subdivided lands." See RSA 356-A:1, VI (defining the terms "subdivision" and "subdivided lands" to mean "any land . . . which is, or has been, or is proposed to be, divided for the purpose of disposition into lots . . . and also include any land whether contiguous or not if said lots . . . are offered as a part of a common promotional plan of advertising and sale; . . ."). However, the Bureau's interpretation does not account for the fact that San-Ken does not own seven of the lots within the Subdivision. Moreover, and more importantly, the Bureau fails to accept that the Act's

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[5] The Act defines "dispose" or "disposition" as "any sale, contract, assignment, or any other voluntary transfer of a legal or equitable interest in a lot, parcel, unit or interest in subdivided lands, except as security for a debt[.]" RSA 356-A:1, I. "Offer" means any "inducement, solicitation, or attempt to encourage any person or persons to acquire any legal or equitable interest in a lot, parcel, unit or interest in subdivided lands, except as security for a debt[.]" RSA 356-A:1, II.

definition of "subdivided lands" is modified and tempered by the introductory clause ("shall not apply to any offer or disposition") that limits the reach of the statute to lots that are to be offered or disposed. Because San-Ken can only offer or dispose its nine lots, and has no interest in the previously owned lots, the Act's plain language exempts registration in this case.

Had the legislature wished for the Act to apply in instances such as this, where a buyer purchases fifteen or fewer lots of a larger subdivision, the legislature could have simply stated as such. However, the plain language of the Act must not be ignored. To interpret the Act as the Bureau suggests requires the phrase "any offer or disposition of" to be rendered superfluous, which is contrary to accepted canons of statutory interpretation. See Petition of State, 159 N.H. 456, 457 (2009) ("We must give effect to all words in a statute, and presume that the legislature did not enact superfluous or redundant words."). Moreover, San-Ken's interpretation is consistent with the purpose of the Act, as evident through its plain language, which is to investigate the sellers of subdivided lots of a certain number, in the name of consumer protection. Notably, the legislature has determined that 15-lot subdivisions and smaller do not trigger the Act's jurisdiction. See RSA 356-A:3, I(a). In the same way that a nine-lot subdivision would not require registration under the Act, San-Ken's nine-lot purchase should not either.

Furthermore, and as observed by the trial court, the Act and the Bureau's rules do not provide any guidance on when a mere purchaser of lots becomes a so-called successor subdivider in the eyes of the Bureau. See June 21, 2016 Order at p. 6. Theoretically, the Bureau argued upon questioning by the trial court, the owner of single lot could conceivably be considered a successor subdivider and subject to the Act. Id. To think that every buyer of

subdivided lots could be subject to registration under the Act is an unjust result which should be avoided. See Cayten v. New Hampshire Dept. of Environmental Services, 155 N.H. 647, 653 (2007). Moreover, the Bureau's interpretation puts the Attorney General's Office (and not the legislature) in the powerful position of determining whether or not an owner of lots must register their land under the Act, at the Bureau's whimsy and convenience, without regulatory guidance, and without providing owners with reasonable notice of the applicable legal framework. Such an interpretation by the Bureau is unreasonable and it unlawfully pushes the agency outside of the limits of its enabling legislation. See In re Campaign for Ratepayers' Rights, 162 N.H. 245, 250 (2011). In short, the Bureau's interpretation of the Act is unreasonable and unjust and should be rejected. Likewise, the trial court's finding in support of the Bureau should be reversed.

IV. The Trial Court Erred in Upholding the Bureau's Road Improvement Condition as the Bureau Lacks Jurisdiction to Unilaterally Modify the Terms of a Planning Board Subdivision Approval.

Finally, even if San-Ken is deemed to be a "subdivider" under the Act, the Bureau lacks the statutory authority allowing it to require San-Ken to further improve the Road as a condition of exemption. The trial court erred in finding that the Act confers the Bureau with concurrent jurisdiction over subdivision control, such that the Bureau may require infrastructure improvements beyond what is required by a local planning board. See October 14, 2016 Order at 4.

In context of the limited scope of an administrative agency's jurisdiction, it is important to note that the Bureau is an administrative body created by statute and charged with enforcing and administering the provisions of the Act. RSA 356-A:2. As such, the Bureau's power and jurisdiction are limited and special to its enabling statute.

> Administrative agencies are granted only limited and special subject matter jurisdiction. . . . That jurisdiction is dependent entirely upon the statutes vesting [the agency] with power and [the agency] cannot confer jurisdiction upon [itself]. . . . Furthermore, ***a tribunal that exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation***.. . . .

In re Campaign for Ratepayers' Rights, 162 N.H. 245, 250 (2011) (quotations and citations omitted) (emphasis added). In other words, the Bureau cannot lawfully step outside of the specific and limited authority delegated to it under RSA 356-A, and its jurisdiction is limited to those circumstances prescribed by the Act. Critically, the Act does not authorize the Bureau to effectively usurp the role of a planning board under the banner of protecting purchasers. State statute is equally clear that the ability to govern subdivision control is vested exclusively in local planning boards. As such, the trial court erred in enabling the Bureau's attempt to exercise jurisdiction over the local planning process.

A. The Bureau is not a Super Planning Board and Lacks Statutory Authority to Require The Road Improvement.

As part of this case, the Bureau takes the unique position that it is empowered under the Act to regulate subdivisions that have already been approved (and in this case, approved and modified) by a local planning board. See October 14, 2016 Order at 2 (summarizing the Bureau's exclusive but concurrent jurisdiction argument). See also App. at 130, ¶ 14. Specifically, the Bureau cites to RSA 356-A:3, II and Section 1304.07 of its administrative rules and argues that it has the ability to require additional infrastructure beyond what is approved "in order to 'protect purchasers' under RSA 356-A:, II and its accompanying regulations." Id. at ¶ 13. When the language of the Act is reviewed, however, and when it is considered in the appropriate context, the unreasonableness of the Bureau's argument rings clear.

The Bureau does not argue that the Act confers specific authority upon the Attorney General to modify local subdivision approvals. Rather, the Bureau's statutory argument ultimately relies upon precatory language found in RSA 356-A:3, II, which allows the Bureau to exempt provisions of the Act "in the public interest and for the protection of purchasers[.]" Alongside the aspirational language of the Act cited above, the Bureau also relies upon Section 1304.07 of its own rules, promulgated under the Act. Section 1304.07(a) of the Bureau's rules requires the Bureau to exempt a subdivision if certain conditions are met, including:

> If the streets or roads providing access to the subdivision and to the lots, parcels, units, or interests for which exemption is applied are not complete at the time the application is filed, the subdivider shall post surety acceptable to the town or city as follows:
>
> a. The surety shall be in the full amount of the cost of completing the streets or roads to assure completion to local standards and;
>
> b. The surety shall be in the form prescribed by Jus 1304.14;

By its plain language, this is a bond requirement that is triggered only if a subdivider seeks registration (or exemption) under the Act before the completion of the roads, at which time the Bureau is then authorized to require surety in an amount set by the local municipality. This rule does not authorize the Bureau to require additional road improvements or other infrastructure; rather, the Bureau may only demand a bond in the amount of the cost of the roads that is acceptable to the municipality. This provision does not apply in the instant matter as it is undisputed that San-Ken completed the Road as required by the Town in the Subdivision Amendment prior to filing its application with the Bureau. In fact, the Planning Board specifically determined that no further bond was required, CR at 27, which renders the applicability of Section 1304.07(a) null and void. Given that the Road was completed to local

standards, and no further bond was required by the Town, the Bureau cannot lawfully look to Section 1304.07(a) as a basis for requiring further infrastructure improvements as a condition of exemption under the Act.

B. Title LXIV of the New Hampshire Revised Statutes Specifically Delegates Authority Over Planning and Zoning Issues to Local Land Use Boards, and the Authority to Regulate Subdivisions Lies Within the Exclusive Jurisdiction of Planning Boards.

Not only does the Act fail to empower the Bureau with authority to regulate subdivision control, Title LXIV of the New Hampshire Revised Statutes explicitly delegates subdivisions and related regulations to local planning boards. Thus, in demanding that San-Ken improve the Road beyond what is required by the Subdivision Amendment as approved by the Planning Board, the Bureau has impermissibly veered outside of its jurisdiction and into land use planning matters that are expressly and exclusively delegated by state statute to the Planning Board. RSA 674:35, II specifically delegates the power to regulate subdivisions to local planning boards, stating in part that ***"[t]he planning board of a municipality shall have the authority to regulate the subdivision of land*** . . . . (Emphasis added.) Once subdivision jurisdiction is delegated to the Planning Board, that jurisdiction is exclusive. RSA 674:42.

Case law provides further illustration about the local and exclusive nature of municipal planning and zoning, which highlights how the trial court erred in allowing the Bureau to interject itself into the local planning process in context of the Act. In Green Crow Corp. v. Town of New Ipswich, 157 N.H. 344 (2008), as part of a road layout appeal, this Court provided a comprehensive summary on RSA chapters 672 through 677, and detailed the local planning and zoning process codified within Title LXIV. This Court began by citing the purpose of the statute, including that "***[p]lanning***, zoning ***and related regulations have been***

and should continue to be the responsibility of municipal government[.]" Green Crow, 157 N.H. at 352 (quoting RSA 672:1, I) (emphasis added). "Within this scheme [RSA 672 – 677], the legislature has provided a variety of mechanisms for a municipality to utilize in conducting its land use planning, including controlling growth and managing the impact upon infrastructure." Id. at 353.

> In addition to creating various mechanisms for municipalities to govern local land use under Title LXIV, the legislature has established diverse bodies to effectuate them. . . . Each body is granted different authority and a distinct role in the task of regulating land use development and growth within the respective community. . . . ***The planning board's duties include*** devising the master plan, ***regulating the subdivision of land*** and regulating site plan review. *See* RSA 674:1 (1996) (master plan); RSA 674:35,:36 (Supp.2007) (subdivision regulation); RSA 674:43,:44 (Supp.2007) (site plan). . . .
>
> ***A significant portion of the responsibility and tasks of careful and wise land use planning falls to the planning board.*** . . . [T]he legislature has identified the planning board as the central authority for globally managing municipal land use planning and growth control. See RSA 674:1 (master plan); RSA 674:35,:36 (subdivision regulation); RSA 674:43,:44 (site plan review); RSA 674:21, V(d) (impact fees shall be assessed when planning board approves subdivision plat or site plan or when building permit granted); RSA 674:21, V(j) (exaction for off-site improvements shall be assessed when planning board approves development); RSA 674:21, II (Supp.2007) (even if innovative land use control ordinance provides for administration by board of selectmen or zoning board of adjustment, any proposal shall be reviewed by planning board prior to final consideration). When preparing, revising or amending the master plan, a planning board may review such issues as the "best design methods to prevent sprawl growth in the community and the region." RSA 674:3, I (Supp.2007). Additionally, under RSA 674:1, V, "[t]he planning board may, from time to time, recommend to the local legislative body amendments of the zoning ordinance or zoning map or additions thereto." Finally, RSA 674:1, VI provides that "[i]n general, the planning board may be given such powers by the municipality as may be necessary to enable it to fulfill its functions, promote municipal planning, or carry out the purposes of [Title LXIV]."

Id. at 354–355 (internal citations omitted) (emphasis added). Even more importantly for the instant matter is the Green Crow Court's confirmation as to the exclusive nature of local control over planning and zoning issues.

> Without attempting to identify all aspects of the planning and zoning scheme designed by the legislature under Title LXIV, ***we conclude that it is clear that the legislature intended for municipal land use planning and zoning to occur within the confines of that comprehensive Title, with significant authority resting with the planning board.***

Id. at 355 (emphasis added).

As apparent from the above, by means of Title LXIV, the legislature has enacted a detailed and comprehensive regulatory scheme that confers exclusive jurisdiction over land use matters to local municipalities. Specifically, the Planning Board is delegated significant power over the planning process (including subdivision control) under RSA 674. Notably, and contrary to both the trial court's decision and the Bureau's arguments, nothing herein gives the Bureau any rights to manipulate the local planning process in connection with its consumer protection efforts. The Bureau's position disregards that local planning boards are the exclusive authority on subdivision matters and that the Planning Board has unambiguously determined that the Road is complete and that no bond is required – a decision made prior to San-Ken's application for exemption under the Act. Because the Planning Board is vested with exclusive control over the Subdivision, the Bureau's condition that seeks to supersede the Subdivision Amendment is unreasonable, unjust, and should be held to be an unlawful exercise of its authority.

C. The Trial Court's Error is Further Evident in Light of Well-Established Principles of Statutory Interpretation.

The trial court's error is further revealed in light of traditional canons of statutory interpretation. This Court will not "examine a particular statutory provision in isolation, but read it in concert with all associated sections." Sanborn Reg'l Sch. Dist. v. Budget Comm. of Sanborn Reg'l Sch. Dist., 150 N.H. 241, 242 (2003). Moreover, courts will interpret two related statutes such that they will not contradict with one another and lead to reasonable

results. Id. If two statutory provisions conflict, the specific statute controls over the more general one. Id.

The Court's task here is to interpret the Act in light of the planning and zoning scheme codified in Title LXIV. The Bureau suggests that the Act and the RSA 672 – 677 create a system of exclusive but concurrent jurisdiction over subdivision control, with planning boards authorized to regulate subdivisions for the purpose of planning and the Bureau authorized to regulate subdivisions as needed to protect purchasers. App. at 129. As discussed previously, this position is unreasonable and unlawful in light of the plain language of the Act and of the planning and zoning scheme enacted by the legislature. Moreover, requiring subdivision approvals from two separate authorities would lead to absurd and unjust results contrary to the intent of the legislature. See Hogan v. Pat's Peak Skiing, LLC, 168 N.H. 71, 73 (2015) ("We construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result.").

The Bureau's interpretation of the Act also creates uncertainty and potential conflicts between a planning board and the Bureau. As noted previously, and as commented upon by this Court in Green Crow, RSA 672 – 677's statutory scheme provides a comprehensive and detailed framework for local land use planning via local control through planning boards. Contrastingly, the Bureau relies upon the general purpose of the Act to "protect purchasers" as the primary basis for its interpretation. In the event of a conflict between the specifics of Title LXIV and the general purpose of the Act, case law requires that the specific statute control over the more general one. Sanborn Reg'l Sch. Dist. v. Budget Comm. of Sanborn Reg'l Sch. Dist., 150 N.H. 241, 242 (2003). Given that the Bureau relies on a statement of

general purpose within the Act, the detailed scheme set forth in Title LXIV (and specifically within RSA 674) must control.

The Bureau's interpretation of the Act is further flawed in that it requires an unconstitutional reading of the Act. Contra White v. Lee, 124 N.H. 69, 77–78 (1983) ("A statute will not be construed to be unconstitutional, where it is susceptible to a construction rendering it constitutional."). The Bureau's interpretation renders the statute impermissibly vague. "A statute can be impermissibly vague for either of two independent reasons: (1) it fails to provide people of ordinary intelligence a reasonable opportunity to understand the conduct it prohibits; or (2) it authorizes or even encourages arbitrary and discriminatory enforcement." State v. Hynes, 159 N.H. 187, 200 (2009). Neither the Act nor the Bureau's rules inform reasonable purchasers of subdivided lots whether the Bureau will enforce the Act as to those lots and, more importantly, whether the Bureau will demand changes to approved subdivision infrastructure. Moreover, without being tethered to a statute or to a rule the Bureau is forced to review applications under the Act on an ad-hoc basis, which encourages arbitrary enforcement of the Act. "An agency cannot merely flit serendipitously from case to case, like a bee buzzing from flower to flower, making up the rules as it goes along." Henry v. I.N.S., 74 F.3d 1, 6 (1st Cir. 1996). Here, the Bureau did just that in requiring a modification of a previously approved subdivision as part of an application under the Act, with no authority under the Act nor guidance from its rules.

In light of the above, the trial court's decisions upholding the Bureaus should be reversed.

D. The Consequences of the Bureau's Position are Significant and Far-Reaching.

To be clear, if upheld, the Bureau's reach into local land use matters and subdivision severe implications going forward. Where now an un-appealed subdivision approval is

considered final, if the Bureau's position in this case is allowed to proceed, it will eviscerate such finality and interject uncertainty into the planning and development process. Local planning boards and developers will have to question and guess at whether the Bureau will require subdivision amendments in connection with registration under the Act. Financing will be impacted as lenders will no longer have the same assurances as to their collateral. These drastic consequences cannot be what the legislature intended when it created the comprehensive and detailed zoning and planning enabling act as codified in Title LXIV. Likewise, the legislature cannot have intended for the Act to be used as a back-door means of regulating subdivision control.

The Bureau's position in this case creates a two-prong subdivision approval process where a single prong current exists. Under the Bureau's approach, conflicts are bound to arise between local planning boards and the Bureau, and there is no mechanism in either the Act or Title LXIV that acknowledges such a scheme or that would allow for the resolution of inevitable conflicts. Similarly, there are no notice provisions in the Act benefitting abutters and it is unclear what appeal rights impacted parties might have when the Bureau requires a subdivision modification. These potential consequences are real and are the epitome of an absurd and unjust result that would result from the Bureau's interpretation. See Hogan v. Pat's Peak Skiing, LLC, 168 N.H. 71, 73 (2015). The legislature cannot have anticipated (let alone intended) the chaos that will ensure if the Attorney General's office is permitted to intrude into local land use matters that are specifically and exclusively reserved for planning boards.

CONCLUSION

For all of these reasons, the trial court erred in ruling in favor of the Bureau in the June 21, 2016 Order and the October 14, 2016 Order. Appellant respectfully requests that this Honorable Court reverse the trial court decisions on appeal and remand the matter with instructions consistent with such reversal.

ORAL ARGUMENT

Appellant requests 15 minutes for oral argument. Attorney Michael A. Klass will argue on Appellant's behalf.

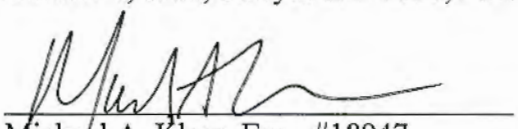
RULE 16(3)(I) CERTIFICATION

I hereby certify that the decisions being appealed are in writing and that copies are appended to this brief.

Respectfully submitted,

San-Ken, Inc.

By their attorneys
Bernstein, Shur, Sawyer & Nelson, P.A.



Michael A. Klass, Esq., #18947
mklass@bernsteinshur.com
Bernstein, Shur, Sawyer & Nelson, P.A.
P.O. Box 1120
Manchester, NH 03105-1120
603-623-8700

Dated: June 14, 2017

CERTIFICATE OF SERVICE

I hereby certify that two true and exact copies of the foregoing Brief of Appellant, San-Ken Homes, Inc. and the accompanying Appendix were mailed this day to John W. Garrigan, by U.S. mail, postage prepaid.

Dated: June 14, 2017

Michael A. Klass, Esq.

COPY OF THE DECISIONS BELOW

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT
226-2015-CV-0281

San-Ken Homes, Inc.

v.

New Hampshire Attorney General,
Consumer Protection and Antitrust Bureau

ORDER

The plaintiff, San-Ken Homes, Inc. ("San-Ken"), on May 29, 2015, appealed an order of the New Hampshire Attorney General, Consumer Protection and Antitrust Bureau ("Bureau"), pursuant to RSA 356-A:14. The appeal asserts that the Bureau lacked authority to require San-Ken to be registered under RSA 356-A, the Land Sales Full Disclosure Act ("Act") and, specifically, lacked authority to require San-Ken to make improvements to Old Beaver Road in the Oakwood Common subdivision in New Ipswich, New Hampshire.

Deirdre Daley and Bernard Satterfield, owners of lots in Oakwood Common, moved to intervene. Their intervention requests were denied on November 25, 2015 (Garfunkel, J.). The parties filed a certified record ("CR") on July 13, 2015, and on March 1, 2016, they each submitted memoranda of law.

The Court conducted a bench trial on March 3, 2016. After consideration of the evidence, the Court finds and rules as follows.

Background and Facts

The parties agree on the relevant facts of the history of Oakwood Common, which is a 16 lot subdivision originally developed by 112 Chestnut Street, LLC ("112"). The New Ipswich Planning Board ("Board") approved the subdivision on June 7, 2006. (CR 198-199.) Among the conditions of approval was that 112 pave Old Beaver Road to Town standards. 112 agreed and established an irrevocable letter of credit to ensure the work would be completed. (CR 592.) On August 11, 2006, 112 applied for a certificate of exemption from the Act, RSA 356-A:3, II. 0 The Bureau granted the exemption on October 27, 2006. (CR 674.) In the application for exemption, 112 committed that the "road servicing the subdivision will be built to town specifications and owned and maintained by the Lot owners..." (CR 474.)

112 constructed Old Beaver Road but did not meet the Town's required paving standards. 112 put on a ½" base course rather than a 2" base course, and no topcoat wear course, when a 1" wear course was required. (CR 37-38.) A report of an engineering firm confirmed the substandard paving and recommended an additional 1½" base course be applied, at an estimated cost of $83,783; at a minimum it recommended an additional 1" should be applied, at an estimated cost of $43,446. (Id.)

By 2010, 112 had developed and sold seven lots but was unable to complete the subdivision or finish the work on Old Beaver Road. TD Banknorth foreclosed on the remaining nine lots. San-Ken, which had no relationship to 112, bought these nine lots as a single parcel for $150,000 and recorded title to the property on June 19, 2014. (CR 61-64.)

San-Ken applied for building permits in July of 2014; the Board of Selectmen denied the request until a road bond was posted or Old Beaver Road was completed to Town standards. (CR 41-42.) At a hearing on August 6, 2014, after San-Ken argued it should not have to pave to the 2006 standards, the Board suggested an option for San-Ken would be to seek modification of the road requirements. A public hearing was scheduled for September 3, 2014, to consider modification of the original subdivision approval. (CR 6-7.)

Four lot owners within Oakwood Common appeared before the Board on September 3, 2014, arguing that San-Ken was now in the position of developer and they had been promised a road that would meet Town specifications. They opposed modification to the original approval; one lot owner estimated that approximately $20,000 of the purchase price of each lot was for road paving. (CR 8-14.) The matter was continued to September 17, 2014.

On September 17, 2014, the Board heard further discussion regarding San-Ken's commitment to form a homeowners association, repair cracks and pot holes and seal coat the road, pay 9/16ths of the cost of a top coat, and reduce its voting strength to eight votes so that it could not unilaterally force decisions on other lot owners. (CR 16.) The Board approved the modified road requirements. (CR 16-18.) San-Ken completed the sealing and pot hole and crack repairs by October 24, 2014. (CR 739.)

On November 20, 2014, San-Ken approached the Bureau to obtain a certificate of exemption from the Act, pursuant to RSA 356-A:3, II and N.H. Admin. Rules, Jus 1304.07. (CR 254-332.) Exemption would allow San-Ken to market the nine lots. The Bureau required, as a condition of obtaining a certificate of exemption, that San-Ken

repair and pave the road to the Town's original specifications. The Bureau concluded that San-Ken was a "successor subdivider" under the Act and as such was responsible for completion of the amenities provided in the 2006 Declaration of Subdivision. The paved road was not only a Town requirement, it was an amenity promised to all purchasers under the subdivision documents. (CR 426-428.)

San-Ken disagreed with the Bureau's interpretation that registration or exemption from registration was required but, in order to be able to market the lots, it sought a certificate of exemption "without prejudice and while reserving all rights and defenses." (Ex. 6A, letter of January 29, 2015.) On April 21, 2015, San-Ken obtained a bond in the amount of $50,106, payable to the Bureau, to guarantee application of 1½" of pavement to Old Beaver Road. (CR 812-821.) The Bureau issued the certificate of exemption on May 1, 2015. (CR 77.)

Land Sales Full Disclosure Act and Authority of the Bureau

Although San-Ken's regulatory status and the authority of the Bureau is in dispute, the parties do not disagree on most of the essential provisions and interpretation of the Act. The Act is designed to protect purchasers of subdivided residential lots by requiring developers of subdivisions to be registered under RSA 356-A before lots are offered for sale.

RSA 356-A:4, I requires registration of any subdivision prior to lots being offered for sale, unless the subdivided land is exempted from registration by RSA 356-A:3. RSA 356-A:3, I exempts from registration subdivided lands if there are not more than 15 lots. If Oakwood Common had originally been designed as a nine lot subdivision,

therefore, the Act would not have applied. If a development is built in phases, however, each phase must be registered, even if a particular phase comprises fewer than 16 lots.

RSA 356-A:3, II authorizes the Bureau the discretion to "exempt from any of the provisions of this chapter any subdivision or any lots, parcels, units or interests in a subdivision if it finds that the enforcement of all of the provisions of the chapter with respect to such subdivision, lots, parcels, units or interests is not necessary in the public interest and for the protection of purchasers by reason of the small amount involved or in the limited character of the offering, or because such property, in the discretion of the [Bureau], is otherwise adequately regulated by federal, state, county, municipal, or town statutes or ordinances . . ."

A subdivider is "a person who is an owner of subdivided land or one who offers it for disposition. Any successor of the person referred to in this paragraph who comes to stand in the same relation to the subdivided lands as his predecessor did shall also come within this definition; provided, however, the term "subdivider" shall not include any homeowners association which is not controlled by a subdivider." RSA 356-A:1, V. When a new developer takes over a project, then, it must register as a "successor subdivider" and is responsible for the terms approved by the Bureau before any sales are offered.

The Bureau takes the position that San-Ken is not simply an owner of nine lots and is also not a developer of a new nine lot subdivision. Rather, San-Ken, according to the Bureau, is a successor subdivider of Oakwood Common and must be registered or exempted and abide by all terms of the certificate before lots are offered for sale. The Bureau argues it must impose successor subdivider status on San-Ken in order to

protect the interests of the lot owners who purchased from 112 under the Declaration of Covenants, which committed to a paved road. It argues the certificate of exemption granted to 112 does not run with the land and cannot be extended to San-Ken, as the purpose of the Act is to protect consumers by preventing false, deceptive or misleading offers to sell divided lands, and evaluating the financial and business plan details of the developer. A successor developer certificate requires new disclosures and Bureau scrutiny. See, RSA 356-A:5 (Application for Registration), RSA 356-A:6 (Public Offering Statement), and RSA 356-A:7 (Inquiry and Examination).

The Act does not establish a threshold number of units that make a buyer a successor subdivider. Upon questioning at trial, the Bureau argued an owner of two lots, and conceivably even one lot, could be considered a successor subdivider. The Bureau also stated there could be situations in which there are multiple successor subdividers, if more than one entity purchased lots with the intention of resale. When asked whether a person who purchases two lots, one for himself and one for resale to a family member, could be a successor subdivider, the Bureau stated that was possible. Then again, the Bureau stated there could be instances in which a buyer purchases one or more lots with the intention of resale without triggering a successor subdivider registration requirement and that there are no statutory provisions or administrative rules establishing when a purchaser is a successor subdivider.

San-Ken argues the successor subdivider provisions do not apply to a purchaser in its position, in that San-Ken does not "stand in the same relation to the subdivided lands as his predecessor did." *See* RSA 356-A:1, V. San-Ken argues it has no relationship to the original developer, has never held itself out to be the developer of the

subdivision, and had no notice or any way of knowing that purchase at foreclosure would carry with it an obligation to complete the development. San-Ken asserts it only sought registration in order to market the lots. It argues the Bureau has no authority to require registration or exemption from registration, and has no jurisdiction to countermand the 2014 determination of the Board modifying the paving requirements. If the Board found the modified terms for Old Beaver Road acceptable, the Bureau is without authority to demand otherwise, according to San-Ken.

Standard of Review

The standard of review for this administrative appeal is not fully set forth in statute. RSA 356-A:14, I states "[a]ny person aggrieved by a decision or action of the attorney general may, by petition, appeal from said decision or action to the superior court for review. The superior court may affirm, reverse, or modify the decision or action of the attorney general as justice may require." San-Ken urges a standard of broad discretion to achieve a fair and equitable result, relying on tax abatement cases that construed RSA 76:17 ("as justice requires")[1], a First Circuit workers compensation case that construed RSA 281:14 ("as justice may require")[2] and a will contest under New York law ("as justice requires")[3].

The Bureau urges instead that the Court apply the standard of review used in workers compensation and board of registration in medicine administrative appeals.[4] These cases held that New Hampshire courts "will not overturn agency decision or orders, absent an error of law, 'unless the court is satisfied by a clear preponderance of

[1] Tau Chapter of Alpha XI Delta Fraternity v. Town of Durham, 112 N.H. 233 (1972); LSP Ass'n v. Town of Gilford, 142 N.H. 369 (1997).
[2] Del Rio v. N. Blower Co., 574 F. 2d 23 (1st Cir. 1978).
[3] Matter of Estate of Greatsinger, 67 N.Y. 2d 177 (1986).
[4] Appeal of Dell, 140 N.H. 484 (1995); Appeal of Stetson, 138 N.H. 293 (1994).

the evidence before it, that such order is unjust or unreasonable.'" Stetson, 138 N.H. at 295 (citation omitted). The Bureau further argues the agency, charged with the statute's administration and construction, is entitled to substantial deference. New Hampshire Retirement System v. Sununu, 126 N.H. 104, 108 (1985).

The Court finds the standard of review in this instance to be that advocated by the Bureau. The Court will grant the agency substantial but not absolute deference. Appeal of Weaver, 150 N.H. 254, 256 (2003). The Court will not overturn the agency's determination unless a clear preponderance of the evidence demonstrates the order is unjust or unreasonable. Stetson, 138 N.H. at 295.

Analysis

1. San-Ken's Regulatory Status

San-Ken purchased nine of the original 16 lots in a single transaction, for development and resale to individual purchasers. All lots would be subject to the original Declaration of Covenants and individual owners would be members of the homeowners association as set forth in those Covenants. The Board granted San-Ken's request to modify the original approval, holding San-Ken to certain improvements to Old Beaver Road. This demonstrates that the Board considered San-Ken to bear some relationship to the future build out of Oakwood Common.

The Court does not necessarily agree with the Bureau regarding all instances in which a purchaser would be considered a successor subdivider. For example, it is hard to envision how or why purchase of a single lot for resale would trigger registration under the Act. San-Ken's purchase of 9 of the 16 lots, application to the Selectmen for building permits, negotiations with the Board for some improvements to Old Beaver

Road, and commitment to create a homeowners association, however, are sufficient to demonstrate that San-Ken has come "to stand in the same relation to the subdivided lands as his predecessor did." San-Ken has failed to demonstrate by a clear preponderance of the evidence that the Bureau's determination that San-Ken is a successor subdivider was unjust or unreasonable. Requiring registration or exemption from registration under the Act, therefore, was just and reasonable.

2. Bureau's Road Improvement Condition

When granting the certificate of exemption from registration, the Bureau required Old Beaver Road be improved to the specifications the Town imposed on 112 in 2006, and not to the modified specifications the Town imposed on San-Ken in 2014. The Bureau argues it must impose the original standard in order to protect the initial lot owners who relied on the representations in the Declaration of Covenants regarding road construction.

The Bureau's purpose is no doubt well-meaning and an attempt to meet its mandate to protect purchasers of subdivided lands under the Act. The Court finds no authority, however, for the Bureau to disregard and countermand the Board's modification of the original road standards. The Bureau argues that the actions of the Town frustrated purposes of the Act and thus are preempted, citing Forster v. Town of Henniker, 167 N.H. 745 (2015). Forster, however, addresses whether a municipal ordinance is impliedly preempted when it conflicts with a statutory scheme, which is not the situation in the instant case. To the contrary, the Bureau insists on enforcing the local ordinance regarding road paving specifications despite the Board's vote to modify the road requirements.

Neither party presented case law squarely on point and the Court is not aware of other cases in which the Bureau has disregarded a municipal determination and imposed a requirement that the municipality no longer seeks to impose. The Bureau has presented no persuasive basis for its proposition that it has the authority to impose a condition that the Board voted not to impose. The Court finds by a clear preponderance of the evidence that the imposition of the 2006 road specifications as a condition of granting an exemption from registration to be unjust and unreasonable. That term of the certificate of exemption is invalid. The road improvements shall be as required by the Board in 2014, namely, to fix cracks, repair pot holes and apply a 1/2 " seal coat, all of which appear to have been completed by October 24, 2014. The bond held by the Bureau for further road paving shall be returned to San-Ken.

3. Conclusion

The Court AFFIRMS the Bureau's determination that San-Ken is a successor subdivider. The Court REVERSES the request that the 2006 road specifications be met. The certificate of exemption shall be modified consistent with this order.

So ordered.

June 21, 2016

AMY L. IGNATIUS
Presiding Justice

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT
226-2015-CV-0281

San-Ken Homes, Inc.

v.

New Hampshire Attorney General,
Consumer Protection and Antitrust Bureau

ORDER

The plaintiff, San-Ken Homes, Inc. ("San-Ken"), on May 29, 2015, appealed an order of the New Hampshire Attorney General, Consumer Protection and Antitrust Bureau ("Bureau"), pursuant to RSA 356-A:14, asserting that the Bureau lacked authority to require San-Ken to be registered under RSA 356-A, the Land Sales Full Disclosure Act ("Act") and, specifically, lacked authority to require San-Ken to make improvements to Old Beaver Road in the Oakwood Common subdivision in New Ipswich, New Hampshire. After a bench trial on March 3, 2016, the Court found the Bureau had the authority to require San-Ken to be registered as a successor subdivider but did not have the authority to require San-Ken to complete the road to the specifications initially required by the Town of New Ipswich as part of its 2006 subdivision approval.[1] See Order dated June 21, 2016.

Positions of the Parties

The Bureau, on July 5, 2016, moved for partial reconsideration, arguing the Court misconstrued the Bureau's argument regarding the purpose and authority of the Bureau

[1] In 2014, the New Ipswich Planning Board modified the road specifications imposed on the original developer, substituting lesser construction and paving requirements for San-Ken.

to require San-Ken to meet the initial road specifications imposed by the Planning Board. San-Ken objected, on July 14, 2016. The Court heard arguments of the parties on August 9, 2016. After consideration, the Court finds and rules as follows.

The Bureau argues the Court apparently misunderstood its position when it concluded the Bureau sought to impose its judgment regarding road completion, despite the Planning Board's 2014 vote to modify the road specifications. The Bureau asserts its position is not to substitute its own standards for road construction or impose its views in contravention of the municipality's vote. Rather, it seeks to enforce the consumer protection laws related to subdivision of lands pursuant to RSA 356-A and protect purchasers who relied on the approved subdivision documents. The Bureau argues it has an obligation to enforce the original subdivision documents' commitments, on which those initial purchasers relied, even if the Planning Board no longer chooses to impose that level of road construction.

The Bureau argues the exclusive jurisdiction in municipalities to regulate subdivisions, pursuant to RSA 674:35 and 674:36, and the exclusive jurisdiction in the Bureau to enforce the consumer protection provisions of the Land Sales Full Disclosure Act, RSA 356-A, "taken together . . . create a scheme of concurrent regulatory jurisdiction over subdivisions in this state." Motion for Partial Reconsideration at 14. Ultimately, according to the Bureau, the Court's order is unfair to purchasers who relied on the approved subdivision documents. Further, the Court's order will allow developers to subvert consumer protections by promising certain amenities to the Bureau during the regulatory process, as well as early purchasers, and then seeking modification from municipal authorities to escape from those early promises.

San-Ken disagrees, arguing the Court rightly rejected the Bureau's efforts to substitute its judgement for that of the municipality and impose terms the municipality no longer mandated. Because there was no fact or law that had been overlooked or misapprehended, the motion to partially reconsider should be denied. Further, the Bureau should not be allowed to argue any damage the decision might have on the Bureau's ability to enforce consumer protections or to protect purchasers from unscrupulous developers, as those arguments could have been, but were not, raised previously.

San-Ken reiterates its position that the Bureau has overreached in its authority and its concept of "concurrent jurisdiction" is not supported by law, specifically RSA 674:35,II and 674:42. Finally, as to fairness, San-Ken argues it is not responsible for the failures of the initial developer and when the Planning Board agreed to modify the road conditions in 2014, the purchasers filed no appeal despite being fully aware of the decision.

Analysis

"A motion for reconsideration is designed to bring to the trial court's attention points of law or fact that the Court has overlooked or misapprehended." Farris v. Daigle, 139 N.H. 453, 455 (1995) (citing Super. Ct. R. 59-A (1)); see also Webster v. Town of Candia, 146 N.H. 430, 444 (2001). Whether to entertain a motion for reconsideration is in the sound discretion of the trial court. See Webster, 146 N.H at 444 ("We will uphold a trial court's decision on a motion for reconsideration absent an abuse of discretion."); Smith v. Shepard, 144 N.H. 262, 265 (1999) (explaining that "the trial court had the discretion to [ ] not consider the issue").

The Court did not fully appreciate the Bureau's arguments on the law and thus GRANTS partial reconsideration. The bulk of the June 21, 2016, order addressed San-Ken's regulatory status as successor subdivider and the appropriate standard of review under this unusual set of circumstances. The Court has now considered more fully the Bureau's arguments regarding its authority to enforce the subdivision documents under which the original 7 purchasers bought lots. It is undisputed that those 7 purchasers have not received the level of road construction and paving they were promised in the original subdivision documents, for which one purchaser estimates they paid approximately $20,000 per lot.

Upon reconsideration, the Court finds the Bureau is within its authority under RSA 356-A to require the successor subdivider San-Ken to complete Old Beaver Road to the original specifications, even if the municipality no longer cares to impose such standards. Its duty to enforce the consumer protection provisions under the approved Declaration of Subdivision is independent of the municipality's decision to modify the road construction and paving requirements.

If there were no purchasers from the initial developer, the analysis might be different. In this case, however, 7 of the 16 lots were sold under clear provisions regarding the level of construction and paving being conveyed, representing a significant value. The Court agrees that its June 21, 2016, order would be unfair to those purchasers and could undermine the authority of the Bureau to enforce consumer protections in future cases. While it is true that the purchasers could have, and perhaps should have, appealed the Planning Board's 2014 modification, that failure to appeal does not obviate the authority of the Bureau to enforce the subdivision commitments

made during the regulatory process.

Finally, the Court disagrees with San-Ken's statement that the Bureau failed to raise the potential for its diminished capacity to protect consumers if the Court did not hold San-Ken to the 2006 road requirements. Although the phrasing was not entirely similar, the issue was identified during trial.

Because the Court did not fully understand the Bureau's arguments on the law, the motion for partial reconsideration is GRANTED. San-Ken, as successor subdivider, shall complete the road to the 2006 specifications, as set forth in the approved Declaration of Subdivision.

So ordered.

October 14, 2016

AMY L. IGNATIUS
Presiding Justice

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT
226-2015-CV-0281

San-Ken Homes, Inc.

v.

New Hampshire Attorney General,
Consumer Protection and Antitrust Bureau

ORDER

The petitioner, San-Ken Homes, Inc. ("San-Ken") seeks reconsideration of the Court's October 14, 2016 order, for the limited purpose of clarifying the road improvements sought by the New Hampshire Attorney General in this case involving a successor subdivider of land in New Ipswich, New Hampshire.

The petitioner is correct in noting that the court mistakenly ordered that Old Beaver Road be brought to the 2006 Road Specifications. In fact the court intended to require road improvements to meet the Escrow Agreement specifications set forth in the trial record.

The court therefore GRANTS the petitioner's motion to reconsider for the purpose of this clarification. In all other respects, the October 14, 2016 order remains unchanged.

So ordered.

December 9, 2016

AMY L. IGNATIUS
Presiding Justice

STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket Number 2017-00008

SAN-KEN HOMES, INC.,

APPELLANT,

V.

NEW HAMPSHIRE ATTORNEY GENERAL, CONSUMER PROTECTION AND ANTITRUST BUREAU,

APPELLEE.

RULE 7 APPEAL OF FINAL DECISION OF THE HILLSBOROUGH SUPERIOR COURT SOUTHERN DISTRICT

APPENDIX OF APPELLANT, SAN-KEN HOMES, INC.

Attorneys for the Appellant:
Bernstein, Shur, Sawyer & Nelson, P.A.

Michael A. Klass, Esq., #18947
mklass@bernsteinshur.com
670 N. Commercial Street, Suite 108
P.O. Box 1120
Manchester, NH 03105
603-623-8700

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CHAPTER 76
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Abatement

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76:17 By Court. – If the selectmen neglect or refuse so to abate in accordance with RSA 76:16, I (b), any person aggrieved, having complied with the requirements of RSA 74, may, in lieu of appealing pursuant to RSA 76:16-a, apply by petition to the superior court in the county, which shall make such order thereon as justice requires. The appeal shall be filed on or before September 1 following the date of notice of tax under RSA 76:1-a, and not afterwards. If the appeal is filed before July 1 following the date of notice of tax, the person aggrieved shall state in the appeal to the court the date of the municipality's decision on the RSA 76:16, I(b) application.

Source. 1983, 345:1. 1991, 386:9. 1994, 393:6. 1995, 265:19. 2002, 217:3, eff. May 16, 2002. 2014, 175:3, eff. Sept. 9, 2014.

TITLE XI
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CHAPTER 151
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Section 151:4

151:4 Application for License. –

I. Applicants for a license shall file applications under oath with the department of health and human services upon forms prescribed and shall pay the license fee annually into the state treasury, or it shall be refunded to the applicant if the license is denied. The following shall not be required to pay the license fee:

(a) Facilities operated by any unit or division of federal, state, or local government;

(b) Laboratories located in hospitals and operated under the supervision of the hospital; and

(c) Sheltered care facilities, including sheltered homes and community living facilities, in which a placement is made under the department of health and human services.

II. Applications under this section shall be signed:

(a) In a private facility, by the owner,

(b) In a facility having a corporate formation, by 2 of its officers,

(c) In a facility under a governmental unit, by the head of the governmental department having jurisdiction over it,

(d) In an area agency as defined under RSA 171-A:2, I-b, by the area agency director.

III. (a) The department of health and human services shall require that applications set forth the:

(1) Full name and address of the owner of the facility for which license is sought.

(2) Name of the persons in control thereof.

(3) Certification, where local licensing is required, that the facility conforms with applicable local rules, regulations and ordinances having to do with health and safety.

(4) Name or location, or both, of community residences together with any certification required under subparagraph (a)(3) of this paragraph, when the application is submitted by an area agency as defined under RSA 171-A:2, I-b.

(5) Certification that the applicant has notified the public of the intent to file the application with a description of the facility or special health care service to be licensed by publishing a notice in a newspaper of general circulation covering the area where the service is to be located in at least 2 separate issues of the newspaper no less than 10 business days prior to the filing of the application.

(6) Certification, if the facility or special health care service is to be located within a radius of 15 miles of a hospital certified as a critical access hospital, pursuant to 42 C.F.R. section 485.610(b) and (c), that the applicant has given written notice of the intent to file the application with a description of the facility or special health care service to be licensed to the chief executive officer of the hospital by registered mail no less than 10 business days prior to the filing of the application.

(7) For any new facility to be licensed under RSA 151:2, I(a) or (d) to be located within a radius of 15 miles of a hospital certified as a critical access hospital, pursuant to 42 C.F.R. section 485.610 (b) and (c), a written determination by the commissioner of health and human services, after inquiry to the critical access hospital, that the proposed new facility will not have a material adverse impact

on the essential health care services provided in the service area of the critical access hospital.

(b) In addition to the requirements of subparagraph III(a), for facilities providing residence, the application shall include a description of the services and programs to be offered to the residents and a description of the facility's relation to or reliance upon any health care to be provided or offered to residents by individuals, agencies, or organizations from outside of the residence who are not employees of or under contract with or which will not receive payment from the applicant.

III-a. In addition to the requirements under paragraph III, the department of health and human services shall require that the materials submitted for certification of facilities under RSA 126-A:19 be attached to the application for license.

IV. The department of health and human services may require that applications set forth:

(a) Affirmative evidence of ability to comply with such reasonable standards, rules and regulations as may be lawfully prescribed hereunder,

(b) The submission of annual reports of expenses of operation and other information necessary to determine costs. Such reports shall be in accordance with forms and instructions issued by the department.

(c) Any other additional information that the department of health and human services may require.

V. The department of health and human services shall not accept or process the license application of a facility operating under suspension or revocation of a license until any violation of this chapter or of rules adopted thereunder has been corrected and the facility has paid to the department a reinspection fee equal to the annual license fee established in RSA 151:5.

VI. In addition to publication on the department's website, any application for a special health care services license, under RSA 151:2-e, shall be available for inspection and copying by any person immediately upon it being filed.

VII. Any person shall have the right, within 30 days after the filing of any application, to object in writing prior to action by the department on any license on the grounds that the application does not meet the applicable requirements of this chapter or any rule adopted under this chapter. If the license is granted by the department over a timely objection, the person who objected shall have a right to request a rehearing by the commissioner of the department of health and human services under RSA 541:3 within 30 days and to appeal under RSA 541 based on the grounds stated in the objection. If the license is denied by the department in the first instance or after rehearing, the applicant may appeal within 30 days of the date of the department's notice of decision to the supreme court.

Source. 1947, 216:1, par. 4. RSA 151:4. 1969, 379:3. 1977, 332:1. 1979, 399:5, 6. 1982, 44:2. 1983, 274:1; 291:1, I. 1988, 156:2-4. 1991, 365:3. 1995, 310:9, 175, 181, eff. Nov. 1, 1995. 2016, 198:2, 3, eff. July 1, 2016.

TITLE XXXI
TRADE AND COMMERCE

CHAPTER 356-A
LAND SALES FULL DISCLOSURE ACT

Section 356-A:1

356-A:1 Definitions. – As used in this chapter the following words shall have the following meanings unless the context clearly requires otherwise:

I. "Dispose" or "disposition" refers to any sale, contract, assignment, or any other voluntary transfer of a legal or equitable interest in a lot, parcel, unit or interest in subdivided lands, except as security for a debt;

II. "Offer" means any inducement, solicitation, or attempt to encourage any person or persons to acquire any legal or equitable interest in a lot, parcel, unit or interest in subdivided lands, except as security for a debt;

III. "Person" means a natural person, corporation, partnership, association, trust, or other entity capable of holding title to real property, or any combination thereof;

IV. "Purchaser" means any person or persons who acquire by means of a voluntary transfer a legal or equitable interest in a lot, parcel, unit or interest in subdivided lands, except as security for a debt;

V. "Subdivider" means a person who is an owner of subdivided land or one who offers it for disposition. Any successor of the person referred to in this paragraph who comes to stand in the same relation to the subdivided lands as his predecessor did shall also come within this definition; provided, however, the term "subdivider" shall not include any homeowners association which is not controlled by a subdivider;

VI. "Subdivision" and "subdivided lands" mean any land in this or another state which is, or has been, or is proposed to be, divided for the purpose of disposition into lots, parcels, units or interests and also include any land whether contiguous or not if said lots, parcels, units or interests are offered as a part of a common promotional plan of advertising and sale; provided, however, that the terms "subdivision" and "subdivided lands" shall not include condominiums;

VII. "Broker" means a real estate broker duly licensed in this state pursuant to RSA 331-A;

VIII. [Repealed.]

IX. "Agent" means any person who represents, or acts for or on behalf of, a subdivider in selling or leasing, or offering to sell or lease, any lot, parcel, unit or interest in a subdivision, but shall not include an attorney-at-law whose representation of another person consists solely of rendering legal services;

X. "Blanket encumbrance" means a trust, deed, mortgage, judgment, or any other lien or encumbrance, including but not limited to an option or contract to sell or a trust agreement, affecting a subdivision or affecting more than one lot, parcel, unit or interest offered within a subdivision, except that such term shall not include any lien or other encumbrance arising as the result:

(a) Of the imposition of any tax assessment by any public authority;

(b) Of easements; or

(c) Of conditions, covenants, and restrictions which affect the subdivisions;

XI. "Publicly held corporation" means a corporation

(a) Having more than 50 stockholders of record; or

(b) Which is actively traded on one of the major stock exchanges;

XII. "Subsidiary corporation" means any corporation, the stock of which is more than 50 percent owned by another corporation or corporations;

XIII. "Closely held corporation" means any corporation which is not a publicly held corporation as defined in paragraph XI nor a subsidiary corporation as defined in paragraph XII;

XIV. "Hearing" means a hearing open to the public;

XV. "Interest" includes, without limitation, any fee simple interest, leasehold interest for a term of more than 5 years, life estate and time sharing interest;

XVI. "Time sharing interest" means the exclusive right to occupy one or more lots, parcels, or units, including campground sites, for less than 60 days each year for a period of more than 5 years from the date of execution of an instrument for the disposition of such right, regardless of whether such right is accompanied by a fee simple interest or a leasehold, or neither of them, in said lots, parcels or units. Time sharing interest shall include "interval ownership interest," "vacation license," or any other similar term;

XVII. "Days" means calendar days, unless modified by the word "business", in which case said term shall include all days except Saturdays, Sundays and legal holidays in the state of New Hampshire.

Source. 1970, 55:1; 1977, 469:1-4; 1979, 171:1; 1985, 173:1; 300:29, IV. 1992, 278:4, eff. July 17, 1992.

Section 356-A:2

356-A:2 Administration. – There is hereby added to the department of justice, consumer protection and antitrust bureau, such assistant attorneys general, investigators, clerical, stenographic and other staff as the attorney general may appoint within the appropriation made therefor. Said staff shall enforce and administer the provisions of this chapter, subject to the supervision of the attorney general, and perform such other duties as the attorney general may from time to time assign.

Source. 1970, 55:1. 1979, 171:1. 1985, 300:7, I(a).

Section 356-A:3

356-A:3 Exemptions. –

I. Unless the method of disposition is adopted for the purpose of evasion of this chapter, the provisions of this chapter shall not apply to any offer or disposition of:

(a) Subdivided lands if not more than 15 lots, parcels, units or interests are included iu such subdivided lands; provided, however, this exemption shall not apply to subdivided lands involving time share interests;

(b) Subdivided lands pursuant to court order;

(c) Subdivided lands by any government or government agency;

(d) Subdivided lands if all lots, parcels, units and interests are restricted to commercial, industrial or other non-residential use;

(e) Cemetery lots;

(f) Securities or units of interest issued by a real estate investment trust regulated under any state or federal statute;

(g) Securities registered with the insurance commissioner of this state; and

(h) Any interest in oil, gas or other minerals or any royalty interest therein, if the offer or disposition of such interests are regulated as securities by any federal agency or by the insurance

commissioner of this state.

I-a. (a) A subdivider of subdivided lands of no more than 50 lots, parcels, units, or interests may apply to the attorney general for an exemption from the registration and annual reporting requirements of RSA 356-A:4, I and RSA 356-A:5 through RSA 356-A:9. Within 60 days of receipt of an application for exemption, the attorney general shall issue a written notice to the subdivider stating that the exemption has either been granted or denied, or the attorney general may identify deficiencies in the application. The subdivider shall have 15 days to correct the deficiencies, or a longer period mutually agreed to by the subdivider and the attorney general. If the attorney general fails to respond to the application within 60 days, the subdivider shall be deemed to have been granted an exemption. The governing body of the municipality in which the subdivision is located shall be provided notice and an opportunity to submit comments to the attorney general on any application for exemption under this paragraph.

(b) A subdivider shall be entitled to an exemption from the registration and annual reporting requirements of RSA 356-A:4, I and RSA 356-A:5 through RSA 356-A:9 if the following conditions are met:

(1) The subdivision shall have no more than 50 lots, parcels, units, or interests, including any that might be added at any future time.

(2) Each lot offered or disposed of under the exemption shall be limited exclusively by:

(A) Enforceable covenants or restrictions; or

(B) Enforceable zoning ordinances applicable to single-family residences or duplexes. For purposes of this subparagraph, mobile homes, townhouses, and other residences intended for use by one family shall be considered single family residences.

(3) The city or town in which the subdivision lots are located has a population of at least 5,000 at the time the application is filed, based on the most recent decennial U.S. census. If the subdivision is located in more than one town or city, only those lots located in a town or city that has a population of at least 5,000 may be exempted.

(4) Each of the cities or towns in which lots are located shall have, prior to the time the application is filed:

(A) Established a planning board pursuant to RSA 673:1, I.

(B) Enacted a process for the enforcement of the state building code pursuant to RSA 674:51.

(C) Appointed a building inspector pursuant to RSA 673:1, III.

(D) Adopted a zoning ordinance pursuant to RSA 674:16.

(E) Adopted subdivision regulations pursuant to RSA 674:36.

(5) The contract of sale shall require delivery of a warranty deed, free from monetary liens and encumbrances, to the purchaser within 360 days after the signing of the sales contract.

(6) The contract of sale shall be voidable at the election of the purchaser, in the event the warranty deed has not been delivered within the required time period, and the contract shall state that it is so voidable.

(7) The purchaser or purchaser's agent shall make a personal, on-site inspection of the lot purchased prior to signing a contact or agreement to purchase.

(8) If the subdivider or the subdivider's agent represents in any manner that improvements, roads, sewers, water, gas or electric service, or recreational amenities will be provided or completed by the subdivider, the purchase and sale agreement shall contain provisions so obligating the subdivider.

(9) The purchase and sale agreement shall contain notice of the cancellation rights under RSA 356-A:4, II and shall identify the person or institution holding deposits in escrow by name and address.

(10) The subdivider shall not:

(A) Have been convicted of any crime within the past 10 years which, if committed in this

state, would constitute a felony.

(B) Have been the subject of a cease and desist order, revocation, injunction, or similar enforcement order relating to illegal condominium or land sales activity in this state or elsewhere.

(C) Have as a principal, any person or entity who has been subject to such enforcement order or criminal conviction, or who has been a principal in an entity that has been subject to such enforcement order or criminal conviction.

(11) The subdivider shall provide, by certified mail, a copy of the request for exemption under this paragraph to the governing body of each city or town in which lots are located. Postal receipts verifying that the governing body has been so notified shall be submitted to the attorney general with the application for exemption.

II. The attorney general may from time to time, in accordance with rules adopted by it pursuant to RSA 541-A, exempt from any of the provisions of this chapter any subdivision or any lots, parcels, units or interests in a subdivision if it finds that the enforcement of all of the provisions of this chapter with respect to such subdivision or lots, parcels, units or interests is not necessary in the public interest and for the protection of purchasers by reason of the small amount involved or the limited character of the offering, or because such property, in the discretion of the attorney general, is otherwise adequately regulated by federal, state, county, municipal, or town statutes or ordinances, or because such property has been registered and approved pursuant to the laws of any other state. Applications for exemption shall be filed in a form prescribed by the attorney general and shall be accompanied by an application fee of $200.

Source. 1970, 55:1. 1971, 474:1. 1977, 469:5. 1979, 289:1. 1983, 469:79. 1985, 300:7, I, b. 2014, 291:1, eff. Sept. 26, 2014.

Section 356-A:4

356-A:4 Prohibition on Dispositions of Interests in Subdivisions. – Unless the subdivided lands or the transaction is exempted by RSA 356-A:3:

I. No subdivider may offer or dispose of any lot, parcel, unit or interest in subdivided lands located in this state, nor offer or dispose in this state of any lot, parcel, unit or interest in subdivided lands located without this state prior to the time the subdivided lands are registered in accordance with this chapter;

II. No subdivider, except as provided in RSA 356-A:6, IV, may dispose of any lot, parcel, unit or interest in subdivided lands unless he delivers to the purchaser a current public offering statement by the time of such disposition and such disposition is expressly and without qualification or condition subject to cancellation by the purchaser within 5 days from the contract date of the disposition, or delivery of the current public offering statement, whichever is later. If the purchaser elects to cancel, he may do so by notice thereof hand-delivered or deposited in the United States mail, return receipt requested, within the 5 day period, to the declarant or to any agent of the subdivider; provided, however, that if the purchaser elects to mail the notice of cancellation, he must also provide the subdivider with telephonic notice of cancellation within the 5 day period. Such cancellation shall be without penalty, and any deposit made by the purchaser shall be refunded in its entirety no later than 10 days from the receipt of such written notice of cancellation. "Contract date" shall not refer to the closing or settlement date, but shall refer to the creation of a binding obligation for consideration;

III. No person, other than the owner, subdivider, or regular employee thereof, shall act in this state as an agent of said owner or subdivider for the sale or disposition of subdivisions subject to the provisions of this chapter unless he is licensed pursuant to RSA 331-A.

IV. No person shall, in connection with the offer or disposition of any lot, parcel, unit or interest in subdivided lands located in this state or in connection with the offer or disposition in this state of any

lot, parcel, unit or interest in subdivided lands without this state, conduct or participate in any type of lottery or contest or offer prizes or gifts for the purpose of inducing or encouraging any person to visit a subdivision, attend any meeting at which a subdivision will be discussed, or purchase a lot, parcel, unit or interest in subdivided lands; provided, however, that this paragraph shall not prohibit the reimbursement of a prospective purchaser for reasonable travel expenses or the offering, in a manner not dependent upon or connected with chance, of tangible personal property which will be delivered to the offeree not later than the time of the offeree's visit to a subdivision or attendance at a meeting at which a subdivision will be discussed.

Source. 1970, 55:1. 1977, 469:6. 1979, 289:3, eff. Oct. 1, 1979.

Section 356-A:5

356-A:5 Application for Registration. –

I. The application for registration of subdivided lands shall be filed in a form prescribed by the attorney general and shall contain the following documents and information:

(a) An irrevocable appointment of the attorney general to receive service of any lawful process in any noncriminal proceeding arising under this chapter against the subdivider or his personal representative;

(b) A legal description of the perimeter of subdivided lands offered for registration, together with a map showing the division proposed or made, and the dimensions of the lots, parcels, units or interests and the relation of the subdivided lands to existing streets, roads, and other off-site improvements;

(c) The states or jurisdictions in which an application for registration or similar document has been filed, and any adverse order, judgment, or decree entered in connection with the subdivided lands by the regulatory authorities in each jurisdiction or by any court;

(d) The subdivider's name, address, and the form, date, and jurisdiction of organization; and the address of each of its offices in this state;

(e) The name, address, and principal occupation for the past 5 years of every director, president, vice president, treasurer, clerk, of the subdivider or person occupying a similar status or performing similar functions; the extent and nature of any interest of each in the subdivider or the subdivided lands as of a specified date within 30 days of the filing of the application;

(f) If the subdivider is a closely held corporation, partnership, joint stock company, trust or sole proprietorship, the name, address and principal occupation of each trustee, stockholder, partner, or person having any beneficial interest therein;

(g) If the subdivider is a publicly held corporation, the name, address and principal occupation of each stockholder owning more than 10 percent of the shares outstanding;

(h) If the subdivider is a subsidiary corporation, the name, address and principal occupation of each stockholder or person having a beneficial interest therein, and the name, address and principal occupation of each stockholder owning more than 10 percent of the shares outstanding in the corporation or corporations to which it is subsidiary;

(i) a statement of the condition of the title to the subdivided lands, including all easements, conditions, covenants, restrictions, liens and other encumbrances, if any, affecting subdivided lands owned by the subdivider, with appropriate recording data, as of a specified date within 30 days of the date of application, which statement shall be in the form of a title opinion of a licensed attorney, not under salary to the subdivider or owner, or other evidence of title acceptable to the attorney general;

(j) Copies of the instruments which will be delivered to a purchaser to evidence his interest in the subdivided lands and of the contracts and other agreements which a purchaser will be required to agree to or sign;

(k) [Repealed.]

(l) If there is a blanket encumbrance or lien affecting more than one lot, parcel, unit or interest, a statement of the consequences for a purchaser of failure to discharge the blanket encumbrance or lien and the steps, if any, taken to protect the purchaser in case of this eventuality;

(m) [Repealed.]

(n) A statement of the zoning, subdivision, and other governmental approvals, if any, affecting the subdivided lands and also, if known, any existing tax and existing or proposed special taxes or assessments which affect the subdivided lands;

(o) A statement of the existing provisions for access, sewage disposal, water, and other public utilities in the subdivided lands; a statement of any improvements or amenities which may be constructed, an estimate of their cost and the schedule for their completion; provided, however, that if the subdivider will give no assurances as to the construction or completion of said improvements or amenities, a statement that no assurance will be given must be included; and a statement of the plan for financing the construction of said improvements or amenities and the maintenance of the subdivided lands;

(p) A description of the promotional plan for the disposition of the subdivided lands;

(q) The proposed public offering statement;

(r) If the subdivider is a corporation, a copy of its articles of incorporation with all amendments thereto;

(s) If the subdivider is a trust, a copy of all instruments by which the trust is created together with all amendments thereto;

(t) If the subdivider is a partnership, unincorporated association, joint stock company, or any other form of organization, a copy of its articles of partnership or association and all other papers pertaining to its organization, including all amendments thereto;

(u) If the subdivider is not the holder of legal title, copies of the appropriate documents required by subparagraphs (r), (s) or (t) shall be submitted for the holder of legal title;

(v) Any other information, including any current financial statement, which the attorney general by reasonable rules requires for the protection of purchasers. If the subdivider is a limited liability company, corporation, or other entity, personal financial statements from all principals holding more than a 25 percent ownership interest in the subdivider, certified as true and complete by the individual principals, accompanied by federal income tax returns for the 2 most recent full calendar years, may be submitted in lieu of financial statements for the subdivider. Financial information filed with the attorney general shall not be disclosed publicly except in connection with a hearing, civil action, or criminal action involving the party who submitted the information.

II. For subdivisions not entitled to exemption under RSA 356-A:3, I-a, a subdivider of subdivided lands of no more than 50 lots, parcels, units or interests may make an abbreviated registration in lieu of these requirements, which shall contain only the documents and information required by RSA 356-A:5, I(a), (c)-(h), (j), (n)-(p) and (v); provided, however, that this section shall not apply to subdivided lands involving time share interests.

III. A subdivider of a subdivision which has been registered under the federal Interstate Land Sales Full Disclosure Act may file, in lieu of the documents and information required by RSA 356-A:5, I(b)-(e), and (i)-(u) and RSA 356-A:6, I, a copy of an effective statement of record, a property report, and any exhibits requested by the attorney general, filed with the Secretary of Housing and Urban Development.

IV. The submission of documents and information required by RSA 356-A:5, I, may be satisfied by the documents and information contained in or attached to the public offering statement.

V. If the subdivider registers additional subdivided lands to be offered for disposition, he may consolidate the subsequent registration with any earlier registration offering subdivided lands for disposition under the same promotional plan.

VI. At any time the attorney general has reasonable cause to believe that the subdivider may be unable to complete the development of the subdivided lands, or provide for its maintenance, if responsibility therefor is assumed by the subdivider, as represented in its application for registration due to:

(a) Its failure to commence or complete the development of the subdivided lands according to schedules set forth in the application;

(b) Its failure to commence or complete the development of any other subdivided lands or condominium according to representations authorized and made by the subdivider or declarant in connection with the offering or disposing of any interest therein;

(c) Its failure to set forth a reasonable plan to obtain adequate financing to commence or complete the development of the subdivided lands or provide for its maintenance; or

(d) Its commission of any false, deceptive or misleading acts in connection with the offering or disposing of any interest in any subdivided lands or condominium;

it may require the subdivider to post a bond, in favor of the state, or to provide evidence of financial security in such amount as the attorney general determines to be necessary to provide reasonable assurance of the commencement and completion of the development of the subdivision. Such bond shall not be accepted unless it is with a surety company authorized to do business in this state. Any person aggrieved by the failure of the subdivider to complete or maintain the subdivided lands may proceed on such bond against the subdivider or surety or both to recover damages.

VII. Every application shall be accompanied by a fee in an amount equal to $30 per lot, parcel, unit or interest, except that the initial application fee shall not be less than $300 nor more than $2,000, and the fee for any application for registration of additional lots, parcels, units or interests shall not be less than $200 nor more than $2,000.

VIII. The applicant of a subdivision to be converted within the meaning of RSA 356-C:1, II, shall, in addition to the requirements contained in this section, include with the application for registration a copy of the notices described in RSA 356-C:3, I or II and a certified statement that such notices comply with the provisions of RSA 356-C:3, I or II and have been or will be mailed to each of the tenants in the subdivisions for which registration is sought, in compliance with RSA 356-C:3, I or II.

Source. 1970, 55:1. 1977, 469:7-12. 1981, 568:25. 1983, 398:2, 469:80. 1985, 300:7, I(b). 1989, 408:102, eff. July 1, 1989. 2009, 144:240, eff. July 1, 2009. 2011, 224:319, eff. July 1, 2011. 2014, 291:2, eff. Sept. 26, 2014. 2015, 256:3, eff. Jan. 1, 2016.

Section 356-A:6

356-A:6 Public Offering Statement. –

I. A public offering statement shall be in a form prescribed by the attorney general and shall include the following:

(a) The name and principal address of the subdivider;

(b) A general description of the subdivided lands stating the total number of lots, parcels, units, or interests in the offering;

(c) The significant terms of any encumbrances, easements, liens, and restrictions, including zoning, water pollution and other regulations affecting the subdivided lands and each unit or lot, and a statement indicating whether or not any such zoning, water pollution and other regulations have been complied with;

(d) A statement of the use for which the property is offered;

(e) Information concerning improvements, including streets, water supply, levees, drainage control systems, irrigation systems, sewage disposal facilities and customary utilities, and the estimated cost, if any, to be borne by the purchaser, date of completion and responsibility for

construction and maintenance of existing and proposed improvements which are referred to in connection with the offering or disposition of any interest in subdivided lands;

(f) Additional information reasonably required by rules adopted by the attorney general, pursuant to RSA 541-A, to assure full and fair disclosure to prospective purchasers, including a statement of the cancellation rights set forth in RSA 356-A:4, II.

II. The public offering statement shall not be used for any promotional purposes until it is approved by the attorney general. The attorney general may, in his discretion, authorize the use of such statement prior to his approval of the registration of the subdivided lands under such conditions as he deems appropriate. No person may advertise or represent that the attorney general approves or recommends the subdivided lands or disposition thereof. No portion of the public offering statement may be underscored, italicized, or printed in larger or heavier or different color type than the remainder of the statement unless the attorney general requires it, and no statement may be used unless in its entirety.

III. The attorney general may require the subdivider at any time to alter or amend the proposed public offering statement in order to assure full and fair disclosure to prospective purchasers. A public offering statement is not current unless all amendments are incorporated.

IV. Any subdivider which has been permitted to submit an abbreviated registration pursuant to RSA 356-A:5, II, and any subdivider or subdivided lands which has been registered under the federal Interstate Land Sales Full Disclosure Act is not required to prepare a public offering statement to be used in connection with the offer or disposition of any interest in the subdivided lands.

Source. 1970, 55:1. 1977, 469:13-15. 1985, 300:7, I(b), 15.

Section 356-A:7

356-A:7 Inquiry and Examination. –

I. Upon receipt of an application for registration in proper form, the attorney general shall forthwith initiate such examination as he shall deem necessary to determine:

(a) That the subdivider can convey or can reasonably be expected to be able to convey or cause to be conveyed the interest in subdivided lands offered for disposition if the purchaser complies with the terms of the offer and, when appropriate, that release clauses, conveyances in trust or other safeguards have been provided;

(b) That there is reasonable assurance that all proposed improvements will be completed as represented. Reasonable assurance includes, but is not limited to, institutional financing in the form of a revolving line of credit in an amount equal to one-fourth of the total cost of constructing the residential units being registered, so long as (i) the loan documents provide (a) that funds may be re-advanced during the term of the loan to construct the residential units, and (b) that the institutional lender shall notify the attorney general in the event that the revolving line of credit is cancelled and (ii) in addition to the funds allocated to residential unit construction, the applicant shall provide evidence of adequate funds to complete any infrastructure, such as roads and utilities, necessary to service the units being registered. This subparagraph shall not prohibit the attorney general from finding other forms of financing to provide reasonable assurance. If the attorney general determines that a revolving line of credit has been cancelled, or is no longer adequate to pay for the cost of constructing the units that have been registered, the attorney general may issue a temporary cease and desist order pursuant to RSA 356-A:12;

(c) That the general promotional plan is not false or misleading and complies with the standards prescribed by the attorney general in his rules and affords full and fair disclosure;

(d) Whether the subdivider has not, or if a corporation its officers, directors, and principals have not, been convicted of a crime involving land dispositions or any aspects of the land sales business or

any other felony in this state, the United States, or any other state or foreign country within the past 10 years and has not been subject to any injunction or administrative order within the past 10 years restraining a false or misleading promotional plan involving land dispositions;

(e) That the public offering statement requirements of this chapter have been satisfied.

II. All reasonable expenses incurred by the attorney general in carrying out the examination required by paragraph I shall be paid by the subdivider and no order registering the subdivided lands shall be entered until such expenses have been fully paid.

Source. 1970, 55:1. 1977, 469:16. 1985, 300:7, I, b. 2015, 256:4, eff. Jan. 1, 2016.

Section 356-A:8

356-A:8 Notice of Filing and Registration. –

I. Upon receipt of the application for registration in proper form, the attorney general shall issue a notice of filing to the applicant. As soon as possible and within 60 days from the date of the notice of filing, the attorney general shall enter an order registering the subdivided lands or rejecting the registration. If no order or rejection is entered within 60 days from the date of notice of filing, the land shall be deemed registered unless the applicant has consented in writing to a delay. Notice of all registrations shall be recorded in the registry of deeds of each county in which said land is situated within 10 days of their receipt by the attorney general.

II. If the attorney general affirmatively determines, upon inquiry and examination, that the requirements of this chapter have been met, he shall enter an order registering the subdivided lands and shall designate the form of the public offering statement.

III. If the attorney general determines upon inquiry and examination that any of the requirements of this chapter have not been met, the attorney general shall notify the applicant that the application for registration must be corrected in the particulars specified within 15 days. If the requirements are not met within the time allowed, the attorney general shall enter an order rejecting the registration which shall include the findings of fact upon which the order is based. During the aforesaid 15 day period, the applicant may petition for reconsideration and shall be entitled to a hearing within 15 days of receipt by the attorney general of said petition. The attorney general shall enter his findings on said petition within 10 days of said hearing. The attorney general shall order a rejection of the registration until such time as the hearing, once requested, has taken place and the attorney general has entered his findings thereon, or such petition is withdrawn; provided, however, that if by the time that said findings are entered, all of the particulars specified in the attorney general's notice have been corrected or, as a result of the attorney general's reconsideration and hearing, have been met to the attorney general's satisfaction, the attorney general shall order registration of the subdivided lands.

IV. The fact that a statement of record with respect to a subdivision has been filed or is in effect shall not be deemed a finding by the attorney general that the statement of record is true and accurate on its face, or be held to mean the attorney general has in any way passed upon the merits of, or given approval to, such subdivision. It shall be unlawful to make, or cause to be made, to any prospective purchaser any representation contrary to this paragraph.

V. The subdivider shall not make any material change in the plan of disposition or development of the subdivided lands contained in the application for registration without notifying the attorney general, obtaining his prior approval and making appropriate amendment of the public offering statement.

Source. 1970, 55:1. 1977, 469:17, 18. 1985, 300:7, I, b. 1999, 100:2, eff. Jan. 1, 2000.

Section 356-A:9

356-A:9 Annual Report. –

I. On April 1 of each year following the registration of the subdivided lands, the subdivider shall, until such time as all of the improvements in the subdivided lands have been completed and all of the lots, parcels, units or interests have been disposed of by the subdivider, file a report in the form prescribed by the attorney general. The report shall reflect any material changes in information contained in the original application for registration, including but not limited to any change in the ownership of interests in the corporation or organization as required in RSA 356-A:5, I(f), (g) and (h).

II. The attorney general at his option may permit the filing of annual reports within 30 days after the anniversary date of the consolidated registration in lieu of the anniversary date of the original registration.

Source. 1970, 55:1. 1977, 469:19. 1985, 300:7, I, b.

Section 356-A:9-a

356-A:9-a Escrow of Deposits. – Any deposit made in regard to any disposition of a lot, parcel, unit or interest in subdivided lands shall be held in escrow until settlement or closing. Such escrow funds shall be deposited in a separate account designated for this purpose; provided, however, if such funds are being held by a real estate broker or attorney licensed under the laws of this state, they may be placed in that broker's or attorney's regular escrow account and need not be placed in a separate designated account. Such escrow funds shall not be subject to attachment by the creditors of either the purchaser or the subdivider.

Source. 1977, 469:20, eff. Sept. 10, 1977.

Section 356-A:9-b

356-A:9-b Resale by Purchaser. –

I. In the event of any resale of a lot, parcel, unit or interest in subdivided lands by any person other than the subdivider, the prospective purchaser shall have a right to obtain from the property owners' association, if any, prior to the contract date of disposition, the following:

(a) A statement of any capital expenditures and major maintenance expenditures anticipated by the property owners' association within the current or succeeding 2 fiscal years;

(b) A statement of the status and amount of any reserve for the major maintenance or replacement fund and any portion of such fund earmarked for any specified project by the board of directors;

(c) A copy of the income statement and balance sheet of the property owners' association for the last fiscal year for which such statement is available;

(d) A statement of the status of any pending suits or judgments in which the property owners' association is a party defendant;

(e) A statement setting forth what insurance coverage is provided for all property owners by the property owners' association and what additional insurance coverage would normally be secured by each individual property owner; and

(f) A statement that any improvements or alterations made to the lot, parcel, unit or interest by the prior property owner are not known to be in violation of any restrictions and covenants imposed upon the subdivided lands.

II. The principal officer of the property owners' association, or such other officer or officers as the instruments creating such association may specify, shall furnish the statements prescribed by paragraph I upon the written request of any prospective purchaser within 10 days of the receipt of such request.

Source. 1977, 469:20, eff. Sept. 10, 1977.

Section 356-A:9-c

356-A:9-c Taxation. – Each lot, parcel, or unit in which time sharing interests, as defined in RSA 356-A:1, XVI, have been created shall be valued for purposes of real property taxation as if such lot, parcel, or unit were owned by a single taxpayer. Condominium units in which time sharing interests have been created shall be taxed as wholly owned condominium units. The total cumulative purchase price paid for time sharing interests in any such lot, parcel, or unit shall not be determinative of its assessed value. No taxes shall be assessed against the individual owner of a time sharing interest but shall be assessed against the record owner of such lot, parcel, or unit; the owners' association; trustee; or managing agent, as appropriate.

Source. 1985, 107:1. 1989, 128:1, eff. May 15, 1989.

Section 356-A:10

356-A:10 General Powers and Duties. –

I. [Repealed.]

II. If it appears that any person has engaged or is about to engage in any false, deceptive or misleading advertising to offer or dispose of any lot, parcel, unit or interest in subdivided lands, the attorney general may require by written notice the filing of advertising material relating to such subdivided lands prior to its distribution.

III. If it appears that a person has engaged or is about to engage in an act or practice constituting a violation of a provision of this chapter or a rule or order hereunder, the attorney general, with or without prior administrative proceedings, may bring an action in the superior court to enjoin the acts or practices and to enforce compliance with this chapter or any rule or order hereunder. Upon proper showing, injunctive relief or temporary restraining orders shall be granted, and a receiver may be appointed pursuant to paragraph III-a. The attorney general is not required to post a bond in any court proceedings.

III-a. In connection with any action brought under paragraph III, the attorney general may also petition the court to appoint a receiver to take charge of the business of any person during the course of litigation when the attorney general has reason to believe that such an appointment is necessary to prevent such person from continuing to engage in any act or practice declared unlawful by this chapter and to preserve the assets of said person to restore to any other person any money or property, acquired by any unlawful act or practice. The receiver shall have the authority to sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, records, documents, papers, choses in action, bills, notes and property of every description, including property with which such property has been mingled if it cannot be identified in kind because of such commingling, derived by means of any unlawful act or practice, and to sell, convey and assign the same and hold, dispose and distribute the proceeds thereof under the direction of the court. Any person who has suffered damages as a result of the use of any unlawful act or practice and submits proof to the satisfaction of the court that he has in fact been damaged may participate with general creditors in the distribution of the assets to the extent that he has sustained out-of-pocket losses. In the case of a partnership or business entity, the receiver shall settle the estate and distribute the assets under the direction of the court. The court shall have jurisdiction of all questions arising in such proceedings and may make such orders and judgments therein as may be required. In lieu of the foregoing procedure, the court may permit any person alleged to have violated this chapter to post a bond in a manner and in an amount to be fixed by the court. Said bond shall be

made payable to the state and may be distributed by the court only after a decision on the merits and the process of appeals has been exhausted.

IV. The attorney general may intervene in any suit involving subdivided lands alleging violation of this chapter. In any such suit by or against a subdivider involving subdivided lands, the subdivider promptly shall furnish the attorney general notice of the suit and copies of all pleadings.

V. The attorney general may:

(a) Accept registrations filed in other states, in lieu of the filing required by this chapter upon the filing of a fee of $100;

(b) Contract with similar agencies in this state or other jurisdictions to perform investigative functions;

(c) Accept grants in aid from any source.

VI. The attorney general may cooperate with similar agencies in other jurisdictions to establish uniform filing procedures and forms, uniform public offering statements, advertising standards, rules and common administrative practices.

Source. 1970, 55:1. 1977, 469:21, 22. 1985, 300:7, I(b), 16, eff. Jan. 1, 1986; 300:30, eff. July 1, 1987.

Section 356-A:11

356-A:11 Investigations and Proceedings. –

I. The attorney general may:

(a) Make necessary public or private investigations within or outside of this state to determine whether any person has violated or is about to violate this chapter or any rule or order hereunder, or to aid in the enforcement of this chapter or in the prescribing of rules and forms hereunder;

(b) Require or permit any person to file a statement in writing, under oath and subject to the pains and penalties of perjury or otherwise as the agency determines, as to all the circumstances concerning matters under investigation.

II. For the purpose of any hearing under this chapter, the attorney general or any officer designated by rule may administer oaths or affirmations. Upon his own motion or upon request of any party, the attorney general or any officer designated by rule shall subpoena witnesses, issue subpoena duces tecum, compel their attendance, take evidence, and require the production of any matter which is relevant to such hearing, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts or any other matter reasonably calculated to lead to the discovery of material evidence.

III. Upon failure to obey a subpoena or subpoena duces tecum or to answer questions propounded by the investigating officer, or to produce any material required by the investigating officer, and upon reasonable notice to all persons affected thereby, the attorney general may apply to the superior court for an order compelling compliance.

Source. 1970, 55:1. 1985, 300:7, I(b).

Section 356-A:12

356-A:12 Cease and Desist Orders. –

I. If the attorney general determines after notice and hearing that a person has:

(a) Violated any provisions of this chapter;

(b) Directly or through an agent or employee knowingly engaged in any false, deceptive, or

misleading advertising, promotional, or sales methods to offer or dispose of any interest in subdivided lands;

(c) Made any material change in the plan of disposition and development of the subdivided lands subsequent to the order of registration without notifying the attorney general, obtaining his prior approval and making an appropriate amendment to the public offering statement;

(d) Disposed of any subdivided lands which have not been registered with the attorney general;

(e) Violated any lawful order or rule of the attorney general;

he may issue an order requiring the person to cease and desist from the unlawful practice and to take such affirmative action as in the judgment of the attorney general will carry out the purposes of this chapter.

II. If the attorney general determines that the public interest will be irreparably harmed by delay in issuing an order, he may, without hearing, issue a temporary cease and desist order. Prior to issuing the temporary cease and desist order, the attorney general shall attempt to give telephonic or other notice of the proposal to issue a temporary cease and desist order to the person. Every temporary cease and desist order shall include findings of fact in support of the attorney general's determination that the public interest will be irreparably harmed by delay in issuing the order and a provision that upon request a hearing will be held within 10 business days of the deposit in the United States mails or delivery in hand of said order to determine whether or not it becomes permanent.

Source. 1970, 55:1. 1977, 469:23, 24. 1985, 300:7, I(b).

Section 356-A:13

356-A:13 Revocation. –

I. A registration may be revoked after notice and hearing upon a written finding of fact that the subdivider has:

(a) Failed to comply with the terms of a cease and desist order;

(b) Been convicted after final appeal in any court subsequent to the filing of the application for registration for a crime involving fraud, deception, false pretenses, misrepresentation, false advertising, or dishonest dealing in real estate transactions;

(c) Disposed of, concealed, or diverted any funds or assets of any person so as to defeat the rights of subdivision purchasers;

(d) Failed to perform any stipulation or agreement made with the agency as an inducement to grant any registration, to reinstate any registration, or to approve any promotional plan or public offering statement;

(e) Made intentional misrepresentations or concealed material facts in an application for registration.

Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.

II. If the attorney general finds after notice and hearing that the subdivider has been guilty of a violation for which revocation could be ordered, he may issue a cease and desist order instead.

III. If the attorney general makes a determination that the public interest will be irreparably harmed by delay in issuing an order, he may, without hearing, issue a temporary cease and desist order subject to the requirements of RSA 356-A:12, II.

Source. 1970, 55:1. 1977, 469:25, 26. 1985, 300:7, I(b).

Section 356-A:14

356-A:14 Judicial Review. –

I. Any person aggrieved by a decision or action of the attorney general may, by petition, appeal from said decision or action to the superior court for review. The superior court may affirm, reverse, or modify the decision or action of the attorney general as justice may require.

II. The filing of the petition does not itself stay enforcement of the attorney general's decision. The attorney general may grant, or the superior court may order, a stay upon appropriate terms.

III. Within 30 days after the service of the petition, or within further time allowed by the court, the attorney general shall transmit to the superior court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record.

IV. If, before the date set for a court hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the attorney general, the court may order that the additional evidence be taken before the attorney general upon conditions determined by the court. The attorney general may modify his findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the superior court.

Source. 1970, 55:1. 1977, 469:27. 1985, 300:7, I(b).

Section 356-A:15

356-A:15 Penalties. – Any person who wilfully violates any provision of RSA 356-A or of a rule adopted under it or any person who wilfully, in an application for registration, makes any untrue statement of a material fact or omits to state a material fact shall be guilty of a class B felony if a natural person, or guilty of a felony if any other person.

Source. 1970, 55:1. 1973, 528:249, eff. Oct. 31, 1973 at 11:59 p.m.

Section 356-A:16

356-A:16 Civil Remedy. –

I. Any subdivider who disposes of any lot, parcel, unit or interest in subdivided lands in violation of this chapter, or who in disposing of any lot, parcel, unit or interest in subdivided lands makes an untrue statement of a material fact, or who in disposing of any lot, parcel, unit or interest in subdivided lands omits a material fact required to be stated in a registration statement or public offering statement or necessary to make the statements made not misleading, is liable to the purchaser of such lot, parcel, unit or interest, as set forth in paragraph II, unless, in the case of an untruth or omission, it is proved that the purchaser knew of the untruth or omission or that the subdivider did not know and in the exercise of reasonable care could not have known of the untruth or omission, or that the purchaser did not rely on the untruth or omission.

II. Any purchaser, who is eligible for relief under paragraph I, may bring an action to restrain by temporary or permanent injunction any act or practice declared unlawful by this chapter and may recover the consideration, including all finance charges, paid in connection with the purchase of the lot, parcel, unit or interest in subdivided lands together with interest at the rate of 6 percent per year from the date of all such payments, less the amount of any income received from such subdivided lands, upon tender of deed reconveying title to the subdivider which is as good and marketable as that

which was conveyed to the purchaser by the subdivider. In the discretion of the court, exemplary damages of up to $5,000 may also be awarded. If the purchaser no longer owns the lot, parcel, unit or interest in subdivided lands, he may recover the amount that would be recoverable upon a tender of a reconveyance less the value of the lot, parcel, unit or interest in subdivided lands when disposed of and less interest at the rate of 6 percent per year on that amount from the date of disposition. If the purchaser prevails in any such action, he may be awarded all reasonable court costs and attorney's fees, as approved by the court.

III. Any person who materially participates in any disposition of a lot, parcel, unit or interest in subdivided lands in the manner specified in paragraph I and knew of the existence of the facts by reason of which the liability is alleged to exist is also liable jointly and severally with the subdivider if and to the extent such liability may exist at common law or under other statutory provision. A right to contribution exists among persons so liable.

IV. Every person whose occupation gives authority to a statement which with his consent has been used in an application for registration or public offering statement, if he is not otherwise associated with the subdivision and development plan in a material way, is liable only for false statements knowingly made.

V. At any time before the entry of an action under this section, and thereafter only with the approval of the court, a subdivider or any other person may limit his exposure herein by tendering a written offer to reimburse the injured person for all mandatory damages set forth in paragraph II, including reasonable attorney's fees and court costs, if any, to the date of such tender upon reconveyance of title as set forth in paragraph II.

VI. A person may not recover under this section in actions commenced more than 2 years from the date the purchaser knew or should have known of the existence of his cause of action, but in any case not more than 6 years after his first payment of money to the subdivider in the contested transaction.

VII. Any stipulation or provision purporting to bind any person acquiring subdivided lands to waive compliance with this chapter or any rule or order under it is void.

VIII. The owner, publisher, licensee or operator of any newspaper, magazine, visual or sound radio broadcasting station or network of stations or the agents or employees of any such owner, publisher, licensee or operator of such newspaper, magazine, station or network of stations shall not be liable under this chapter for any advertising of any subdivision, lot, parcel or unit in any subdivision carried in any such newspaper or magazine or by any such visual or sound radio broadcasting station or network of stations nor shall any of them be liable under this chapter for the contents of any such advertisement.

IX. Any broker or real estate salesman violating any provision of this chapter may, in addition to any other penalty imposed by this chapter, have his real estate broker's or salesman's license suspended or revoked by the real estate commission pursuant to RSA 331-A for such time as in the circumstances it considers justified.

Source. 1970, 55:1. 1977, 469:28, eff. Sept. 10, 1977.

Section 356-A:17

356-A:17 Jurisdiction. – Dispositions of subdivided lands are subject to this chapter, and the superior courts of this state have jurisdiction in claims or causes of action arising under this chapter if:

I. The subdivided lands offered for disposition are located in this state; or

II. The subdivider's principal office is located in this state; or

III. Any offer or disposition of subdivided lands is made in this state, whether or not the offeror or offeree is then present in this state, if the offer originates within this state or is directed by the offeror to a person or place in this state and received by the person or at the place to which it is directed.

Source. 1970, 55:1, eff. May 4, 1970.

Section 356-A:18

356-A:18 Interstate Rendition. – In the proceedings for extradition of a person charged with a crime under this chapter, it need not be shown that the person whose surrender is demanded has fled from justice or at the time of the commission of the crime was in the demanding or other state.

Source. 1970, 55:1, eff. May 4, 1970.

Section 356-A:19

356-A:19 Service of Process. –

I. Service may be made by delivering a copy of the process to the office of the attorney general but it is not effective unless the plaintiff (which may be the attorney general in a proceeding instituted by him):

(a) Forthwith sends a copy of the process and of the pleading by certified or registered mail to the defendant or respondent at his last known address, and

(b) The plaintiff's affidavit of compliance with this section is filed in the case on or before the date specified by the court on the summons, or within such further time as the court allows.

II. If any person, including any nonresident of this state, engages in conduct prohibited by this chapter or any rule or order hereunder, and has not filed a consent to service of process and personal jurisdiction over him cannot otherwise be obtained in this state, that conduct authorizes the attorney general to receive service of process in any noncriminal proceeding against him or his successor which grows out of that conduct and which is brought under this chapter or any rule or order hereunder, with the same force and validity as if served on him personally. Notice shall be given as provided in paragraph I.

Source. 1970, 55:1. 1985, 300:7, I(b). 2014, 204:13, eff. July 11, 2014.

Section 356-A:20

356-A:20 Conflict of Interests. – No member of the consumer protection and antitrust bureau, department of justice or any partnership, firm or corporation with which a member is associated shall act as subdivider, agent, attorney or broker of a subdivision, lot, parcel, unit or interest therein or offer or dispose of a subdivision, lot, parcel, unit or interest therein required to be approved pursuant to RSA 356-A:4.

Source. 1970, 55:1. 1985, 300:7, I(b).

Section 356-A:21

356-A:21 Short Title. – This chapter may be cited as the Land Sales Full Disclosure Act.

Source. 1970, 55:1, eff. May 4, 1970.

Section 356-A:22

356-A:22 Severability. – If any provision of this chapter or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the chapter which can be given effect without the invalid provisions or application, and to this end the provisions of this chapter are severable.

Source. 1970, 55:1, eff. May 4, 1970.

Editor's and Revisor's Notes (7)

HISTORY

Source. 1970, 55:1. 1977, 469:27. 1985, 300:7, I(b).

Amendments--1985. Paragraph I: Substituted "attorney general" for "agency" preceding "may" in the first sentence and preceding "as justice" in the second sentence.

Paragraph II: Substituted "attorney general" for "agency" preceding "decision" in the first sentence and preceding "may" in the second sentence.

Paragraph III: Substituted "attorney general" for "agency" preceding "shall" in the first sentence.

Paragraph IV: Substituted "attorney general" for "agency" throughout the paragraph.

--1977. Paragraph I: Substituted "review" for "trial de novo" at the end of the first sentence.

Revision note--1995. Substituted "attorney general's" for "attorney general" preceding "decision" in the first sentence of par. II to correct a grammatical error.

TITLE XXXIV
PUBLIC UTILITIES

CHAPTER 365
COMPLAINTS TO, AND PROCEEDINGS BEFORE, THE COMMISSION

Proceedings Before the Commission

Section 365:21

365:21 Rehearings and Appeals. – The procedure for rehearings and appeals shall be that prescribed by RSA 541, except as herein otherwise provided. Notwithstanding RSA 541:5, upon the filing of a motion for rehearing, the commission shall within 30 days either grant or deny the motion, or suspend the order or decision complained of pending further consideration, and any order of suspension may be upon such terms and conditions as the commission may prescribe.

Source. 1951, 203:11 par. 21, eff. Sept. 1, 1951. 2014, 24:1, eff. July 22, 2014.

TITLE LV
PROCEEDINGS IN SPECIAL CASES

CHAPTER 541
REHEARINGS AND APPEALS IN CERTAIN CASES

Section 541:1

541:1 Definition. – The word "commission" as here used means the public utilities commission, the milk sanitation board, or any state department or official concerning whose decision a rehearing or appeal is sought in accordance with the provisions of this chapter.

Source. RL 414:1. RSA 541:1. 1967, 345:2, 5. 1989, 138:8. 1996, 228:103, eff. July 1, 1996.

Section 541:2

541:2 Uniform Procedure. – When so authorized by law, any order or decision of the commission may be the subject of a motion for rehearing or of an appeal in the manner prescribed by the following sections.

Source. RL 414:2.

Section 541:3

541:3 Motion for Rehearing. – Within 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.

Source. 1913, 145:18. PL 239:1. 1937, 107:14; 133:75. RL 414:3. RSA 541:3. 1994, 54:1, eff. Jan. 1, 1995.

Section 541:4

541:4 Specifications. – Such motion shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable. No appeal from any order or decision of the commission shall be taken unless the appellant shall have made application for rehearing as herein provided, and when such application shall have been made, no ground not set forth therein shall be urged, relied on, or given any consideration by the court, unless the court for good cause shown shall allow the appellant to specify additional grounds.

Source. 1913, 145:18. PL 239:2. 1937, 107:15; 133:76. RL 414:4.

Section 541:5

541:5 Action on Motion. – Upon the filing of such motion for rehearing, the commission shall within ten days either grant or deny the same, or suspend the order or decision complained of pending further consideration, and any order of suspension may be upon such terms and conditions as the commission may prescribe.

Source. 1913, 145:18. PL 239:3. 1937, 107:16; 133:77. RL 414:5.

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.

Section 541:7

541:7 Petition. – Such petition shall state briefly the nature of the proceeding before the commission, and shall set forth the order or decision complained of, and the grounds upon which the same is claimed to be unlawful or unreasonable upon which the petitioner will rely in the supreme court.

Source. 1913, 145:18. PL 239:5. 1937, 107:18; 133:79. RL 414:7.

Section 541:8

541:8 Parties. – Any person or corporation whose rights may be directly affected by said appeal may appear and become a party, or the court may order such persons and corporations to be joined as parties as justice may require.

Source. 1913, 145:18. PL 239:6. 1937, 107:19; 133:80. RL 414:8.

Section 541:9

541:9 Notice to Commission. – Upon the filing of an appeal, the clerk of court shall issue an order of notice requiring the commission to file with the court a certified copy of the record in the proceeding, together with such of the evidence introduced before or considered by the commission as may be specified by any party in interest, as well as such other evidence, so introduced and considered, as the commission may deem proper to certify, together with the originals or copies of all exhibits introduced in evidence before the commission.

Source. 1913, 145:18. PL 239:7. 1937, 107:20; 133:81. RL 414:9.

Section 541:10

541:10 Other Notice. – Such notice as the court may order shall also be given to persons and corporations who were parties to the proceeding before the commission, or who may be ordered joined by the court.

Source. 1913, 145:18. PL 239:8. 1937, 107:21; 133:82. RL 414:10.

Section 541:11

541:11 Fees for Copies. – The commission shall collect from the party making the appeal a fee of ten cents per folio of one hundred words for the copy of the record and such testimony and exhibits as shall be transferred, and five cents per folio for manifold copies, and shall not be required to certify the record upon any such appeal, nor shall said appeal be considered, until the fees for copies have been paid.

Source. 1915, 99:3. PL 239:9. 1937, 107:22; 133:83. RL 414:11.

Section 541:12

541:12 Argument. – Upon the filing of said copy of the record, evidence, and exhibits, the case shall be in order for argument at the next regular session of the court, unless the same be postponed for good cause shown.

Source. 1913, 145:18. PL 239:10. 1937, 107:23; 133:84. RL 414:12.

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.

Section 541:14

541:14 Additional Evidence. – No new or additional evidence shall be introduced in the supreme court, but the case shall be determined upon the record and evidence transferred, except that in any case, if it shall be necessary in order that no party shall be deprived of any constitutional right, or if the court shall be of the opinion that justice requires the reception of evidence of facts which have occurred since the hearing, or which by reason of accident, mistake, or misfortune could not have been offered before the commission, it shall remand the case to the commission to receive and consider such additional evidence.

Source. 1913, 145:18. PL 239:12. 1937, 107:25; 133:86. RL 414:14. 1951, 203:13, eff. Sept. 1, 1951.

Section 541:15

541:15 Action of Commission. – Upon receipt of such evidence, the commission shall consider the same and may alter, modify, amend, or rescind the order or decision appealed from, and shall report its action thereon to the court within said twenty days.

Source. 1913, 145:18. PL 239:15. 1937, 107:28; 133:89. RL 414:17.

Section 541:16

541:16 Subsequent Proceedings. – If the commission shall rescind the order appealed from the appeal shall be dismissed; if it shall alter, modify, or amend the same such altered, modified, or amended order shall take the place of the original order complained of, and the court shall render judgment with reference thereto in said appeal as though said order had been made by the commission in the first instance, after allowing any amendments of the pleadings or other incidental proceedings desired by the parties which the changed situation may require.

Source. 1913, 145:18. PL 239:16. 1937, 107:29; 133:90. RL 414:18.

Section 541:17

541:17 Evidence, How Considered. – All evidence transferred by the commission shall be considered by the court regardless of any technical rule which might have rendered the same inadmissible if originally offered in the trial of an action at law.

Source. 1913, 145:18. PL 239:17. 1937, 107:30; 133:91. RL 414:19. 1951, 203:15, eff. Sept. 1, 1951.

Section 541:18

541:18 Suspension of Order. – No appeal or other proceedings taken from an order of the commission shall suspend the operation of such order; provided, that the supreme court may order a suspension of such order pending the determination of such appeal or other proceeding whenever, in the opinion of the court, justice may require such suspension; but no order of the public utilities commission providing for a reduction of rates, fares, or charges or denying a petition for an increase therein shall be suspended except upon conditions to be imposed by the court providing a means for securing the prompt repayment of all excess rates, fares, and charges over and above the rates, fares, and charges which shall be finally determined to be reasonable and just.

Source. 1913, 145:18. PL 239:18. 1937, 107:31; 133:92. RL 414:20. 1951, 203:16, eff. Sept. 1, 1951.

Section 541:19

541:19 Conditions. – Any order of the court suspending an order of the public utilities commission fixing rates, fares, charges, or prices shall, among other things, provide that the public utility affected by the order suspended shall keep such accounts as shall suffice to show the amount being collected by such public utility, pending the appeal, in excess of the amounts which it would have collected if the order or decree of the commission had not been suspended, and shall provide such means as the court shall determine to secure the prompt repayment of all excess rates, fares and charges over and above the rates, fares and charges which shall finally be determined to be reasonable and just.

Source. 1913, 145:18. PL 239:19. 1937, 107:32; 133:93. RL 414:21. 1951, 203:17, eff. Sept. 1, 1951.

Section 541:20

541:20 Contempt of Court. – Whenever there is occasion after final decision for the distribution of said excess, any violation on the part of any public utility, or of the officers or members thereof, of the order of the court providing for the repayment of said excess may be punished as a contempt of court.

Source. 1951, 203:18. RL 414:21-a.

Section 541:21

541:21 Exceptions. – The provisions of this chapter shall not apply to appeals from the assessment of damages in eminent domain proceedings, but such appeals shall be taken and prosecuted as otherwise provided.

Source. 1951, 203:19. RL 414:21-b.

Section 541:22

541:22 Remedy Exclusive. – No proceeding other than the appeal herein provided for shall be maintained in any court of this state to set aside, enjoin the enforcement of, or otherwise review or impeach any order of the commission, except as otherwise specifically provided.

Source. 1913, 145:18. PL 239:22. 1937, 107:33; 133:94. RL 414:22.

TITLE LXIV
PLANNING AND ZONING

CHAPTER 672
GENERAL PROVISIONS

Purpose

Section 672:1

672:1 Declaration of Purpose. – The general court hereby finds and declares that:

I. Planning, zoning and related regulations have been and should continue to be the responsibility of municipal government;

II. Zoning, subdivision regulations and related regulations are a legislative tool that enables municipal government to meet more effectively the demands of evolving and growing communities;

III. Proper regulations enhance the public health, safety and general welfare and encourage the appropriate and wise use of land;

III-a. Proper regulations encourage energy efficient patterns of development, the use of solar energy, including adequate access to direct sunlight for solar energy uses, and the use of other renewable forms of energy, and energy conservation. Therefore, the installation of solar, wind, or other renewable energy systems or the building of structures that facilitate the collection of renewable energy shall not be unreasonably limited by use of municipal zoning powers or by the unreasonable interpretation of such powers except where necessary to protect the public health, safety, and welfare;

III-b. Agriculture makes vital and significant contributions to the food supply, the economy, the environment and the aesthetic features of the state of New Hampshire, and the tradition of using the land resource for agricultural production is an essential factor in providing for the favorable quality of life in the state. Natural features, terrain and the pattern of geography of the state frequently place agricultural land in close proximity to other forms of development and commonly in small parcels. Agricultural activities are a beneficial and worthwhile feature of the New Hampshire landscape. Agritourism, as defined in RSA 21:34-a, is undertaken by farmers to contribute to both the economic viability and the long-term sustainability of the primary agricultural activities of New Hampshire farms. Agricultural activities and agritourism shall not be unreasonably limited by use of municipal planning and zoning powers or by the unreasonable interpretation of such powers;

III-c. Forestry, when practiced in accordance with accepted silvicultural principles, constitutes a beneficial and desirable use of New Hampshire's forest resource. Forestry contributes greatly to the economy of the state through a vital forest products industry; and to the health of the state's forest and wildlife resources through sustained forest productivity, and through improvement of wildlife habitats. New Hampshire's forests are an essential component of the landscape and add immeasurably to the quality of life for the state's citizens. Because New Hampshire is a heavily forested state, forestry activities, including the harvest and transport of forest products, are often carried out in close proximity to populated areas. Further, the harvesting of timber often represents the only income that can be derived from property without resorting to development of the property for more intensive uses, and, pursuant to RSA 79-A:1, the state of New Hampshire has declared that it is in the public interest to encourage preservation of open space by conserving forest and other natural resources. Therefore, forestry activities, including the harvest and transport of forest products, shall not be

unreasonably limited by use of municipal planning and zoning powers or by the unreasonable interpretation of such powers;

III-d. For purposes of paragraphs III-a, III-b, III-c, and III-e, "unreasonable interpretation" includes the failure of local land use authorities to recognize that agriculture and agritourism as defined in RSA 21:34-a, forestry, renewable energy systems, and commercial and recreational fisheries, when practiced in accordance with applicable laws and regulations, are traditional, fundamental and accessory uses of land throughout New Hampshire, and that a prohibition upon these uses cannot necessarily be inferred from the failure of an ordinance or regulation to address them;

III-e. All citizens of the state benefit from a balanced supply of housing which is affordable to persons and families of low and moderate income. Establishment of housing which is decent, safe, sanitary and affordable to low and moderate income persons and families is in the best interests of each community and the state of New Hampshire, and serves a vital public need. Opportunity for development of such housing shall not be prohibited or unreasonably discouraged by use of municipal planning and zoning powers or by unreasonable interpretation of such powers;

III-f. New Hampshire commercial and recreational fisheries make vital and significant contributions to the food supply, the economy, the environment, and the aesthetic features of the state of New Hampshire, and the tradition of using marine resources for fisheries production is an essential factor in providing for economic stability and a favorable quality of life in the state. Many traditional commercial and recreational fisheries in New Hampshire's rivers and estuarine systems are located in close proximity to coastal development. Such fisheries are a beneficial and worthwhile feature of the New Hampshire landscape and tradition and should not be discouraged or eliminated by use of municipal planning and zoning powers or the unreasonable interpretation of such powers.

IV. The citizens of a municipality should be actively involved in directing the growth of their community;

V. The state should provide a workable framework for the fair and reasonable treatment of individuals;

V-a. The care of up to 6 full-time preschool children and 3 part-time school age children in the home of a child care provider makes a vital and significant contribution to the state's economy and the well-being of New Hampshire families. The care provided through home-based day care closely parallels the activities of any home with young children. Family based care, traditionally relied upon by New Hampshire families, should not be discouraged or eliminated by use of municipal planning and zoning powers or the unreasonable interpretation of such powers; and

VI. It is the policy of this state that competition and enterprise may be so displaced or limited by municipalities in the exercise of the powers and authority provided in this title as may be necessary to carry out the purposes of this title.

Source. 1983, 447:1. 1985, 68:1; 335:3; 369:1. 1989, 42:1; 170:1. 1990, 174:1; 180:1, 2. 1991, 198:1. 2002, 73:1. 2008, 299:3, eff. Jan. 1, 2010; 357:2, 3, eff. July 11, 2009. 2016, 267:2, 3, eff. June 16, 2016.

Words and Phrases Defined

Section 672:2

672:2 Definition of Words and Phrases. – The following words and phrases when used in Title LXIV shall have the meanings given to them in this chapter.

Source. 1983, 447:1, eff. Jan. 1, 1984.

Section 672:3

672:3 Abutter. – "Abutter" means any person whose property is located in New Hampshire and adjoins or is directly across the street or stream from the land under consideration by the local land use board. For purposes of receiving testimony only, and not for purposes of notification, the term "abutter" shall include any person who is able to demonstrate that his land will be directly affected by the proposal under consideration. For purposes of receipt of notification by a municipality of a local land use board hearing, in the case of an abutting property being under a condominium or other collective form of ownership, the term abutter means the officers of the collective or association, as defined in RSA 356-B:3, XXIII. For purposes of receipt of notification by a municipality of a local land use board hearing, in the case of an abutting property being under a manufactured housing park form of ownership as defined in RSA 205-A:1, II, the term "abutter" includes the manufactured housing park owner and the tenants who own manufactured housing which adjoins or is directly across the street or stream from the land under consideration by the local land use board.

Source. 1983, 447:1. 1986, 33:2. 2002, 216:1, eff. July 15, 2002.

Section 672:4

672:4 District Commissioners. – "District commissioners" means the board of commissioners of a village district or precinct.

Source. 1983, 447:1, eff. Jan. 1, 1984.

Section 672:5

672:5 Ex Officio Member. – "Ex Officio member" means any member who holds office by virtue of an official position and who shall exercise all the powers of regular members of a local land use board.

Source. 1983, 447:1, eff. Jan. 1, 1984.

Section 672:6

672:6 Local Governing Body. – "Local governing body" means, in addition to any other appropriate title:

I. Board of selectmen in a town;

II. City council or board of aldermen in a city;

III. Village district commissioners in a village district; or

IV. County commissioners in a county in which there are located unincorporated towns or unorganized places.

Source. 1983, 447:1. 1989, 266:7, eff. July 1, 1989.

Section 672:7

672:7 Local Land Use Board. – "Local land use board" means a planning board, historic district commission, inspector of buildings, building code board of appeals, zoning board of adjustment, or other board or commission authorized under RSA 673 established by a local legislative body.

Source. 1983, 447:1. 2010, 226:4, eff. Aug. 27, 2010.

Section 672:8

672:8 Local Legislative Body. – "Local legislative body" means one of the following basic forms of government utilized by a municipality:

I. Council, whether city or town;
II. Mayor--council;
III. Mayor--board of aldermen;
IV. Village district or precinct;
V. Town meeting; or
VI. County convention.

Source. 1983, 447:1. 1985, 103:18. 1989, 266:8, eff. July 1, 1989.

Section 672:9

672:9 Mayor. – "Mayor" means the chief executive officer of the municipality, whether the official designation of the office is mayor of a city, city or town manager, the board of selectmen of a town, the board of commissioners of a village district, the county commissioners of a county in which there are located unincorporated towns or unorganized places, or any other title or any official designated in the municipal charter to perform the duties of "mayor."

Source. 1983, 447:1. 1989, 266:8. 1991, 377:3, eff. Aug. 31, 1991.

Section 672:10

672:10 Municipality. – "Municipality" or "municipal" means, includes and relates to cities, towns, village districts, and counties in which there are located unincorporated towns or unorganized places.

Source. 1983, 447:1. 1989, 266:8, eff. July 1, 1989.

Section 672:11

672:11 Planning Board. – "Planning board" means and includes city, town, village district, and county planning boards, in counties which contain unincorporated towns or unorganized places, established under the provisions of RSA 673.

Source. 1983, 447:1. 1989, 266:8, eff. July 1, 1989.

Section 672:12

672:12 Selectmen. – "Selectmen" means the board of selectmen of a town and the county commissioners of a county in which there are located unincorporated towns or unorganized places.

Source. 1983, 447:1. 1989, 266:8, eff. July 1, 1989.

Section 672:13

672:13 Street. – "Street" means, relates to and includes street, avenue, boulevard, road, lane, alley, viaduct, highway, freeway and other ways.

Source. 1983, 447:1, eff. Jan. 1, 1984.

Section 672:14

672:14 Subdivision. –

I. "Subdivision" means the division of the lot, tract, or parcel of land into 2 or more lots, plats, sites, or other divisions of land for the purpose, whether immediate or future, of sale, rent, lease, condominium conveyance or building development. It includes resubdivision and, when appropriate to the context, relates to the process of subdividing or to the land or territory subdivided.

II. The division of a parcel of land held in common and subsequently divided into parts among the several owners shall be deemed a subdivision under this title.

III. The grant of an easement in gross to a public utility for the purpose of placing and maintaining overhead and underground facilities necessary for its transmission or distribution network such as poles, wires, cable, conduit, manholes, repeaters and supporting apparatus, including any unstaffed structure which is less than 500 square feet, shall not be construed as a subdivision under this title, and shall not be deemed to create any new division of land for any other purpose.

IV. The rent, lease, development, or grant of an easement to a person for the purpose of placing and maintaining a wireless communications facility shall not be construed as a subdivision under this title, and shall not be deemed to create any new division of land for any other purpose. For purposes of this paragraph, "wireless communications facilities" means any towers, poles, antennas, or other unstaffed structure of less than 500 square feet intended for use in connection with licensed transmission or receipt of radio or television signals, or any other licensed spectrum-based transmissions or receptions. This paragraph shall not be deemed to affect other local zoning, site plan, or regulatory authority over wireless communications facilities.

Source. 1983, 447:1. 1988, 75:1. 1998, 299:1, 2, eff. June 1, 1999.

TITLE LXIV
PLANNING AND ZONING

CHAPTER 674
LOCAL LAND USE PLANNING AND REGULATORY POWERS

Master Plan

Section 674:1

674:1 Duties of the Planning Board. –

I. It shall be the duty of every planning board established under RSA 673:1 to prepare and amend from time to time a master plan to guide the development of the municipality. A master plan may include consideration of any areas outside the boundaries of the municipality which in the judgment of the planning board bear a relation to or have an impact on the planning of the municipality. Every planning board shall from time to time update and amend the adopted master plan with funds appropriated for that purpose by the local legislative body. In preparing, amending, and updating the master plan:

(a) The planning board shall have responsibility for promoting interest in, and understanding of, the master plan of the municipality. In order to promote this interest and understanding, the planning board may publish and distribute copies of the master plan, or copies of any report relating to the master plan, and may employ such other means of publicity and education as it may deem advisable.

(b) The planning board shall also have authority to make any investigations, maps and reports, and recommendations which relate to the planning and development of the municipality.

II. The planning board may:

(a) From time to time report and recommend to the appropriate public officials and public agencies programs for the development of the municipality, programs for the erection of public structures, and programs for municipal improvements. Each program shall include recommendations for its financing. It shall be part of the planning board's duties to consult with and advise public officials and agencies, public utility companies, civic organizations, educational organizations, professional organizations, research organizations, and other organizations, and to consult with citizens, for the purposes of protecting or carrying out of the master plan as well as for making recommendations relating to the development of the municipality.

(b) Upon request advise the governing body as to whether proposed ordinances and bylaws regarding the maintenance and operation of stormwater systems under RSA 149-I:6, I-a are consistent with the master plan.

III. Members of the planning board, when duly authorized by the board as a whole, may attend municipal planning conferences or meetings, or hearings upon pending municipal planning legislation. The planning board may by majority vote authorize the payment of reasonable expenses incident to such attendance.

IV. The planning board, and its members, officers, and employees, in the performance of their functions may, by ordinance, be authorized to enter upon any land and make such examinations and surveys as are reasonably necessary and place and maintain necessary monuments and marks and, in

the event consent for such entry is denied or not reasonably obtainable, to obtain an administrative inspection warrant under RSA 595-B.

V. The planning board may, from time to time, recommend to the local legislative body amendments of the zoning ordinance or zoning map or additions thereto.

VI. In general, the planning board may be given such powers by the municipality as may be necessary to enable it to fulfill its functions, promote municipal planning, or carry out the purposes of this title. Such powers shall not include regulating timber harvesting operations that are not part of a subdivision application or a development project subject to site plan review under this chapter.

Source. 1983, 447:1. 1991, 231:12. 2011, 85:3. 2015, 247:2, eff. Sept. 11, 2015.

Section 674:2

674:2 Master Plan; Purpose and Description. –

I. The purpose of the master plan is to set down as clearly and practically as possible the best and most appropriate future development of the area under the jurisdiction of the planning board, to aid the board in designing ordinances that result in preserving and enhancing the unique quality of life and culture of New Hampshire, and to guide the board in the performance of its other duties in a manner that achieves the principles of smart growth, sound planning, and wise resource protection.

II. The master plan shall be a set of statements and land use and development principles for the municipality with such accompanying maps, diagrams, charts and descriptions as to give legal standing to the implementation ordinances and other measures of the planning board. Each section of the master plan shall be consistent with the others in its implementation of the vision section. The master plan shall be a public record subject to the provisions of RSA 91-A. The master plan shall include, at a minimum, the following required sections:

(a) A vision section that serves to direct the other sections of the plan. This section shall contain a set of statements which articulate the desires of the citizens affected by the master plan, not only for their locality but for the region and the whole state. It shall contain a set of guiding principles and priorities to implement that vision.

(b) A land use section upon which all the following sections shall be based. This section shall translate the vision statements into physical terms. Based on a study of population, economic activity, and natural, historic, and cultural resources, it shall show existing conditions and the proposed location, extent, and intensity of future land use.

III. The master plan may also include the following sections:

(a) A transportation section which considers all pertinent modes of transportation and provides a framework for both adequate local needs and for coordination with regional and state transportation plans. Suggested items to be considered may include but are not limited to public transportation, park and ride facilities, and bicycle routes, or paths, or both.

(b) A community facilities section which identifies facilities to support the future land use pattern of subparagraph II(b), meets the projected needs of the community, and coordinates with other local governments' special districts and school districts, as well as with state and federal agencies that have multi-jurisdictional impacts.

(c) An economic development section which proposes actions to suit the community's economic goals, given its economic strengths and weaknesses in the region.

(d) A natural resources section which identifies and inventories any critical or sensitive areas or resources, not only those in the local community, but also those shared with abutting communities. This section, which may specifically include a water resources management and protection plan, shall provide a factual basis for any land development regulations that may be enacted to protect water resources and other identified natural areas. A key component in preparing this section is to identify

adopt a zoning ordinance or regulation with respect to antennas used exclusively in the amateur radio service that fails to conform to the limited federal preemption entitled Amateur Radio Preemption, 101 FCC 2nd 952 (1985) issued by the Federal Communications Commission.

Source. 1983, 447:1. 1989, 42:2. 1995, 176:2. 2000, 279:2. 2002, 73:2. 2011, 85:2, eff. July 15, 2011.

Section 674:18

674:18 Adoption of Zoning Ordinance. – The local legislative body may adopt a zoning ordinance under RSA 674:16 only after the planning board has adopted the mandatory sections of the master plan as described in RSA 674:2, I and II.

Source. 1983, 447:1. 2002, 178:4, eff. July 14, 2002.

Section 674:19

674:19 Applicability of Zoning Ordinance. – A zoning ordinance adopted under RSA 674:16 shall not apply to existing structures or to the existing use of any building. It shall apply to any alteration of a building for use for a purpose or in a manner which is substantially different from the use to which it was put before alteration.

Source. 1983, 447:1, eff. Jan. 1, 1984.

Section 674:20

674:20 Districts. – In order to accomplish any or all of the purposes of a zoning ordinance enumerated under RSA 674:17, the local legislative body may divide the municipality into districts of a number, shape and area as may be deemed best suited to carry out the purposes of RSA 674:17. The local legislative body may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land within each district which it creates. All regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts.

Source. 1983, 447:1, eff. Jan. 1, 1984.

Section 674:21

674:21 Innovative Land Use Controls. –

I. Innovative land use controls may include, but are not limited to:

(a) Timing incentives.
(b) Phased development.
(c) Intensity and use incentive.
(d) Transfer of density and development rights.
(e) Planned unit development.
(f) Cluster development.
(g) Impact zoning.
(h) Performance standards.
(i) Flexible and discretionary zoning.

(j) Environmental characteristics zoning.
(k) Inclusionary zoning.

[Paragraph I(l) effective until June 1, 2017; see also paragraph I(l) set out below.]

(l) Accessory dwelling unit standards.

[Paragraph I(l) effective June 1, 2017; see also paragraph I(l) set out above.]

(l) Impact fees.

[Paragraph I(m) effective until June 1, 2017; see also paragraph I(m) set out below.]

(m) Impact fees.

[Paragraph I(m) effective June 1, 2017; see also paragraph I(m) set out above.]

(m) Village plan alternative subdivision.

[Paragraph I(n) effective until June 1, 2017; see also paragraph I(n) set out below.]

(n) Village plan alternative subdivision.

[Paragraph I(n) effective June 1, 2017; see also paragraph I(n) set out above.]

(n) Integrated land development permit option.

[Paragraph I(o) effective until June 1, 2017.]

(o) Integrated land development permit option.

II. An innovative land use control adopted under RSA 674:16 may be required when supported by the master plan and shall contain within it the standards which shall guide the person or board which administers the ordinance. An innovative land use control ordinance may provide for administration, including the granting of conditional or special use permits, by the planning board, board of selectmen, zoning board of adjustment, or such other person or board as the ordinance may designate. If the administration of the innovative provisions of the ordinance is not vested in the planning board, any proposal submitted under this section shall be reviewed by the planning board prior to final consideration by the administrator. In such a case, the planning board shall set forth its comments on the proposal in writing and the administrator shall, to the extent that the planning board's comments are not directly incorporated into its decision, set forth its findings and decisions on the planning board's comments.

III. Innovative land use controls must be adopted in accordance with RSA 675:1, II.

[Paragraph IV effective until June 1, 2017; see also paragraph IV set out below.]

IV. As used in this section:

(a) "Inclusionary zoning" means land use control regulations which provide a voluntary incentive or benefit to a property owner in order to induce the property owner to produce housing units which are affordable to persons or families of low and moderate income. Inclusionary zoning includes, but is not limited to, density bonuses, growth control exemptions, and a streamlined application process.

(b) "Accessory dwelling unit" means a second dwelling unit, attached or detached, which is permitted by a land use control regulation to be located on the same lot, plat, site, or other division of land as the permitted principal dwelling unit.

(c) "Phased development" means a development, usually for large-scale projects, in which construction of public or private improvements proceeds in stages on a schedule over a period of years established in the subdivision or site plan approved by the planning board. In a phased development, the issuance of building permits in each phase is solely dependent on the completion of the prior phase and satisfaction of other conditions on the schedule approved by the planning board. Phased development does not include a general limit on the issuance of building permits or the granting of subdivision or site plan approval in the municipality, which may be accomplished only by a growth management ordinance under RSA 674:22 or a temporary moratorium or limitation under RSA 674:23.

[Paragraph IV effective June 1, 2017; see also paragraph IV set out above.]

IV. As used in this section:

(a) "Inclusionary zoning" means land use control regulations which provide a voluntary incentive or benefit to a property owner in order to induce the property owner to produce housing units which are affordable to persons or families of low and moderate income. Inclusionary zoning includes, but is not limited to, density bonuses, growth control exemptions, and a streamlined application process.

(b) "Phased development" means a development, usually for large-scale projects, in which construction of public or private improvements proceeds in stages on a schedule over a period of years established in the subdivision or site plan approved by the planning board. In a phased development, the issuance of building permits in each phase is solely dependent on the completion of the prior phase and satisfaction of other conditions on the schedule approved by the planning board. Phased development does not include a general limit on the issuance of building permits or the granting of subdivision or site plan approval in the municipality, which may be accomplished only by a growth management ordinance under RSA 674:22 or a temporary moratorium or limitation under RSA 674:23.

V. As used in this section "impact fee" means a fee or assessment imposed upon development, including subdivision, building construction, or other land use change, in order to help meet the needs occasioned by that development for the construction or improvement of capital facilities owned or operated by the municipality, including and limited to water treatment and distribution facilities; wastewater treatment and disposal facilities; sanitary sewers; storm water, drainage and flood control facilities; municipal road systems and rights-of-way; municipal office facilities; public school facilities; the municipality's proportional share of capital facilities of a cooperative or regional school district of which the municipality is a member; public safety facilities; solid waste collection, transfer, recycling, processing, and disposal facilities; public library facilities; and public recreational facilities not including public open space. No later than July 1, 1993, all impact fee ordinances shall be subject to the following:

(a) The amount of any such fee shall be a proportional share of municipal capital improvement costs which is reasonably related to the capital needs created by the development, and to the benefits

accruing to the development from the capital improvements financed by the fee. Upgrading of existing facilities and infrastructures, the need for which is not created by new development, shall not be paid for by impact fees.

(b) In order for a municipality to adopt an impact fee ordinance, it must have enacted a capital improvements program pursuant to RSA 674:5-7.

(c) Any impact fee shall be accounted for separately, shall be segregated from the municipality's general fund, may be spent upon order of the municipal governing body, shall be exempt from all provisions of RSA 32 relative to limitation and expenditure of town moneys, and shall be used solely for the capital improvements for which it was collected, or to recoup the cost of capital improvements made in anticipation of the needs which the fee was collected to meet.

(d) All impact fees imposed pursuant to this section shall be assessed at the time of planning board approval of a subdivision plat or site plan. When no planning board approval is required, or has been made prior to the adoption or amendment of the impact fee ordinance, impact fees shall be assessed prior to, or as a condition for, the issuance of a building permit or other appropriate permission to proceed with development. Impact fees shall be intended to reflect the effect of development upon municipal facilities at the time of the issuance of the building permit. Impact fees shall be collected at the time a certificate of occupancy is issued. If no certificate of occupancy is required, impact fees shall be collected when the development is ready for its intended use. Nothing in this subparagraph shall prevent the municipality and the assessed party from establishing an alternate, mutually acceptable schedule of payment of impact fees in effect at the time of subdivision plat or site plan approval by the planning board. If an alternate schedule of payment is established, municipalities may require developers to post bonds, issue letters of credit, accept liens, or otherwise provide suitable measures of security so as to guarantee future payment of the assessed impact fees.

(e) The ordinance shall establish reasonable times after which any portion of an impact fee which has not become encumbered or otherwise legally bound to be spent for the purpose for which it was collected shall be refunded, with any accrued interest. Whenever the calculation of an impact fee has been predicated upon some portion of capital improvement costs being borne by the municipality, a refund shall be made upon the failure of the legislative body to appropriate the municipality's share of the capital improvement costs within a reasonable time. The maximum time which shall be considered reasonable hereunder shall be 6 years.

(f) Unless otherwise specified in the ordinance, any decision under an impact fee ordinance may be appealed in the same manner provided by statute for appeals from the officer or board making that decision, as set forth in RSA 676:5, RSA 677:2-14, or RSA 677:15, respectively.

(g) The ordinance may also provide for a waiver process, including the criteria for the granting of such a waiver.

(h) The adoption of a growth management limitation or moratorium by a municipality shall not affect any development with respect to which an impact fee has been paid or assessed as part of the approval for that development.

(i) Neither the adoption of an impact fee ordinance, nor the failure to adopt such an ordinance, shall be deemed to affect existing authority of a planning board over subdivision or site plan review, except to the extent expressly stated in such an ordinance.

(j) The failure to adopt an impact fee ordinance shall not preclude a municipality from requiring developers to pay an exaction for the cost of off-site improvement needs determined by the planning board to be necessary for the occupancy of any portion of a development. For the purposes of this subparagraph, "off-site improvements" means those improvements that are necessitated by a development but which are located outside the boundaries of the property that is subject to a subdivision plat or site plan approval by the planning board. Such off-site improvements shall be limited to any necessary highway, drainage, and sewer and water upgrades pertinent to that development. The amount of any such exaction shall be a proportional share of municipal

improvement costs not previously assessed against other developments, which is necessitated by the development, and which is reasonably related to the benefits accruing to the development from the improvements financed by the exaction. As an alternative to paying an exaction, the developer may elect to construct the necessary improvements, subject to bonding and timing conditions as may be reasonably required by the planning board. Any exaction imposed pursuant to this section shall be assessed at the time of planning board approval of the development necessitating an off-site improvement. Whenever the calculation of an exaction for an off-site improvement has been predicated upon some portion of the cost of that improvement being borne by the municipality, a refund of any collected exaction shall be made to the payor or payor's successor in interest upon the failure of the local legislative body to appropriate the municipality's share of that cost within 6 years from the date of collection. For the purposes of this subparagraph, failure of local legislative body to appropriate such funding or to construct any necessary off-site improvement shall not operate to prohibit an otherwise approved development.

(k) Revenue from impact fees imposed upon development and collected by a municipality under RSA 674:21, V for construction of or improvement to municipal road systems may be expended upon state highways within the municipality only for improvement costs that are related to the capital needs created by the development. Such improvements may include items such as, but not limited to, traffic signals and signage, turning lanes, additional travel lanes, and guard rails. No such improvements shall be constructed or installed without approval of the state department of transportation. In no event shall impact fees be used for any improvements to roads, bridges, or interchanges that are part of the interstate highway system. Nothing in RSA 674:21, V shall be construed as allowing or authorizing additional impact fees merely by virtue of having approved the expenditure of collected fee revenue for construction of or improvement of state highways, nor shall it be construed as allowing the adoption of new impact fees devoted to assessing impacts to state highways.

(l) No later than 60 days following the end of the fiscal year, any municipality having adopted an impact fee ordinance shall prepare a report listing all expenditures of impact fee revenue for the prior fiscal year, identifying the capital improvement project for which the fees were assessed and stating the dates upon which the fees were assessed and collected. The annual report shall enable the public to track the payment, expenditure, and status of the individually collected fees to determine whether said fees were expended, retained, or refunded.

VI. (a) In this section, "village plan alternative" means an optional land use control and subdivision regulation to provide a means of promoting a more efficient and cost effective method of land development. The village plan alternative's purpose is to encourage the preservation of open space wherever possible. The village plan alternative subdivision is meant to encourage beneficial consolidation of land development to permit the efficient layout of less costly to maintain roads, utilities, and other public and private infrastructures; to improve the ability of political subdivisions to provide more rapid and efficient delivery of public safety and school transportation services as community growth occurs; and finally, to provide owners of private property with a method for realizing the inherent development value of their real property in a manner conducive to the creation of substantial benefit to the environment and to the political subdivision's property tax base.

(b) An owner of record wishing to utilize the village plan alternative in the subdivision and development of a parcel of land, by locating the entire density permitted by the existing land use regulations of the political subdivision within which the property is located, on 20 percent or less of the entire parcel available for development, shall grant to the municipality within which the property is located, as a condition of approval, a recorded easement reserving the remaining land area of the entire, original lot, solely for agriculture, forestry, and conservation, or for public recreation. The recorded easement shall limit any new construction on the remainder lot to structures associated with farming operations, forest management operations, and conservation uses, and shall specify that the restrictions contained in the easement are enforceable by the municipality. Public recreational uses

shall be subject to the written approval of those abutters whose property lies within the village plan alternative subdivision portion of the project at the time when such a public use is proposed.

(c) The submission and approval procedure for a village plan alternative subdivision shall be the same as that for a conventional subdivision. Existing zoning and subdivision regulations relating to emergency access, fire prevention, and public health and safety concerns including any setback requirement for wells, septic systems, or wetland requirement imposed by the department of environmental services shall apply to the developed portion of a village plan alternative subdivision, but lot size regulations and dimensional requirements having to do with frontage and setbacks measured from all new property lot lines, and lot size regulations, as well as density regulations, shall not apply.

(1) The total density of development within a village plan alternate subdivision shall not exceed the total potential development density permitted a conventional subdivision of the entire original lot unless provisions contained within the political subdivision's land use regulations provide a basis for increasing the permitted density of development within a village plan alternative subdivision.

(2) In no case shall a political subdivision impose lesser density requirements upon a village plan alternative subdivision than the density requirements imposed on a conventional subdivision.

(d) If the total area of a proposed village plan alternative subdivision including all roadways and improvements does not exceed 20 percent of the total land area of the undeveloped lot, and if the proposed subdivision incorporates the total sum of all proposed development as permitted by local regulation on the undeveloped lot, all existing and future dimensional requirements imposed by local regulation, including lot size, shall not apply to the proposed village plan alternative subdivision.

(e) The approving authority may increase, at existing property lines, the setback to new construction within a village plan alternative subdivision by up to 2 times the distance required by current zoning or subdivision regulations, subject to the provisions of subparagraph (c).

(f) Within a village plan alternative subdivision, the exterior wall construction of buildings shall meet or exceed the requirements for fire-rated construction described by the fire prevention and building codes being enforced by the state of New Hampshire at the date and time the property owner of record files a formal application for subdivision approval with the political subdivision having jurisdiction of the project. Exterior walls and openings of new buildings shall also conform to fire protective provisions of all other building codes in force in the political subdivision. Wherever building code or fire prevention code requirements for exterior wall construction appear to be in conflict, the more stringent building or fire prevention code requirements shall apply.

[Paragraph VII effective July 1, 2017.]

VII. In this section, "integrated land development permit option" means an optional land use control to allow a project to proceed, in whole or in part, as permitted by the department of environmental services under RSA 489.

Source. 1983, 447:1. 1988, 149:1, 2. 1991, 283:1, 2. 1992, 42:1. 1994, 278:1. 2002, 236:1, 2. 2004, 71:1, 2; 199:2, 3. 2005, 61:1, 2. 2008, 63:1. 2012, 106:1, 2. 2013, 270:5, 6. 2015, 31:1, eff. July 6, 2015. 2016, 6:3, 4, eff. June 1, 2017.

Section 674:21-a

674:21-a Development Restrictions Enforceable. – Any open space designation or other development restriction which is part of a cluster development, planned unit development, village plan alternative subdivision, or other proposal approved under innovative land use controls, or which

it would be inequitable to require the violation to be corrected.

II. In lieu of the findings required by the board under subparagraphs I(a) and (b), the owner may demonstrate to the satisfaction of the board that the violation has existed for 10 years or more, and that no enforcement action, including written notice of violation, has been commenced against the violation during that time by the municipality or any person directly affected.

III. Application and hearing procedures for equitable waivers under this section shall be governed by RSA 676:5 through 7. Rehearings and appeals shall be governed by RSA 677:2 through 14.

IV. Waivers shall be granted under this section only from physical layout, mathematical or dimensional requirements, and not from use restrictions. An equitable waiver granted under this section shall not be construed as a nonconforming use, and shall not exempt future use, construction, reconstruction, or additions on the property from full compliance with the ordinance. This section shall not be construed to alter the principle that owners of land are bound by constructive knowledge of all applicable requirements. This section shall not be construed to impose upon municipal officials any duty to guarantee the correctness of plans reviewed by them or property inspected by them.

Source. 1996, 226:4, eff. Jan. 1, 1997.

Section 674:34

674:34 Powers of Building Code Board of Appeals. – The building code board of appeals shall hear and decide appeals of orders, decisions, or determinations made by the building official or fire official relative to the application and interpretation of the state building code or state fire code as defined in RSA 155-A:1. An application for appeal shall be based on a claim that the true intent of the code or the rules adopted thereunder have been incorrectly interpreted, the provisions of the code do not fully apply, or an equally good or better form of construction is proposed. The board shall have no authority to waive requirements of the state building code or the state fire code.

Source. 1983, 447:1. 2012, 242:17, eff. June 18, 2012.

Regulation of Subdivision of Land

Section 674:35

674:35 Power to Regulate Subdivisions. –

I. A municipality may by ordinance or resolution authorize the planning board to require preliminary review of subdivisions, and to approve or disapprove, in its discretion, plats, and to approve or disapprove plans showing the extent to which and the manner in which streets within subdivisions shall be graded and improved and to which streets water, sewer, and other utility mains, piping, connections, or facilities within subdivisions shall be installed. A municipality may by ordinance or resolution transfer authority to approve or disapprove plans showing the extent to which and the manner in which streets within subdivisions shall be graded and improved from the planning board to the governing body.

II. The planning board of a municipality shall have the authority to regulate the subdivision of land under the enactment procedures of RSA 675:6. The ordinance or resolution which authorizes the planning board to regulate the subdivision of land shall make it the duty of the city clerk, town clerk, clerk of district commissioners or other appropriate recording official to file with the register of deeds of the county in which the municipality is located a certificate of notice showing that the planning board has been so authorized, giving the date of such authorization.

III. The planning board shall not limit the number of building permits that may be issued except in accordance with an innovative land use control ordinance addressing timing incentives and phased development under RSA 674:21 and adopted under RSA 674:16; or an ordinance to regulate and control the timing of development, adopted under RSA 674:22; or an ordinance establishing a temporary moratorium or limitation on the issuance of building permits, adopted under RSA 674:23. This paragraph shall not be construed to limit the planning board's authority to deny a subdivision application on the basis that it is scattered or premature.

Source. 1983, 447:1. 2004, 71:3. 2005, 51:1. 2009, 200:2. 2014, 125:2, eff. Aug. 15, 2014.

Section 674:36

674:36 Subdivision Regulations. –

I. Before the planning board exercises its powers under RSA 674:35, the planning board shall adopt subdivision regulations according to the procedures required by RSA 675:6.

II. The subdivision regulations which the planning board adopts may:

(a) Provide against such scattered or premature subdivision of land as would involve danger or injury to health, safety, or prosperity by reason of the lack of water supply, drainage, transportation, schools, fire protection, or other public services, or necessitate the excessive expenditure of public funds for the supply of such services;

(b) Provide for the harmonious development of the municipality and its environs;

(c) Require the proper arrangement and coordination of streets within subdivisions in relation to other existing or planned streets or with features of the official map of the municipality;

(d) Provide for open spaces of adequate proportions;

(e) Require suitably located streets of sufficient width to accommodate existing and prospective traffic and to afford adequate light, air, and access for firefighting apparatus and equipment to buildings, and be coordinated so as to compose a convenient system;

(f) Require, in proper cases, that plats showing new streets or narrowing or widening of such streets submitted to the planning board for approval shall show a park or parks suitably located for playground or other recreational purposes;

(g) Require that proposed parks shall be of reasonable size for neighborhood playgrounds or other recreational uses;

(h) Require that the land indicated on plats submitted to the planning board shall be of such character that it can be used for building purposes without danger to health;

(i) Prescribe minimum areas of lots so as to assure conformance with local zoning ordinances and to assure such additional areas as may be needed for each lot for on-site sanitary facilities;

(j) Include provisions which will tend to create conditions favorable to health, safety, convenience, or prosperity; and

(k) Encourage the installation and use of solar, wind, or other renewable energy systems and protect access to energy sources by the regulation of orientation of streets, lots, and buildings; establishment of maximum building height, minimum set back requirements, and limitations on type, height, and placement of vegetation; and encouragement of the use of solar skyspace easements under RSA 477.

(l) Provide for efficient and compact subdivision development which promotes retention and public usage of open space and wildlife habitat, by allowing for village plan alternative subdivision as defined in RSA 674:21, VI.

(m) Require innovative land use controls on lands when supported by the master plan.

(n) Include provision for waiver of any portion of the regulations. The basis for any waiver granted by the planning board shall be recorded in the minutes of the board. The planning board may

only grant a waiver if the board finds, by majority vote, that:

(1) Strict conformity would pose an unnecessary hardship to the applicant and waiver would not be contrary to the spirit and intent of the regulations; or

(2) Specific circumstances relative to the subdivision, or conditions of the land in such subdivision, indicate that the waiver will properly carry out the spirit and intent of the regulations.

(o) As a condition of subdivision approval, where the subdivision requires an alteration of terrain permit under RSA 485-A:17, require that the applicant protect or document archeological resources in areas of archeological sensitivity that have been identified in the master plan in accordance with RSA 674:2, III(h).

III. The subdivision regulations of the planning board may stipulate, as a condition precedent to the approval of the plat, the extent to which and the manner in which streets shall be graded and improved and to which water, sewer, and other utility mains, piping, connections, or other facilities shall be installed. The regulations or practice of the planning board:

(a) May provide for the conditional approval of the plat before such improvements and installations have been constructed, but any such conditional approval shall not be entered upon the plat.

(b) Shall provide that, in lieu of the completion of street work and utility installations prior to the final approval of a plat, the planning board shall accept a performance bond, irrevocable letter of credit, or other type or types of security as shall be specified in the subdivision regulations; provided that in no event shall the exclusive form of security required by the planning board he in the form of cash or a passbook. As phases or portions of the secured improvements or installations are completed and approved by the planning board or its designee, the municipality shall partially release said security to the extent reasonably calculated to reflect the value of such completed improvements or installations. Cost escalation factors that are applied by the planning board to any bond or other security required under this section shall not exceed 10 percent per year. The planning board shall, within the limitations provided in this subparagraph, have the discretion to prescribe the type and amount of security, and specify a period for completion of the improvements and utilities to be expressed in the bond or other security, in order to secure to the municipality the actual construction and installation of such improvements and utilities. The municipality shall have the power to enforce such bonds or other securities by all appropriate legal and equitable remedies.

(c) May provide that in lieu of the completion of street work and utility installations prior to the final approval of the plat, the subdivision regulations may provide for an assessment or other method by which the municipality is put in an assured position to do said work and to make said alterations at the cost of the owners of the property within the subdivision.

IV. The planning board shall not require, or adopt any regulation requiring, the installation of a fire suppression sprinkler system in proposed one- or 2-family residences as a condition of approval for a local permit. Nothing in this paragraph shall prohibit a duly adopted regulation mandating a cistern, dry hydrant, fire pond, or other credible water source other than a fire suppression sprinkler system. Nothing in this paragraph shall prevent an applicant from offering to install fire suppression sprinkler systems in proposed one- or 2-family residences and, if the planning board accepts such offer, the installation of such systems shall be required and shall be enforceable as a condition of the approval. The applicant or the applicant's successor in interest may substitute another means of fire protection in lieu of the approved fire suppression sprinkler system provided that the planning board approves the substitution which approval shall not be unreasonably upheld or delayed.

Source. 1983, 447:1. 1986, 200:2. 1988, 3:1. 2002, 73:3; 236:4. 2004, 71:4; 199:4. 2009, 292:1. 2011, 203:1. 2013, 76:2, eff. Jan. 1, 2014; 207:1, eff. Sept. 8, 2013.

Section 674:37

Section 674:42

674:42 Status of Existing Platting Statutes. – After a planning board is granted platting jurisdiction by a municipality under RSA 674:35, the planning board's jurisdiction shall be exclusive, except to the extent that the municipality has transferred authority to approve or disapprove plans showing the extent to which and the manner in which streets within subdivisions shall be graded and improved from the planning board to the governing body pursuant to RSA 674:35, I. All statutory control over plats or subdivisions of land granted by other statutes shall be given effect to the extent that they are in harmony with the provisions of this title. The planning board shall have all statutory control over plats or subdivisions of land. Prior laws which are inconsistent with the powers granted to the planning board and the municipality under this title, and which have expressly by ordinance been adopted by a municipality and made available to a planning board according to the provisions of this title, are hereby declared to have no application, force or effect so long as the powers conferred by this title shall continue to be exercised by a municipality.

Source. 1983, 447:1. 2014, 125:3, eff. Aug. 15, 2014.

Site Plans

Section 674:43

674:43 Power to Review Site Plans. –

I. A municipality, having adopted a zoning ordinance as provided in RSA 674:16, and where the planning board has adopted subdivision regulations as provided in RSA 674:36, may by ordinance or resolution further authorize the planning board to require preliminary review of site plans and to review and approve or disapprove site plans for the development or change or expansion of use of tracts for nonresidential uses or for multi-family dwelling units, which are defined as any structures containing more than 2 dwelling units, whether or not such development includes a subdivision or resubdivision of the site.

II. The ordinance or resolution which authorizes the planning board to review site plans shall make it the duty of the city clerk, town clerk, village district clerk or other appropriate recording official to file with the register of deeds of the county in which the municipality is situated a certificate of notice showing that the planning board has been so authorized, giving the date of such authorization.

III. The local legislative body of a municipality may by ordinance or resolution authorize the planning board to delegate its site review powers and duties in regard to minor site plans to a committee of technically qualified administrators chosen by the planning board from the departments of public works, engineering, community development, planning, or other similar departments in the municipality. The local legislative body may further stipulate that the committee members be residents of the municipality. This special site review committee may have final authority to approve or disapprove site plans reviewed by it, unless the local legislative body deems that final approval shall rest with the planning board, provided that the decision of the committee may be appealed to the full planning board so long as notice of appeal is filed within 20 days of the committee's decision. All provisions of RSA 676:4 shall apply to actions of the special site review committee, except that such a committee shall act to approve or disapprove within 60 days after submissions of applications, subject to extension or waiver as provided in RSA 676:4, I(f). If a municipality authorizes a site review committee in accordance with this paragraph, the planning board shall adopt or amend its regulations specifying application, acceptance and approval procedures and defining what size and kind of site plans may be reviewed by the site review committee prior to authorizing the committee.

IV. The local legislative body of a municipality may by ordinance or resolution establish thresholds based on the size of a project or a tract below which site plan review shall not be required. If a municipality establishes a size limit below which site plan review shall not be required, the planning board shall adopt or amend its regulations to clearly reflect that threshold. Nothing in this paragraph shall preclude the planning board from establishing such thresholds in the absence of action by the legislative body.

V. Site plan review shall not be required for a collocation or a modification of a personal wireless service facility, as defined in RSA 12-K:2.

Source. 1983, 447:1. 1987, 256:2. 1988, 9:1. 1995, 303:3. 2005, 33:1. 2013, 267:10, eff. Sept. 22, 2013.

Section 674:44

674:44 Site Plan Review Regulations. –

I. Before the planning board exercises its powers under RSA 674:43, it shall adopt site plan review regulations according to the procedures required by RSA 675:6.

II. The site plan review regulations which the planning board adopts may:

(a) Provide for the safe and attractive development or change or expansion of use of the site and guard against such conditions as would involve danger or injury to health, safety, or prosperity by reason of:

(1) Inadequate drainage or conditions conducive to flooding of the property or that of another;

(2) Inadequate protection for the quality of groundwater;

(3) Undesirable and preventable elements of pollution such as noise, smoke, soot, particulates, or any other discharge into the environment which might prove harmful to persons, structures, or adjacent properties; and

(4) Inadequate provision for fire safety, prevention, and control.

(b) Provide for the harmonious and aesthetically pleasing development of the municipality and its environs.

(c) Provide for open spaces and green spaces of adequate proportions.

(d) Require the proper arrangement and coordination of streets within the site in relation to other existing or planned streets or with features of the official map of the municipality;

(e) Require suitably located streets of sufficient width to accommodate existing and prospective traffic and to afford adequate light, air, and access for firefighting apparatus and equipment to buildings, and be coordinated so as to compose a convenient system;

(f) Require, in proper cases, that plats showing new streets or narrowing or widening of such streets be submitted to the planning board for approval;

(g) Require that the land indicated on plats submitted to the planning board shall be of such character that it can be used for building purposes without danger to health;

(h) Include such provisions as will tend to create conditions favorable for health, safety, convenience, and prosperity;

(i) Require innovative land use controls on lands when supported by the master plan; and

(j) Require preliminary review of site plans.

(k) As a condition of site plan approval, require that the applicant protect or document archeological resources in areas of archeological sensitivity that have been identified in the master plan in accordance with RSA 674:2, III(h).

III. The site plan review regulations which the planning board adopts shall:

(a) Provide the procedures which the board shall follow in reviewing site plans;

(b) Define the purposes of site plan review;

(c) Specify the general standards and requirements with which the proposed development shall comply, including appropriate reference to accepted codes and standards for construction;

(d) Include provisions for guarantees of performance, including bonds or other security; and

(e) Include provision for waiver of any portion of the regulations. The basis for any waiver granted by the planning board shall be recorded in the minutes of the board. The planning board may only grant a waiver if the board finds, by majority vote, that:

(1) Strict conformity would pose an unnecessary hardship to the applicant and waiver would not be contrary to the spirit and intent of the regulations; or

(2) Specific circumstances relative to the site plan, or conditions of the land in such site plan, indicate that the waiver will properly carry out the spirit and intent of the regulations.

IV. The site plan review regulations of the planning board may stipulate, as a condition precedent to the approval of the plat, the extent to which and the manner in which streets shall be graded and improved and to which water, sewer, and other utility mains, piping, connections, or other facilities shall be installed. The regulations or practice of the planning board:

(a) May provide for the conditional approval of the plat before such improvements and installations have been constructed, but any such conditional approval shall not be entered upon that plat.

(b) Shall provide that, in lieu of the completion of street work and utility installations prior to the final approval of a plat, the planning board shall accept a performance bond, irrevocable letter of credit, or other type or types of security as shall be specified in the site plan review regulations. The planning board shall have the discretion to prescribe the type and amount of the bond or other security, require satisfactory evidence of the financial ability of any surety or financial institution to pay such bond or other type of security, and specify a period for completion of the improvements and utilities to be expressed in the bond or other security, in order to secure to the municipality the actual construction and installation of such improvements and utilities. The municipality shall have the power to enforce such bonds or other securities by all appropriate legal and equitable remedies.

V. The planning board may, as part of its site plan review regulations, require an applicant to pay all costs for notification of abutters and may provide for the assessment of reasonable fees to cover the board's administrative expenses and costs of special investigation and the review of documents and other matters which may be required by particular applications.

Source. 1983, 447:1. 1985, 103:21. 1986, 200:3. 1987, 256:3. 2004, 71:5. 2005, 33:2. 2009, 292:2. 2013, 76:3, eff. Jan. 1, 2014.

Heritage Commission

Section 674:44-a

674:44-a Heritage Commission. – A heritage commission may be established in accordance with RSA 673 for the proper recognition, use, and protection of resources, tangible or intangible, primarily man-made, that are valued for their historic, cultural, aesthetic, or community significance within their natural, built, or cultural contexts.

Source. 1992, 64:2, eff. June 19, 1992.

Section 674:44-b

TITLE LXIV
PLANNING AND ZONING

CHAPTER 675
ENACTMENT AND ADOPTION PROCEDURES

Zoning Ordinance, Historic District Ordinance and Building Code Enactment Procedures

Section 675:6

675:6 Method of Adoption. – Every local master plan, subdivision regulation, site plan review regulation and historic district regulation referred to in this title shall be adopted or amended by the planning board or historic district commission, as appropriate, in the following manner:

I. The board or commission, as appropriate, shall hold a public hearing prior to adoption or amendment. Notice for the time and place of the hearing shall be as provided in RSA 675:7.

II. The board or commission, as appropriate, may adopt or amend the master plan or regulation upon completion of the public hearing by an affirmative vote of a majority of its members.

III. No master plan, regulation, amendment or exception adopted under this section shall be legal or have any force and effect until copies of it are certified by a majority of the board or commission and filed with the city clerk, town clerk, or clerk for the county commissioners.

IV. The historic district commission may adopt or amend regulations only after the commission has held a public hearing within the district. Notice for the time and place shall be as provided in RSA 675:7. The adopted regulations shall be certified by a majority of the historic district commission members and filed with the city clerk, town clerk, or clerk for the county commissioners.

Source. 1983, 447:1. 1985, 103:24. 1989, 266:26, eff. July 1, 1989.

CHAPTER Jus 1300 LAND SALES FULL DISCLOSURE RULES

Statutory Authority: RSA 356-A:2; RSA 356-A:3, II, RSA 541-A

REVISION NOTE:

Document #9782-A and Document #9782-B, effective 9-11-10, readopted with amendments Chapter Jus 1300 on land sales full disclosure rules. Amendments included the repeal of certain rules in the former Chapter Jus 1300 and renumbering of other rules in that chapter. Document #9782-A contains rules which will expire in 8 years pursuant to RSA 541-A:16, III unless amended, repealed, or superseded before that. Document #9782-B contains rules on agency forms subject to RSA 541-A:19-b and which will not expire except pursuant to RSA 541-A:17, II. The source notes for rules in Jus 1300 indicate which rules in Jus 1300 have provisions in Document #9782-A or Document #9782-B, or both. Document #9782-A and Document #9782-B replace all prior filings for rules in Jus 1300.

The prior filings for rules in Jus 1300 include the following documents:

#5298, effective 1-19-92, EXPIRED 1-19-98
#7640, effective 1-31-02, EXPIRED 1-31-10
#9687, INTERIM, effective 3-31-10

PART Jus 1301 DEFINITIONS

Jus 1301.01 "Bureau" means the bureau of consumer protection and antitrust, New Hampshire attorney general's office.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1301.02 "Documentary evidence" means:

(a) In the case of cost estimates, documentation obtained from the suppliers of the service; and

(b) In the case of estimates of completion dates:

(1) Actual contracts awarded;

(2) Engineering schedules; or

(3) Other evidence of commitments to complete construction.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1301.03 "Good faith estimate" means an estimate based on such documentary evidence as is available.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1301.04 "Institutional lender" means "institutional lender" as defined in RSA 356-B:3, XVII, namely:

(a) Commercial or savings banks;

(b) Savings and loan associations;

(c) Trust companies;

(d) Credit unions;

(e) Industrial loan associations;

(f) Insurance companies;

(g) Pension fund;

(h) Business trust, including but not limited to:

(1) Real estate investment trusts; or

(2) Any other lender regularly engaged in financing the:

a. Purchase;

b. Construction; or

c. Improvement of real estate;

(i) Any assignee of loans made by such lender; or

(j) Any combination of the foregoing entities.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1301.05 "Non-institutional lender" means any individual or entity which provides financing to any subdivider for:

(a) Acquisition of a subdivision or any portion of a subdivision;

(b) Construction of improvements; or

(c) Any other costs associated with the development or marketing of any lots, parcels, units, or interests in a subdivision.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1301.06 "Principal" means:

(a) Each officer, partner or trustee of the declarant, or the subdivider, or person occupying similar status or performing similar functions;

(b) Each natural person who is a real party in interest having more than a 10 percent ownership or beneficial interest in the subdivision, or having more than a 20 percent ownership or beneficial interest in any entity that has a majority direct or majority beneficial interest in the subdivision; or

(c) Any other person that the bureau reasonably determines should be treated as a principal for purposes of submitting information required by Jus 1306.04.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

PART Jus 1302 FEES

Jus 1302.01 Method of Payment. Fees paid by check or money order shall be made payable to the State of New Hampshire.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1302.02 Calculation of Fees.

(a) The amount of the fee for an initial application for registration or an application for registration of additional lots, parcels, units, or interests shall be calculated pursuant to this section.

(b) The fee accompanying each initial application for registration shall be no less than $600 and no more than $5,000. The fee accompanying each additional application shall be no less than $400, nor more than $5,000. The total fee for a subdivision that is to be registered in phases may exceed $5,000.

(c) Subject to paragraph Jus 1302.02(a), the amount of the fee for each application shall be calculated by multiplying the number of lots, parcels, units, or interests for which registration is sought, by $60. This figure shall not include all lots, parcels, units, or interests that eventually might be included in the subdivision, but only those lots, parcels, units, or interests for which registration at the present time is sought.

(d) No subdivider shall apply amounts paid in connection with an application to future applications or to registration of additional lots, parcels, units, or interests.

(e) The amount of the appropriate fee and any refund shall be determined by reference to the number of lots, parcels, units, or interests applied for, and not by reference to the number of lots, parcels, units, or interests actually registered.

(f) So that RSA 356-A:5, VII can be applied consistently with RSA 356-B:51, VII, a subdivision involving time sharing interests or similar interests shall be subject to a fee schedule based on the number of units, or similar designations it contains, rather than the number of time sharing interests, or similar interests, if the subdivision is constituted in such a manner as to contain the equivalent of units.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1302.03 Refunds.

(a) Upon discovery by the bureau that an overpayment has been made, the bureau shall, as soon thereafter as is practicable, cause to be returned to the applicant the amount of the overpayment.

(b) No refund shall be due if an application is rejected by the bureau or withdrawn by the applicant after a Notice of Filing has been issued.

(c) Once an application has been rejected or withdrawn, reconsideration of the application or the filing of a new application shall require submission of an additional fee calculated in the manner provided by Jus 1302.02.

(d) When an application has been returned to the applicant pursuant to Jus 1306.14, the bureau shall as soon thereafter as is practicable return the application fee in its entirety.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1302.04 Exemption Fees. The amount of the fee which shall accompany an application for exemption shall be $200.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

PART Jus 1303 SUBDIVISIONS REGULATED

Jus 1303.01 List Not Exclusive. The subdivisions, lots, parcels, units, and interests described in Jus 1303 shall not be exclusive of any other subdivisions, lots, parcels, units, and interests regulated under RSA 356-A and these rules.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1303.02 Membership Campgrounds.

(a) The provisions of RSA 356-A and these rules shall apply to campgrounds, to the extent that persons are offered the exclusive right to occupy one or more campground sites, one or more times during the year, for a period of more than 5 years.

(b) Consistent with Jus 1303.02(a), "interest" as defined in RSA 356-A:1, XV, shall include the exclusive right to occupy one or more campground sites, lots, parcels, or units, one or more times during the year, for a period of more than 5 years from the date of execution of an instrument for the disposition of such right, regardless of whether such right is accompanied by a fee simple interest or a leasehold, or neither of them, in said campground sites, lots, parcels, or units.

(c) The term interest shall include:

(1) "Interval Ownership Interest;"

(2) "Vacation License;"

(3) "Campground Membership;" or

(4) Any other similar terms.

(d) This section shall not be deemed to exempt campground membership programs from complying with the time sharing provisions of RSA 356-A and these rules, to the extent that such programs involve time sharing interests.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1303.03 Condexes.

(a) To the extent that a plan of development provides for a series of adjoining condominiums, one or more of which contain fewer than 11 units, resulting in the division of contiguous land into more than 15 parcels, lots, units, or interests by whichever measure results in the greater number, the plan shall be considered a method of disposition adopted for the purpose of evasion of RSA 356-A, unless the developer, prior to offering or disposing of any interest in the condominium units:

(1) Obtains registration or exemption from registration for each unit, pursuant to RSA 356-A:5 and A:8 or RSA 356-A:3, II; and

(2) Obtains registration or exemption from registration of each unit in any condominium containing more than 10 units, pursuant to RSA 356-B:51 and B:54, or RSA 356-B:49, III.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1303.04 Planned Unit or Planned Residential Development.

(a) All developments containing a mix of condominiums and single-family or other residential lots, parcels, units, or interests, shall be subject to RSA 356-A and these rules, provided however, that:

(1) The fee submitted with an application for registration or exemption of the subdivision need not include an amount for the condominium units which are to be separately registered or exempted under RSA 356-B; and

(2) All condominiums in the development which contain more than 10 units shall be separately registered or exempted under RSA 356-B, prior to the offering or disposing of interests in units in those condominiums.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1303.05 Application of Rules to Subdivisions Which May Contain 15 or More Lots, or Interests. Any subdivision which might, at any time, include more than 15 lots, parcels, units, or interests shall be subjected to RSA 356-A and these rules, if the ultimate use of any of the lots, parcels, units, or interests is to be residential.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

PART Jus 1304 EXEMPTIONS FROM REGISTRATION

Jus 1304.01 Time Sharing and Campgrounds. No subdivision in which time share interests are offered shall be eligible for exemption from registration and annual reporting under Jus 1304.03, Jus 1304.07, or Jus 1304.10.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1304.02 Recordkeeping. Every subdivider shall keep a copy of each document and all written information submitted to the bureau in connection with any application for exemption from registration ultimately granted, until January 31 of the calendar year following the year in which all lots, parcels, units, or interests in the subdivision have been sold or disposed of by the subdivider.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1304.03 Urban Single Family Residence and Duplex Exemption.

(a) The bureau shall exempt a subdivision from registration and annual reporting requirements of RSA 356-A:4, I and RSA 356-A:5 through RSA 356-A:9, if the conditions below are met:

(1) The subdivision shall have no more than 50 lots, parcels, units, or interests, including any that might be added at any future time, and the total number of lots offered pursuant to each exemption application shall not exceed 35;

(2) Each lot offered or disposed of under the exemption shall be limited exclusively by:

a. Enforceable covenants or restrictions; or

b. Enforceable zoning ordinances to single-family residences or duplexes;

(3) The town or city in which the lots for which an exemption is applied shall have a population of at least 15,000 at the time the application is filed;

(4) Each of the towns or cities in which lots for which exemption is applied shall have, prior to the time the application is filed

a. Established a planning board pursuant to RSA 673:1, I;

b. Adopted a building code pursuant to RSA 673:1, V;

c. Appointed a building inspector pursuant to RSA 673:1, III;

d. Adopted a master plan or sections or parts of a master plan pursuant to RSA 674:1 and 675:6; and

e. Adopted a zoning ordinance pursuant to RSA 674:16;

(5) If the streets or roads providing access to the subdivision and to the lots for which exemption is applied are not complete at the time the application is filed, the subdivider shall post surety

acceptable to the town or city in the full amount of the cost of completing the streets or roads to assure completion to local standards;

(6) Surety required by (a)(5) above shall:

a. Be in the form prescribed by Jus 1304.14; and

b. Be posted as required by (a)(5) prior to an application for exemption under Jus 1304.03 being filed;

(7) The town or city, or a homeowners' association shall have accepted or be obligated to accept the responsibility for maintaining the street or road upon which the lot is situated;

(8) In any case in which a homeowners' association has accepted or is obligated to accept maintenance responsibility, the subdivider shall, prior to the signing of a contract or agreement to purchase, provide the purchaser with a good faith written estimate of the cost of carrying out the responsibility over the first 10 years of ownership;

(9) At the time of closing, potable water, sanitary sewage disposal, and electricity shall be extended to the lot, or the town or city must be obligated to install the facilities within 180 days following closing;

(10) For subdivisions which will not have central water or sewage disposal systems, there shall be assurances that an adequate potable water supply is available year-round and that the lot is approved for the installation of a septic tank;

(11) The contract of sale shall require delivery of a warranty deed, free from monetary liens and encumbrances, to the purchaser within 360 days after the signing of the sales contract;

(12) The contract of sale shall be voidable at the election of the purchaser, in the event the warranty deed has not been delivered within the required time period, and the contract shall state that it is so voidable;

(13) The purchaser or purchaser's spouse shall make a personal, on-site inspection of the lot purchased prior to signing a contact or agreement to purchase;

(14) If the subdivider or agent represents in any manner that improvements, roads, sewers, water, gas or electric service, or recreational amenities will be provided or completed by the subdivider, the purchase and sale agreement shall contain provisions so obligating the subdivider;

(15) The purchase and sale agreement shall contain a notice specifying the cancellation rights provided by RSA 356-A:4, II and shall identify the person or institution holding deposits in escrow by name and address; and

(16) The subdivider shall not:

a. Have been convicted of any crime within the past 10 years which, if committed in this state would constitute a felony;

b. Have been the subject of a cease and desist order, revocation, injunction, or similar enforcement order relating to illegal condominium or land sales activity in this state or elsewhere; and

c. Have as a principal, any person or entity who has been subject to such enforcement order or criminal conviction, or who has been a principal in an entity that has been subject to such enforcement order or criminal conviction.

(b) For purposes of (a)(2)b, above, mobile homes, townhouses, and residences for one family use shall be considered single-family residences for purposes of this exemption provision.

(c) In the case of a subdivision located in more than one town or city, only those lots located in a town or city meeting the population requirement of (a)(3) shall be exempted.

(d) For purposes of determining the population of towns and cities under (a)(3), the bureau shall rely on the most recent population statistics available from the office of state planning.

(e) Notwithstanding (a), above, an exemption shall not be granted if it does not protect purchasers consistent with RSA 356-A.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1304.04 Application for Urban Single Family Residence and Duplex Exemption. A subdivider requesting an exemption from registration pursuant to section Jus 1304.03 shall complete application Form CPLS121 (July, 2010), and shall file the application at the offices of the bureau.

Source. (See Revision Note at chapter heading for Jus 1300) *#9782-B, eff 9-11-10*

Jus 1304.05 Fees for Urban Single Family Residence and Duplex Exemption. The application shall be accompanied by a non-refundable fee in the amount of $200.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1304.06 Effect of Filing.

(a) As to those 35 or fewer lots identified in the application filed under Jus 1304.04, the exemption from registration and annual reporting shall be effective as of the date the certificate of exemption is issued by the bureau, and offers and dispositions may commence as of that date.

(b) No person shall file an application under Jus 1304.04 that is incomplete in any respect, nor shall any person seek a waiver of this requirement or any of the requirements of Jus 1304.03 through Jus 1304.06.

(c) Any offer or disposition of any lot, unit, parcel, or interest in a subdivision for which an incomplete application has been filed shall be deemed an offer or disposition in violation of RSA 356-A:4, I.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1304.07 Fifty Lot Exemption.

(a) The bureau shall exempt a subdivision from the registration and annual reporting requirements of RSA 356-A:4, I and RSA 356-A:5 through RSA 356-A:9 if the following conditions are met:

(1) The subdivision shall have no more than 50 lots, parcels, units, or interests, including any that may be added at a future time;

(2) The town or city in which the lots, parcels, units, or interests for which exemption is applied are located, shall have, prior to the time the application is filed, established a planning board pursuant to RSA 673:1, I;

(3) If the streets or roads providing access to the subdivision and to the lots, parcels, units, or interests for which exemption is applied are not complete at the time the application is filed, the subdivider shall post surety acceptable to the town or city as follows:

a. The surety shall be in the full amount of the cost of completing the streets or roads to assure completion to local standards and;

b. The surety shall be in the form prescribed by Jus 1304.14;

(4) The subdivision shall meet the requirements of Jus 1304.03(a) (7)-(16), except that Jus 1304.03 (a) (7) and (8) need not be complied with if the subdivider discloses in the purchase and sale agreement that no assurances are made with respect to the matters included in those paragraphs; and

(5) At the time the application is filed, the subdivider shall:

a. Be the current owner of record of the lots, parcels, units, or interests in the subdivision; or

b. Be able to present evidence that it can convey or can reasonably be expected to be able to convey title by warranty deed if the purchaser complies with the terms of the offer.

(b) Notwithstanding the provisions of Jus 1304.07(a), above, an exemption shall not be granted if it does not protect purchasers pursuant to RSA 356-A.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1304.08 Application For 50 Lot Exemption.

(a) A subdivider requesting an exemption from registration pursuant to Jus 1304.07 shall complete application Form CPLS122 (July, 2010) and file the application at the offices of the bureau.

(b) The application shall be accompanied by a non-refundable fee in the amount of $200.

Source. (See Revision Note at chapter heading for Jus 1300) *#9782-B, eff 9-11-10*

Jus 1304.09 Review by Bureau. The time periods and procedures provided by Jus 1305.01(d) shall govern the applications made pursuant to Jus 1304.03 and Jus 1304.07.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1304.10 Exemption From Registration: Other Grounds.

(a) The bureau shall exempt any subdivision from the registration and annual reporting requirements of RSA 356-A:4, I and RSA 356-A:5 - 9, if it finds that such registration and annual reports are not necessary in the public interest and for the protection of purchasers by reason of the small amount involved or the limited character of the offering.

(b) No person shall request an exemption from registration, pursuant to this section, for any subdivision that would be eligible for consideration for exemption under Jus 1304.03 or Jus 1304.07.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1304.11 Application. The provisions of Jus 1305.01 shall govern application procedures under Jus 1304.10.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1304.12 Exemption Certificate for 50 Lot Exemption.

(a) Exemption from the registration and annual reporting requirements of RSA 356-A shall be evidenced by a certificate issued by the bureau to the subdivider.

(b) The exemption shall authorize the offer or disposition of only those lots, parcels, units, or interests identified in the certificate.

(c) The exemption shall be effective as of the date the Certificate of Exemption is issued by the bureau, and offers and dispositions may commence as of that date.

(d) The subdivider of a subdivision located in New Hampshire shall cause any certificate of exemption issued by the bureau with respect to such subdivision to be recorded in the registries of deeds for counties in which the subdivision is located. Such recordation shall occur within 10 days of receipt of a certificate of exemption by the subdivider.

(e) The subdivider shall, as soon as is practicable:

(1) Obtain recordation data, consisting of:

a. The date of recordation; and

b. The book and page numbers or their equivalent; and

(2) Provide the bureau, in writing, with a copy of the recorded certificate within 10 days after receipt thereof by the subdivider.

(f) Except as otherwise provided by the terms of the certificate, an exemption shall remain in full force and effect until such time as it has been suspended or revoked as provided by Jus 1305.03.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1304.13 Prior Sales.

(a) The exemptions from registration and annual reporting provided by Jus 1304.03, Jus 1304.07, and Jus 1304.10 shall not be available for any subdivision in which the subdivider has conveyed a legal or equitable interest in any parcel, lot, unit, or interest by means of a deed or other final disposition, including the signing of an installment contract, prior to obtaining an exemption.

(b) Nothing in Jus 1304.13 shall be construed to prevent the bureau from taking any administrative or judicial action, otherwise authorized by law, against any person who has engaged or is about to engage in conduct constituting a violation of RSA 356-A or these rules, including the conduct described in Jus 1304.13(a).

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1304.14 Street and Road Bonds.

(a) The surety required with respect to completion of streets or roads shall be in the form of:

(1) A bond;

(2) An irrevocable letter of credit;

(3) A mortgage to the governmental entity requiring the surety; or

(4) Other form acceptable to the town or city and to the bureau.

(b) Jus 1304.14 shall not be construed as requiring a town or city to accept any of the forms of surety described in paragraph Jus 1304.14(a), nor shall it be construed as requiring the bureau to accept the form or amount of any surety accepted by the town or city.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1304.15 Applications Not in Proper Form.

(a) Upon receipt of an application for exemption pursuant to Jus 1304.03, Jus 1304.07, or Jus 1304.10, that is not in proper form, including but not limited to an incomplete application or an application made on an incorrect form, the bureau shall reject the application. However, if the bureau has reason to believe the application can be readily put into proper form, it shall retain the application and issue to the applicant a Notice of Deficiencies specifying the deficiencies in its form and any other correspondence or document. The Department shall deem an application that can "readily be put into proper form" as one that can be brought into compliance within 15 days from the date of issuance of the Notice of Deficiencies. (RSA 356-A:8, III)

(b) If the application is not put in proper form within 15 days after the issuance of a Notice of Deficiencies, the bureau shall reject the application.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

PART Jus 1305 EXEMPTIONS FROM OTHER STATUTORY REQUIREMENTS

Jus 1305.01 Application.

(a) Except for applications for exemption otherwise provided for by these rules, an application for exemption from any of the provisions of RSA 356-A shall be made by written letter submitted to the offices of the bureau. The letter shall be captioned CPLS120/EXEMPTION REQUEST.

(b) An application shall be accompanied by a non-refundable fee in the amount of $200.

(c) The application shall provide all information and documents that would assist the bureau in making a determination as permitted by RSA 356-A: 3, II, including, at a minimum:

(1) A detailed description of the activity for which an exemption is being requested;

(2) A statement explaining the necessity for the exemption; and

(3) A statement as to why enforcement of the relevant provisions of RSA 356-A is not necessary in the public interest and for the protection of purchasers by reason of:

a. The small amount involved;

b. The limited character of the offering; and/or

c. The property is otherwise adequately regulated by:

1. Federal;

2. State;

3. County;

4. Municipal; or

5. Town statutes or ordinances.

(d) Within 60 days after receipt of an application, the bureau shall notify the applicant, either orally or in writing that:

(1) The application contains apparent errors or omissions, which shall be identified by the bureau;

(2) The application has been denied in whole or in part;

(3) The exemption has been granted in whole or in part; or

(4) The applicant is required to submit additional information.

(e) The time limit imposed by Jus 1305.01(d) may be waived by the applicant and shall be extended by the bureau if the bureau determines that more time is needed to make the appropriate determination.

(f) No person shall engage in any conduct with respect to which an exemption has been or should have been sought under this section, until such time as the application for exemption has been granted.

(g) The bureau shall impose any condition of exemption that is for the protection of purchasers pursuant to RSA 356-A.

(h) The provisions of Jus 1305.01 shall apply to any request for authorization to use a public offering statement prior to registration of the lots, parcels, units, or interests in the subdivision to which it refers, except that no fee shall be required to accompany the request. However, this section shall not prevent the bureau, where otherwise authorized, from requiring the use of a public offering statement prior to registration of the subdivision.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1305.02 Sales to Developers and Builders.

(a) A subdivider may dispose of subdivided lots, parcels, units, or interests, prior to being registered or exempted from registration under any other provision of these rules, to persons who will further develop or improve them and offer and dispose of them to purchasers for residential use under the following conditions:

(1) The subdivider shall, prior to disposing of any lots, parcels, units, or interests to other subdividers, developers, or builders, apply to the bureau in writing for an exemption from RSA 356-A:4, I and II;

(2) The application to the bureau shall be in the form of an affidavit captioned CPLS120/BULK SALE, which shall be signed by the subdivider, or by an officer or principal of the subdivider authorized to sign such affidavit;

(3) The application shall be accompanied by a non-refundable fee of $200;

(4) The application shall include:

a. The name, address and telephone number of the subdivider, one of its principals, and its attorneys, if any;

b. The name and location of the subdivision;

c. The total number of lots, parcels, units, or interests that are included or may eventually be included in the subdivision;

d. The number of lots which may be disposed of to other subdividers, developers, or builders;

e. The names, addresses, and telephone numbers of each of the other subdividers, developers, or builders to whom dispositions may be made;

f. If the disposition is to be made to a legally constituted entity, an identification of the legal form of said entity, the location of its principal place of business, and the identity of each principal thereof;

g. A statement that no offers or dispositions of lots for which exemption is sought pursuant to this section have been made prior to the date the notice was mailed or delivered to the bureau, except as provided by (14) below; and

h. A statement that the purchase agreement between the subdivider and any other subdivider, developer, or builder shall contain an acknowledgment that no offers or dispositions may be made to any purchaser for residential use until such time as the subdivision and the subject lots,

parcels, units, or interests have been registered or exempted by the bureau upon application by the purchaser thereof.

(5) All lots, parcels, units, or interests subject to Jus 1303.05 shall be registered or exempted by the bureau prior to offers or dispositions being made to purchasers for residential use, regardless of whether a subsequent subdivider, developer, or builder is to offer or dispose of fewer than 16 lots, parcels, units, or interests;

(6) The provisions of Jus 1305.02 shall not apply to any subdivision involving time share interests;

(7) Within 30 days after receipt of an application, the bureau shall notify the applicant, either orally or in writing that:

a. The application contains apparent errors or omissions, which shall be identified by the bureau;

b. The application has been denied in whole or in part;

c. The exemption has been granted in whole or in part; or

d. The applicant is required to submit additional information.

(8) The time limit imposed by Jus 1305.02(a)(7) may be waived by the applicant;

(9) No person shall engage in any conduct with respect to which an exemption has been or should have been sought under this rule, until such time as the application of exemption has been granted;

(10) The bureau shall impose any condition of exemption for the protection of purchasers pursuant to RSA 356-A;

(11) Any exemption granted pursuant to this section shall be limited to the offer and disposition described by the subdivider in the notice submitted pursuant to this section;

(12) If the disposition of lots, parcels, units, or interests identified in an application submitted to the bureau pursuant to (5) of this section is not consummated as set forth in the application, the subdivider shall so notify the bureau in writing; and

(13) Neither this section, nor any other section of these rules or of RSA 356-A shall be construed to prohibit a subdivider from soliciting or negotiating offers to purchase some or all lots, parcels, units, or interests in a subdivision prior to registration or exemption of those lots, parcels, units, or interests from persons or entities who will further develop or improve them and offer or dispose of them to purchasers for residential use, provided that the subdivider shall apply for, and receive exemption pursuant to this section prior to disposing of such lots, parcels, units, or interests.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1305.03 Revocation.

(a) If, subsequent to the issuance of an exemption from registration, or other exemption, the bureau has reasonable grounds to believe that exemption in the particular case is not in the public interest, the bureau shall, upon notice of an opportunity for hearing as provided by Jus 1309, revoke the exemption.

(b) Grounds for revocation shall include:

(1) Material omissions or misrepresentations in documents submitted to the bureau;

(2) Unlawful conduct of the subdivider or its agents;

(3) Insolvency of the subdivider or a party providing financing;

(4) Receipt by the bureau of adverse information about the subdivision that should be disclosed to purchasers; and

(5) Any other acts or omissions by the subdivider or its agents contrary to the public interest as embodied in these rules, RSA 356-A or other chapters of the RSAs.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

PART Jus 1306 REGISTRATION

Jus 1306.01 Residential Subdivisions.

(a) The exemption from registration of subdivisions in which all lots, parcels, units, or interests are restricted to non-residential use provided in RSA 356-A:3, I(d) shall not apply to any subdivision as to which there is a substantial possibility that a lot, parcel, unit, or interest therein, may be used by the purchaser as permanent or temporary living quarters, including use as:

(1) A vacation home;

(2) Temporary overnight dwelling; or

(3) As a site upon which vehicular or other portable living quarters will be placed or occupied by the purchaser.

(b) This section shall not prohibit a subdivider from applying for exemption from registration pursuant to Jus 1304.10, in a case where the residential use by the purchaser is limited and the standards for granting the exemption are otherwise satisfied.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1306.02 Recordkeeping. Every subdivider shall keep a copy of each document and all written information submitted to the bureau in connection with any application for registration ultimately approved, until January 31 of the calendar year following the year in which all lots, parcels, units, or interests in the subdivision shall have been sold or disposed of by the subdivider.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1306.03 Comprehensive Application for Registration.

(a) Every subdivider applying for registration of a subdivision of more than 50 lots, parcels, units, or interests shall complete Form CPLS100 (November, 2013) which shall be filed at the offices of the bureau.

(b) Applicants shall complete and file Form CPLS100 (November, 2013) for any subdivision that can eventually include more than 50 lots, parcels, units, or interests.

Source. (See Revision Note at chapter heading for Jus 1300) *#9782-B, eff 9-11-10*

Jus 1306.04 Personal Background Statements, Form CPLS170.

(a) Applicants submitting Form CPLS100 or CPLS110 shall also submit Form CPLS170 (July, 2010) for each principal, except that any institutional lender which holds title to subdivided land by foreclosure, or pursuant to a foreclosure deed or deed in lieu thereof shall submit such information only for those employees, officers, or directors who are directly responsible for and who exercise actual authority over the development and/or marketing interests within such subdivision, whether or not such persons are principals of the institutional lender.

Source. (See Revision Note at chapter heading for Jus 1300) *#9782-B, eff 9-11-10*

Jus 1306.05 Financial Information.

(a) Financial information required by these rules shall consist of evidence, satisfactory to the bureau, of the subdivider's ability to complete all promised improvements or amenities.

(b) Such evidence shall include, at a minimum, the following:

(1) Development and marketing costs;

(2) Financing plan;

(3) Financing commitments; and

(4) Financial statements.

(c) In addition to the minimum requirements stated in (b) above, the bureau shall require an applicant to provide such other financial information that will assist it in making the determinations it is required to make by RSA 356-A:7, I.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1306.06 Development and Marketing Costs.

(a) Information about development and marketing costs required by Jus 1306.05 shall include:

(1) Expenditures; and

(2) Good faith estimates of projected costs of land acquisition, construction, marketing, advertising, sales, interest, and any other costs related to the development of the subdivision or disposition of the lots, parcels, units, or interests.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1306.07 Financing Plans.

(a) The plan of financing required by Jus 1306.05 shall include, at a minimum, a narrative description identifying all sources and amounts of financing of all promised improvements.

(b) In addition, the plan shall include a good faith narrative or graphic cash flow projection relating to all promised improvements.

(c) The projection shall depict, at a minimum, the anticipated schedule and amounts of:

(1) Debt retirement;

(2) Other expenses and anticipated use of income, including disbursements of income from all sources;

(3) Sales revenue;

(4) Other income;

(5) Total gross income;

(6) Total net income; and

(7) Subdividers of time share subdivisions shall also include a statement as to the availability of end loan financing.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1306.08 Financing Commitment.

(a) Evidence of financing commitments required by Jus 1306.05 shall include, at a minimum:

(1) A copy of a written, signed, commitment from an institutional lender to advance funds to the subdivider sufficient to complete all promised improvements, or, to the extent that the subdivider is not relying on funds borrowed from an institutional lender, a statement detailing what funds the declarant is relying on; and

(2) Other evidence of the guaranteed commitment of funds sufficient to complete all promised improvements.

(b) The commitments required by this section may state that the commitment is subject to registration of the subdivision prior to funding.

(c) Upon execution of a loan agreement, mortgage deed or other such legal instrument related to any land acquisition or construction financing, with respect to that portion of a subdivision for which registration has been applied or granted, the subdivider shall submit to the bureau a copy of each such executed legal instrument.

(d) In the event a land acquisition or construction loan has not been funded by the date contemplated in the commitment letter or in the legal instrument evidencing the loan, the subdivider shall immediately submit to the bureau a written statement explaining the status of the loan and why it has not been funded.

(e) With respect to any commitment or portion of a commitment for which there is a pre-sale requirement that has not been met at the time the commitment is submitted to the bureau, such commitment portion shall not be considered by the bureau in determining whether the financing is adequate.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1306.09 Financial Statements.

(a) The financial statements required by Jus 1306.05 shall be the subdivider's financial statements for the last full fiscal year. These statements shall be prepared in accordance with generally accepted accounting principles, and shall be certified or reviewed by an independent licensed public accountant that they have been so prepared and that all adjustments necessary for a fair statement of the results for the periods shown have been included.

(b) Financial statements shall:

(1) Include the following:

a. A balance sheet;

b. An income statement; and

c. A cash flow statement; and

(2) Be no more than 6 months old on the date the application is filed.

(c) The requirements of Jus 1306.09(b) shall not be fulfilled by submission of a financial compilation.

(d) If the statements are more than 6 months old at the date of submission of the application, or if the last full fiscal year has ended within the last 90 days and statements are not yet available, the subdivider may submit a

copy of the statements for the previous full fiscal year and supplement them with interim statements so that the financial information is no more than 6 months old on the date that the application is submitted.

(e) Interim statements:

(1) May be prepared by company personnel; and

(2) Shall contain:

a. A balance sheet;

b. An income statement; and

c. A cash flow statement.

(f) The statements shall be prepared in accordance with generally accepted accounting principles and shall be certified or reviewed as provided in Jus 1306.09(a).

(g) If the subdivider was formed no more than 18 months prior to the submission of an application for registration, an audited or unaudited balance sheet and statement of receipts and disbursements of funds may be submitted.

(h) If the subdivider is a subsidiary company, the bureau shall permit the use of the certified or reviewed statements of the parent company, provided that those statements are accompanied by an unconditional guaranty that the parent company shall perform and fulfill the obligations of the subsidiary.

(i) If the declarant proceeds pursuant to (h) above, the declarant shall submit the following:

(1) The certified or reviewed financial statements of the parent company, together with interim statements if necessary, which comply with Jus 1306.09(a) - (d); and

(2) A properly executed guaranty in a form acceptable to the bureau.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1306.10 Purchase and Sale Agreement.

(a) Subdividers shall use a contract for purchase or lease which includes:

(1) Express notice of the purchaser's 5 day right to cancel, as prescribed by RSA 356-A:4, II;

(2) The name and address of the escrow agent designated to carry out the provisions of RSA 356-A:9-a; and

(3) A space for acknowledgment of receipt of the public offering statement provided, however, that the space for the acknowledgment need not be used with respect to offering any subdivision for which a public offering statement is not required.

(b) The escrow agent identified in the purchase and sale agreement shall be a person or entity unrelated to the subdivider or any principal thereof and shall hold all escrowed funds within the state of New Hampshire.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1306.11 Property Owners' Association. The instruments of any property owners' association shall contain, in addition to all other statutory requirements, a section which sets forth the resale rights of the purchaser provided by RSA 356-A:9-b.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1306.12 Abbreviated Application for Registration.

(a) Every subdivider applying for registration of a subdivision of more than 15 lots, parcels, units, or interests, but which does not contain and never shall contain more than 50 lots, parcels, units, or interests shall complete form CPLS110 (November, 2013) which shall be filed at the offices of the bureau.

(b) Applicants shall file form CPLS110 (November, 2013) for any subdivision that is not eligible for exemption under Jus 1304 and that, upon inclusion of the total number of lots, parcels, units, or interests may eventually be included in the subdivision, would include more than 15 lots, parcels, units, or interests, but no more than 50 lots, parcels, units, or interests.

(c) Jus 1306.12 shall not apply to a subdivision involving time share interests.

Source. (See Revision Note at chapter heading for Jus 1300) *#9782-B, eff 9-11-10*

Jus 1306.13 Applications Not in Proper Form.

(a) Upon receipt of a comprehensive or abbreviated application for registration that is not in proper form, including but not limited to an incomplete application or an application made on an incorrect form, the bureau shall return the application to the applicant. However, if the bureau has reason to believe the application can be readily put into proper form, it shall retain the application and issue to the applicant a Notice of Deficiencies specifying the deficiencies in its form and any other correspondence or document. The Department shall deem an application that can be "readily put into the proper form" as one that can be brought into compliance within 15 days from the date of issuance of the Notice of Deficiencies.

(b) If the application is not put in proper form within 15 days after the issuance of a Notice of Deficiencies, the bureau shall reject the application.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1306.14 Registration of Additional Lots, Parcels, Units, or Interests.

(a) Jus 1306.14 shall only apply to those subdivisions in which some lots, parcels, units, or interests have already been registered.

(b) Every subdivider applying for the registration of lots, parcels, units, or interests which have not been previously registered, shall either:

(1) Complete Form CPLS100 (November, 2013), which shall then be filed with the bureau pursuant to Jus 1306.03, or

(2) Complete Form CPLS110 (November, 2013), which shall then be filed with the bureau pursuant to Jus 1306.12, if the subdivision does not contain and never shall contain more than 50 lots, parcels, units, or interests.

(c) When filing Form CPLS100 (November, 2013) or CPLS110 (November, 2013), the application shall contain all information and documents required by the Form, except that where the current information and documents do not differ from those filed with the original application, appropriate references may be made to the original application.

(d) Subdividers shall file Form CPLS100 (November, 2013) or CPLS110 (November, 2013) which includes all information contained in prior applications, as well as any additions, amendments or changes, which additions, amendments or changes shall be red-lined, underlined or otherwise highlighted for review by the bureau.

Source. (See Revision Note at chapter heading for Jus 1300) *#9782-B, eff 9-11-10*

Jus 1306.15 Fees. An application for registration of additional lots, parcels, units, or interests shall be accompanied by a fee in the amount of $400 or $60 for each lot, parcel, unit, or interest for which registration is sought, whichever is greater, provided, however, that no more than $5,000 shall be submitted with the application.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1306.16 Registration Certificate.

(a) Registration of lots, parcels, units, or interests in a subdivision shall be evidenced by a certificate issued by the bureau to the subdivider.

(b) The registration shall authorize the offer or disposition of only those lots, parcels, units, or interests identified in the certificate.

(c) The bureau shall issue the certificate within 20 days after the effective date of the exemption.

(d) The subdivider of a subdivision located in the state of New Hampshire shall cause any certificate of registration issued by the bureau with respect to such subdivision to be recorded in the registry of deeds for the county wherein the subdivision is located. Such recordation shall occur within 10 days of receipt of a certificate of registration by the subdivider.

(e) The subdivider shall, as soon as is reasonably practicable, obtain recordation data consisting of the following:

(1) Date of recordation;

(2) Book and page numbers or their equivalent; and

(3) Obtain and provide the bureau, in writing, with a copy of the recorded certificate within 10 days after the receipt thereof.

(f) Except as otherwise provided by the terms of the certificate, a registration shall remain in full force and effect until such time as it has been suspended or revoked upon notice and hearing as provided by Jus 1309.

(g) The bureau shall provide a copy of form CPLS200 to each subdivider at the time it issues an initial certificate of registration to said subdivider or upon written request for same by the subdivider or its counsel.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1306.17 Annual Report.

(a) All subdividers so obligated pursuant to RSA 356-A:9 shall file form CPLS200 (July, 2010), the annual report, on April 1 of each year following the date of the original registration.

(b) The report shall be accurate as of the date that the report is made out by the subdivider, except for the financial statements, which shall reflect the subdivider's financial condition as of a date no earlier than December 31 of the year immediately preceding the date of the annual report.

(c) The bureau shall provide a copy of form CPLS200 to each subdivider at the time it issues an initial certificate of registration to said subdivider or upon written request for same by the subdivider or its counsel.

(d) Notwithstanding (b) above, it shall be the responsibility of subdividers to file annual reports pursuant to (a) above, by no later than April 1 of each year, during which they might be required to make such filing. Such

responsibility shall not be dependent on reception by subdividers of any notice from the bureau that said annual reports are or might be due pursuant to this section.

(e) A subdivider shall be exempted from filing an annual report pursuant to this section if it provides to the bureau its affidavit signed by the subdivider if a natural person, or, if subdivider is a legally constituted entity, by an officer or principal thereof authorized to sign such affidavit, that all promised improvements in the subdivision have been completed and all lots, parcels, units, or interests disposed of.

(f) Notwithstanding any other provision of this section, a subdivider shall be required to file with the bureau a supplement to the annual report within 5 business days of the occurrence of any of the following:

(1) Reception by the subdivider of a notice of foreclosure under any mortgage granted by the subdivider affecting the subdivision or any lot, parcel, unit, or interest therein; and

(2) The filing of a petition for voluntary or involuntary bankruptcy by or involving the subdivider, or any affiliate of the subdivider under any chapter of the United States Bankruptcy Code, 11 U.S.C. §§ 101 et. seq. or of similar process under any state insolvency law.

(g) The supplement to the annual report called for in (f), above, shall be submitted in the form of an affidavit by the subdivider, or a principal or officer of the subdivider authorized to sign such affidavit, and shall bear the caption "form CPLS200-SUPPLEMENT."

(h) A supplement to the annual report submitted pursuant to subparagraph (f)(1) shall contain the following information:

(1) A description of the mortgage instrument being foreclosed upon, identifying by full name and address all parties secured thereunder, as well as any person or entity exercising any right of foreclosure thereunder;

(2) The date, place, and manner of any scheduled foreclosure sale or other disposition of all affected property; and

(3) The date and manner of reception by the subdivider of the notice of foreclosure.

(i) The information called for in (h), above, may be provided by submitting to the bureau a copy of any notice provided to a subdivider pursuant to RSA 479:25, I, together with an affidavit of the subdivider or a principal or officer thereof authorized to sign such affidavit, in the form prescribed by (g), above, certifying that, and specifying the date on which the subdivider received said notice.

(j) A supplement to the annual report submitted pursuant to (f)(2), above, shall contain the following information:

(1) Identification, including mailing address, of the court in which the bankruptcy petition or other process has been filed;

(2) The date of such filing;

(3) Whether such filing is effected pursuant to the United States Bankruptcy Code, 11 U.S.C. §§ 101 et seq. and if so, identifying the Chapter of the Bankruptcy Code pursuant to which the filing is made; and

(4) If the filing is made pursuant to an insolvency law of any state, the title and code citation to said law, with a description of the form of protection sought by the filing, such as liquidation, reorganization, or the like.

(k) Failure of the subdivider to file its annual report pursuant to RSA 356-A:9 during any period of time during which it is required to do so and/or failure to timely file any required supplement to the annual report pursuant to this section shall be deemed by the bureau to constitute an irreparable harm to the public interest,

subject to issuance of a cease and desist order pursuant to RSA 356-A:12, II, requiring the subdivider to file its annual report or supplement thereto within 30 days of the date of such order.

(l) Failure to comply with such order shall be deemed by the bureau to constitute adequate grounds for revocation or suspension of registration pursuant to RSA 356-A:13, I.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10, paras (c), (d), (f), (k) and (l); *#9782-B, eff 9-11-10, paras (a), (b), (e), and (g)-(j)*

Jus 1306.18 Material Changes.

(a) Notification to the bureau of proposed material changes in the plan of disposition or development of a subdivision shall be in writing.

(b) No such change shall be made unless and until the bureau has given its affirmative written approval of the change.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1306.19 Registration by Successor Subdivider.

(a) Any person who comes to stand in the same relation to the subdivision as the original subdivider shall be required to make separate application to the bureau for registration as a successor subdivider.

(b) The successor subdivider shall complete form CPLS100 (November, 2013) or form CPLS110 (November, 2013) pursuant to Jus 1306.03 and Jus 1306.12, as appropriate, regardless of whether the successor subdivider seeks to register lots, parcels, units, or interests already registered, or additional lots, parcels, units, or interests.

(c) A successor subdivider may incorporate, by reference, the contents of a preceding application to the extent that such incorporation does not render the successor subdivider's application inaccurate.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10, paras (a) and (c); *#9782-B, eff 9-11-10, para (b)*

Jus 1306.20 Registration of Subdivisions Located Outside of New Hampshire.

(a) With respect to applications for registration of subdivisions located outside of New Hampshire, the bureau shall accept, in lieu of CPLS100 (November, 2013) or CPLS110 (November, 2013):

(1) A certified copy of an application for registration or its equivalent filed with the competent state regulatory agency of any other state with all exhibits and addenda thereto, together with a certificate of registration or other evidence of approval by such agency; or

(2) A certified copy of a statement of record filed with the office of interstate land sales registration of the United States Department of Housing and Urban Development with all exhibits and addenda thereto, together with a certificate of registration issued by that agency name.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

PART Jus 1307 PUBLIC OFFERING STATEMENT

Jus 1307.01 Public Offering Statement Form.

(a) The information contained in the public offering statement shall be set forth under appropriate captions or headings which are reasonably indicative of the principal subject matter thereunder and shall be divided into reasonably short paragraphs or sections. The pages shall be numbered sequentially.

(b) The public offering statement shall be prepared on good quality, unglazed white paper, 8 1/2" x 11" in size.

(c) A waiver of (b), above, shall be granted by the bureau if the proposed alternative size and coloring is of comparable visual quality.

(d) The public offering statement shall be printed, lithographed, mimeographed, typewritten and photocopied, or prepared by a similar process so that it is legible and suitable for a permanent record.

(e) The public offering statement shall be as brief as is consistent with full and accurate disclosure. In no event shall the statement be made so lengthy or detailed so as to discourage close examination.

(f) No public offering statement shall be distributed in connection with the marketing of any lot, unit, parcel, or interest in any subdivision before said lot, unit, parcel, or interest has been registered by the bureau. Upon written request by the subdivider, the bureau shall authorize such distribution prior to registration, but only under such terms and conditions necessary to protect purchasers, consistent with RSA 356-A.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1307.02 Contents of the Cover Page.

(a) The public offering statement shall set forth on its outside front cover or first inside page a statement, substantially as follows, in capital letters printed in boldface, roman type at least as large as 10 point modern type:

"PUBLIC OFFERING STATEMENT

THIS SUBDIVISION IS REGISTERED WITH THE CONSUMER PROTECTION AND ANTITRUST BUREAU OF THE DEPARTMENT OF JUSTICE OF THE STATE OF NEW HAMPSHIRE PURSUANT TO THE PROVISIONS OF THE NEW HAMPSHIRE LAND SALES FULL DISCLOSURE ACT, RSA 356-A. THE ACT REQUIRES THAT A CURRENT PUBLIC OFFERING STATEMENT BE FURNISHED TO A PURCHASER PRIOR TO, OR AT THE TIME SUCH PURCHASER ENTERS INTO A PURCHASE AGREEMENT. THE PURPOSE OF THE STATEMENT IS TO DISCLOSE MATERIAL FACTS PERTAINING TO THIS SUBDIVISION. IT IS RECOMMENDED THAT THE PURCHASER READ THIS STATEMENT CAREFULLY, PHYSICALLY INSPECT THE PROPERTY, REVIEW ALL SALES AND OTHER DOCUMENTS IN DETAIL AND CONSULT AN ATTORNEY FOR ADVICE. NOTHING CONTAINED HEREIN SHOULD BE CONSTRUED AS SUGGESTING THAT THE CONSUMER PROTECTION AND ANTITRUST BUREAU OR ANY OTHER PUBLIC AGENCY RECOMMENDS THE SUBDIVISION OR HAS DETERMINED THAT THE DISPOSITION OF ANY LOT, PARCEL, UNIT, OR INTEREST IN THE SUBDIVISION IS LEGALLY SUFFICIENT TO PROTECT THE RIGHTS OF PURCHASERS.

RECEIPT OF THIS STATEMENT MUST BE ACKNOWLEDGED IN WRITING BY THE PURCHASER ON HIS PURCHASE AGREEMENT.

ANY COMPLAINT ALLEGING UNFAIR OR DECEPTIVE SALES PRACTICES OR A VIOLATION OF THE LAND SALES FULL DISCLOSURE ACT MAY BE DIRECTED TO THE CONSUMER PROTECTION AND ANTITRUST BUREAU, 33 CAPITOL STREET, CONCORD, NEW HAMPSHIRE 03301."

(b) Immediately following the statement quoted in Jus 1307.02(a), shall be the following language, pursuant to RSA 356-A:6, I(f) and 356-A:4, II,

"IMPORTANT

NOTICE OF PURCHASER'S CANCELLATION RIGHTS

New Hampshire law provides that you have an express and unqualified right to cancel your Purchase and Sale Agreement within five (5) calendar days from the date the agreement was entered into or the delivery to you of the Public Offering Statement, whichever is later. If you elect to cancel, you may do so by written notice thereof hand-delivered or deposited in the United States mail, return receipt requested, within the five (5) day period, to the subdivider or to any agent of the subdivider, provided that, however, if you elect to mail the notice of cancellation, you must also provide the subdivider with telephonic notice of cancellation within the five-day period. Such cancellation shall be without penalty and any deposit made by you must be refunded in its entirety no later than ten (10) calendar days from the subdivider's receipt of your written notice of cancellation."

(c) The cover page or first inside page shall also include:

(1) The name of the subdivision;

(2) The effective date(s) of registration; and

(3) When applicable, the date of the most recent approval of the public offering statement by the bureau.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1307.03 Contents of Public Offering Statement.

(a) In addition to those matters required by RSA 356-A:6, every public offering statement shall also include:

(1) A description of any legal proceedings against the subdivider which may affect the financial status of the subdivision; and

(2) A statement of any legal proceedings brought in the last 5 years by a property owners' association or a purchaser of a lot, parcel, unit, or interest against the subdivider, against a principal of the subdivider or against another subdivider, officer, partner or trustee who is a principal of the subdivider.

(b) The description in (a), above, shall include:

(1) The identity of the court;

(2) The docket number;

(3) The names of the parties;

(4) A brief summary of the allegations; and

(5) A statement of the status or the outcome of the case.

(c) A subdivider may include a good faith statement of opinion as to the merits of such litigation.

(d) Notice that any deposit made in regard to any sale of a subdivided lot, parcel, unit or interest therein shall be held in escrow until settlement or closing and the name and address of the escrow agent.

(e) An acknowledgment page for the purchaser to sign acknowledging receipt of the notice required by Jus 1307.02.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1307.04 Additional Disclosure Requirements for Time Sharing and Conversion Subdivisions.

(a) When a subdivider is engaged in the offer and disposition of time sharing interests in a subdivision, the following information shall also be included in the public offering statement:

(1) A paragraph setting forth:

a. The name and address of any exchange program(s) with which the time sharing subdivision is affiliated;

b. The term of the present contract between the subdivider and the exchange program;

c. The annual fee for services; and

d. A statement that the exchange program is an independent entity which is not required to register with the department of justice or to remain affiliated with the subdivider beyond the contract term;

(2) A paragraph stating that the subdivider makes no representations as to the feasibility of future resale of time sharing interests purchased, and giving notice whether or not the subdivider will assist purchasers in the resale of time sharing interests;

(3) A projected budget including:

a. A statement describing any reserve fund established to maintain the real property and to replace, repair or refurbish the personal property in each lot, parcel, unit, or interest; or

b. If no such fund has been established, a statement to that effect; and

(4) If the time sharing interest offered is not a fee simple interest, a paragraph detailing:

a. The nature of the ownership structure of the subdivision;

b. The nature and extent of any blanket encumbrances on the property; and

c. The steps taken, such as execution of non-disturbance agreements, to protect purchasers in the event of any foreclosure on the property, receivership proceeding, or bankruptcy proceeding against the subdivider.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1307.05 Desk Copy of Public Offering Statement to be Made Available to Prospective Purchasers.

(a) At least one master copy of the current public offering statement approved by the bureau shall be maintained by the subdivider as a desk copy and made readily available for inspection by any person who may visit the subdivision, or any sales office or other location in which lots, parcels, units, or interests in the subdivision may be offered or sold.

(b) The desk copy shall be placed in a visible location where prospective purchasers are routinely invited to commence tours of the subdivision or receive sales presentations.

(c) No person shall be advised by a subdivider, or an agent of the subdivider, including sales personnel, that a copy of the public offering statement may be inspected only by purchasers.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

PART Jus 1308 MARKETING

Jus 1308.01 Gifts.

(a) The bureau shall permit promotional activity which includes the offering of prizes or gifts consisting of intangible property as an inducement to visit a subdivision, to attend a meeting at which a subdivision will be discussed, or to acquire a lot, parcel, unit, or interest only if the bureau finds that:

(1) The promotional activity does not constitute participation in a lottery, contest, or the like;

(2) The offer is not being made in a manner dependent on or connected with chance;

(3) The offeree will obtain the benefits of the gift on the day of his or her visit to the subdivision or attendance at the meeting at which the subdivision will be discussed; and

(4) Permitting the offering will not be inconsistent with the public interest.

(5) Enforcement of RSA 356-A:4, IV is not necessary in the public interest or for the protection of purchasers by reason of the small amount involved or the limited character of the offering.

(b) For the purposes of this subsection, "chance" means "a happenstance, a fortuity, or luck" and shall not necessarily have the meaning ascribed to it in any New Hampshire statute relating to gambling or games of chance.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1308.02 Review by the Bureau.

(a) At least 60 days prior to offering any gift of intangible property as contemplated in section Jus 1308.01, the person proposing to make the offer shall submit to the bureau by written letter captioned CPLS120/Exemption Request an application for exemption.

(1) The application shall be accompanied by a non-refundable fee in the amount of $200.

(2) The application shall include, at a minimum:

a. A request for exemption from the provisions of RSA 356-A:4, IV with respect to the offering;

b. A copy of the text of the proposed gift offer and all related promotional materials;

c. A statement as to the suggested retail value of the gift and the source of this claim;

d. The inclusive dates of intended use;

e. The estimated number and geographic distribution of offerees;

f. The name and address of the marketing company or distribution agent, if any, for the offer;

g. A statement of any terms and conditions not disclosed in the text of the offer to the offeree;

h. A statement of assurance as to the applicant's ability to carry out the terms of the offer;

i. Verification by the applicant that the offeree will obtain the benefit of the gift on the day of the visit to the subdivision or attendance at the meeting at which the subdivision will be discussed.

j. The name, address, and telephone number of the applicant; and

k. A statement as to why enforcement of RSA 356-A:4, IV is not necessary in the public interest or for the protection of purchasers by reason of the small amount involved or the limited character of the offering.

(b) Within 60 days of receipt of the application for exemption, the bureau shall grant or deny the application for exemption pursuant to Jus 1308.01.

(c) No offering of any gift of intangible property may be made prior to written or oral notice by the bureau that the exemption has been granted.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1308.03 Non-binding Reservation Agreements.

(a) "Non-binding reservation agreement" means an agreement between the subdivider and a prospective purchaser which is in no way binding on the prospective purchaser and which can be canceled without penalty at the sole discretion of the prospective purchaser by written notice, hand delivered or sent by United States mail, return receipt requested, to the subdivider or to any agent of the subdivider at any time prior to the execution by all parties of a contract for the sale or lease of any lot, parcel, unit, or interest in a subdivision.

(b) The bureau shall permit the use of non-binding reservation agreements under the following conditions:

(1) Such agreement shall not contain any provision for waiver or any other provision in derogation of the rights of the prospective purchaser as contemplated by this paragraph, nor shall any such provision be a part of any ancillary agreement;

(2) Offers made prior to registration or exemption from registration shall be permitted only to the extent that such offers are made by the subdivider solely in connection with efforts to obtain non-binding reservation agreements, provided however, that the subdivider shall first have notified the bureau in writing of its intention to conduct such offers;

(3) Written notice to the bureau of the subdivider's intention to obtain non-binding reservation agreements shall be accompanied by a copy of the proposed form of the non-binding reservation agreement; and

(4) Every non-binding reservation agreement shall:

a. Be labeled as such in capital letters at the top of the agreement; and

b. Include the following disclosures to the prospective purchaser:

1. That the agreement is in no way binding on the prospective purchaser and may be canceled without penalty at the sole discretion of the prospective purchaser by written notice, hand delivered or sent by United States mail, return receipt requested, to the subdivider or to any agent of the subdivider at any time prior to the formation of the contract for the sale or lease of any lot, parcel, unit, or interest;

2. That the subdivision is not yet registered by the New Hampshire attorney general's office, and until such registration is ordered, no binding contract for sale or lease of any lot, parcel, unit, or interest may be created;

3. Any deposit made under the agreement shall be held in escrow and shall be returned by the subdivider no later than 10 days following receipt of cancellation of the agreement; and

4. The name and address of the escrow agent.

(c) For the purposes of (b)(4)b.3., above, the escrow agent shall be a person or entity unrelated to the declarant or any principal thereof and shall hold all escrowed funds within the state of New Hampshire.

(d) The bureau shall not, as a matter of course, approve or disapprove the use or form of a non-binding reservation agreement. However, in addition to the exercise of any other statutory or common law authority, the

bureau upon determination that any statutory requirement or rule has not been satisfied with respect to a non-binding reservation agreement, shall require the subdivider to amend the agreement to conform with the statutory requirement or rule.

(e) Upon cancellation of a non-binding reservation agreement, any deposit made in connection with the agreement shall be returned with interest, unless the written agreement provides that the interest shall not be returned.

(f) Unless the subdivider's right to cancel the agreement or to increase the price is expressly retained in the written reservation agreement, no subdivider shall cancel a non-binding reservation agreement , nor shall the purchase price be increased.

(g) No subdivider shall state a price in a non-binding reservation agreement with intent to sell the lot, parcel, unit, or interest at a price other than the stated price.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1308.04 Advertising.

(a) No subdivision may be advertised, regardless of the medium, prior to submission to the bureau of the notice required by Jus 1308.03 unless:

(1) The subdivision is exempt under RSA 356-A:3, I; or

(2) The subdivision has been registered or exempted from registration by the bureau.

(b) Unless exempt under RSA 356-A:3, I no subdivision may be advertised, regardless of the medium, prior to registration or exemption from registration unless each such advertisement bears in a conspicuous manner substantially the following statement:

"This subdivision has not yet been registered by the New Hampshire Attorney General's Office. Until such time as registration has been issued, only non-binding reservation agreements may be accepted."

(c) No advertisement, regardless of the medium, shall refer to any improvements or amenities that have not been completed, unless the advertisement discloses, in a conspicuous manner, the fact that the improvements or amenities are, as appropriate:

(1) Under construction;

(2) Planned; or

(3) Proposed.

(d) If the subdivider has not promised in an application for exemption or registration, and included good faith estimates and financial assurance with regard to completion, that the improvement or amenity shall be completed, then the advertisement shall state that the improvements or amenity are proposed.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Just 1308.05 Interstate Advertising.

A subdivision which is not located in this state and is not registered in this state and which may be advertised in out-of-state publications disseminated in this state or through an out-of-state medium received in this state must comply with Jus 1308.04 if the offer originates within this state or is directed by the offeror to a person or place in this state.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

PART Jus 1309 CONTESTED CASES AND PETITIONS FOR ADMINISTRATIVE ACTION

Jus 1309.01 Administrative Procedures Act.

(a) In responding to any petition for rule-making or declaratory ruling, and when proceeding in any contested case under RSA 356-A, the bureau shall comply with and be guided by the provisions of RSA 541-A.

(b) To the extent that RSA 356-A is not inconsistent with RSA 541-A, the bureau shall comply with and be guided by the appropriate provisions of RSA 356-A.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1309.02 Notice. Written notice of an adjudicative proceeding, received by prepaid certified mail by a party at least 30 days prior to the date of the hearing, shall be deemed reasonable.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

Jus 1309.03 Presiding Officer. The presiding officer at an adjudicatory hearing conducted under RSA 356-A shall be the assistant attorney general in charge of the bureau or any person designated by him.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10

PART Jus 1310 AFFIRMATION OF COMPLETE APPLICATION

Jus 1310.01 Cover Sheet Required For All Applications

(a) All applications for exemption or registration submitted to the bureau pursuant to these rules shall be accompanied by a cover sheet affirming that the application submitted is complete.

(b) The cover sheet shall consist of an "Affirmation of Complete Application," form CPLS001 (July, 2010), which shall be signed by the applicant if a natural person, or, if the applicant is a legally organized entity, by an officer or principal of the applicant authorized to sign such affirmation.

(c) If an applicant fails to submit form CPLS001 (July, 2010) with an application, or fails to respond affirmatively to all certifications requested in a submitted form CPLS001 (July, 2010), the bureau shall immediately return the application to the applicant as incomplete, together with all fees submitted therewith.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10, para (c); *#9782-B, eff 9-11-10, paras (a) and (b)*

PART Jus 1311 FORMS

Jus 1311.01 Availability of Forms.

(a) The bureau shall have available upon request, the following forms at the bureau's office located at 33 Capitol Street, Concord, New Hampshire 03301 (Telephone number 603-271-3641):

(1) CPLS100 Comprehensive application for registration;

(2) CPLS110 Abbreviated application for registration;

(3) CPLS121 Application for urban single family residence exemption;

(4) CPLS122 Application for 50 lot exemption;

(5) CPLS170 Principal's background statement;

(6) CPLS200 Annual report; and

(7) CPLS001 Affirmation of complete application.

(b) The above forms are available online at http://www.doj.nh.gov/consumer/land_condo.html.

(c) The use of exact copies or exact facsimiles prepared by the subdivider of the forms described in paragraph Jus 1311.01(a) shall be permitted.

(d) All documents submitted to the bureau in connection with any application for exemption or registration, including all forms, or copies or facsimiles thereof, and all exhibits and appendices to such forms, shall be on 8 ½" x 11" paper except that subdivision site plans and any floor plans or other construction plans may be submitted in larger format, provided such plans are folded as nearly as practicable to those dimensions.

Source. (See Revision Note at chapter heading for Jus 1300) #9782-A, eff 9-11-10, paras (a), (b), and (c); *#9782-B, eff 9-11-10, para (d)*

APPENDIX

Rule Number	State Statute Implemented
Jus 1301.01 - 1301.05	RSA 356-A:1
Jus 1302.01 - 1302.03	RSA 356-A:5, VII
Jus 1302.04	RSA 356-A:3, II
Jus 1303.01 - 1303.05	RSA 356-A:3; 356-A:5, III
Jus 1304.01 - 1304.06	RSA 356-A:3
Jus 1304.07-08	RSA 356-A:3, II
Jus 1304.09	RSA 356-A:3; RSA 356-A:8
Jus 1304.10-13	RSA 346-A:3
Jus 1304.14	RSA 356-A:6, I(o)
Jus 1304.15	RSA 356-A:8, III
Jus 1305.01	RSA 356-A:3
Jus 1305.02	RSA 356-A:4
Jus 1305.03	RSA 356-A:13
Jus 1306.01	RSA 356-A:3
Jus 1306.02	RSA 356-A:2
Jus 1306.03 - 1306.11	RSA 356-A:5
Jus 1306.12 - 1306.13	RSA 356-A:5, II
Jus 1306.13	RSA 356-A:8, III
Jus 1306.14 - 1306.15	RSA 356-A:5, V, VII
Jus 1306.16	RSA 356-A:8, I
Jus 1306.17	RSA 356-A:9
Jus 1306.18	RSA 356-A:1, V; RSA 356-A:8, V
Jus 1306.19	RSA 356-A:5
Jus 1306.20	RSA 356-A:4, I; 356-A:10, V
Jus 1307.01 - 1307.05	RSA 356-A:6
Jus 1308.01 - 1308.02	RSA 356-A:4, IV
Jus 1308.03	RSA-356-A:6, II
Jus 1308.04, 1308.05	RSA 356-A:4; 356-A:17
Jus 1309.01 - 1309.03	RSA 356-A:11; 541-A
Jus 1310.01 - 1310.1	RSA 356-A:5, I
Jus 1311.01	RSA 356-A:2; 356-A:5, I

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

NOV 30 2015

Hillsborough Superior Court Southern District
30 Spring Street
Nashua NH 03060

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

Michael A. Klass, ESQ
Bernstein Shur Sawyer & Nelson PA
670 North Commercial Street Suite 108
PO Box 1120
Manchester NH 03105-1120

Case Name: **San-Ken Homes Inc. v. New Hampshire Attorney General, Consumer Protection and Antitrust Bureau**
Case Number: **226-2015-CV-00281**

Enclosed please find a copy of the court's order of November 25, 2015 relative to:

ORDER ON MOTION TO INTERVENE

November 25, 2015

Marshall A. Buttrick
Clerk of Court

(564)

C: John W. Garrigan, ESQ; Andrew J. Piela, ESQ

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT

San-Ken Homes Inc.

v.

New Hampshire Attorney General,
Consumer Protection and Antitrust Bureau

No. 226-2015-CV-00281

ORDER ON MOTION TO INTERVENE

Pursuant to RSA 356-A:14, the petitioner, San-Ken Homes ("San-Ken"), appeals the decision of the respondent, the New Hampshire Attorney General, Consumer Protection and Antitrust Bureau (the "Bureau"), in which the Bureau determined San-Ken was a "successor subdivider" that was required to apply for registration or exemption under the Land Sales Full Disclosure Act (the "Act"), RSA Chapter 356-A. Currently pending before the court is Bernard Satterfield's and Deidre Daley's motion to intervene. The Bureau assents to the motion while San-Ken objects. The court held a hearing on September 30, 2015. For the reasons stated herein, the motion to intervene is DENIED.

Background

For the purposes of this order, the court finds the following relevant facts. In December, 2005, 112 Chestnut Street, LLC ("112 Chestnut") took title to property located in New Ipswich, New Hampshire (the "Property"). 112 Chestnut granted a mortgage on the Property that same day.

In 2006, 112 Chestnut submitted to the New Ipswich Planning Board a subdivision plan that would allow it to develop the Property into sixteen lots, collectively known as Oakwood Common. The plan called for a single private road, Old Beaver Road, which would connect Oakwood Common to an adjacent public way. On June 7, 2006, the planning board approved the subdivision plan. As part of the planning board's approval, it required 112 Chestnut to post security and construct Old Beaver Road according to certain specifications.

On August 11, 2006, 112 Chestnut applied for an exemption from registration under the Act pursuant to RSA 356-A:3, II, the Bureau granted. At some unknown times after receiving the exemption, 112 Chestnut conveyed seven lots of the subdivision to third parties. One of the seven lots was purchased by the proposed interveners.

112 Chestnut eventually defaulted on its mortgage obligations. Thereafter, on May 13, 2014, the mortgagee held a foreclosure sale for the remaining nine lots. San-Ken purchased the nine lots at the sale and recorded a foreclosure deed.

In September, 2014, San-Ken sought to amend the approved subdivision plan. The New Ipswich Planning Board held a public hearing on the amendment on September 17, 2014. The proposed interveners attended the hearing and objected to the amendment. The amendment was nonetheless approved. As part of the planning board's approval, it, among other things, waived the security that was originally posted and lowered Old Beaver Road's construction specifications, as it found the road would be satisfactory if certain repairs were made. The proposed interveners did not appeal the planning board's decision.

At some point after the subdivision amendment was approved, the Bureau determined that San-Ken was required to register under the Act or seek an exemption, concluding it is a "successor subdivider." See RSA 356-A:2, 12 (granting the Bureau the authority to administer and enforce Act's provisions); N.H. Admin. Rules, Jus 1306.19 ("Any person who comes to stand in the same relation to the subdivision as the original subdivider shall be required to make separate application to the bureau for registration as a successor subdivider."). San-Ken disputed the Bureau's determination that it is a "successor subdivider" and contends it is not required to register or apply for an exemption under the Act.

Under protest, San-Ken filed for a registration exemption on November 20, 2014. During the exemption process, San-Ken and the Bureau reached an agreemant in which San-Ken agreed to post a bond related to improvements on Old Beaver Road in exchange for the Bureau issuing a certificate of exemption, despite the fact that the New Ipswich Planning Board approved the subdivision amendment. San-Ken filed its appeal with this court on May 29, 2015, arguing the Bureau acted unlawfully in determining it was required to register or seek an exemption.

In August, 2015, the proposed interveners filed their motion to intervene. They argue that they have a direct interest in the appeal as they purchased their lot with the expectation that Old Beaver Road would be built according to the original subdivision specifications. In response, San-Ken argues, among other things, that the proposed interveners' interests are not direct and apparent, as its appeal concerns whether the Bureau acted unlawfully.

Analysis

"Any person shown to be interested may become a party to any civil action upon filing and service of an Appearance and pleading briefly setting forth his or her relation to the cause . . . ." Super. Ct. Civ. R. 15. "The right of a party to intervene in pending litigation in this state has been rather freely allowed as a matter of practice." Brzica v. Trs. of Dartmouth College, 147 N.H. 443, 446 (2002). "A trial court should grant a motion to intervene if the party seeking to intervene has a right involved in the trial and a direct and apparent interest therein." Id. However, "[w]hen public officers are engaged in litigation to protect public rights, and their pleadings and procedure maintain the public interest, no private person is entitled to intervene." 59 Am. Jur. 2d Parties § 187. Similarly, "when the government exercises its sovereign power to enforce and defend duly enacted laws, no other entity can have an interest sufficient to justify intervention as a matter of right . . . ." Id.

Here, this matter began when the Bureau exercised its power to enforce the Act's registration requirements. Not only was the Bureau exercising its powers to enforce the laws of the state, its actions were taken to maintain a public interest—controlling alleged unlawful actions taken by a subdivider. As such, the proposed interveners lack a direct and apparent interest. Moreover, the dispute at the core of this matter is whether the Bureau acted unlawfully under the Act by requiring San-Ken to register or seek an exemption or issuing a conditioned exemption. Issues concerning whether Old Beaver Road must be improved are indirect matters.

While exceptions to the rule against intervening in government matters have been made when the representation of the government is inadequate, such an argument has not been made in this case. See Buckler v. DeKalb Cty., 659 S.E.2d 398, 402 (Ga. Ct. App. 2008) ("For members of the public to intervene in an action where a governmental entity represents the public interest, there must be 'a very strong showing of inadequate representation.'"). In fact, it appears the proposed interveners' position is identical to the Bureau's. Accordingly, the proposed interveners' motion is DENIED.

SO ORDERED.

November 25, 2015

David A. Garfunkel
Presiding Justice

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, ss
SOUTHERN DISTRICT

SUPERIOR COURT

Docket No. 226-2015-CV-00281

SAN-KEN HOMES, INC.,

v.

NEW HAMPSHIRE ATTORNEY GENERAL,
CONSUMER PROTECTION AND ANTITRUST BUREAU.

PETITIONER'S TRIAL MEMORANDUM

NOW COMES the above-captioned Petitioner, San-Ken Homes, Inc. ("San-Ken" or "Petitioner"), by and through counsel Bernstein, Shur, Sawyer & Nelson, P.A., and hereby submits this trial memorandum setting forth San-Ken's legal arguments in advance of the Hearing on the Merits currently scheduled to take place on March 3, 2016.

I. INTRODUCTION

This matter concerns Petitioner's appeal of a conditional Certificate of Exemption issued by the Defendant New Hampshire Office of the Attorney General, Consumer Protection and Antitrust Bureau ("Bureau"), pursuant to RSA 356-A (the "Act"), and concerning nine lots within a sixteen-lot subdivision ("Subdivision") located in New Ipswich ("Town"). San-Ken first contends that the simple act of purchasing nine lots within an existing subdivision at foreclosure sale does not trigger the Act or result in San-Ken being a successor subdivider. As such, San-Ken should not have been required to register its land with the Bureau at the onset. Regardless of the outcome of that initial inquiry, San-Ken contends that the Bureau lacks the statutory authority to require San-Ken to make infrastructure improvements that are not required

by the Town. In requiring San-Ken to improve the Subdivision's private road beyond what is required by the Town's Planning Board, the Bureau unlawfully acted outside of the scope of its jurisdiction and into matters that are exclusively reserved for the Planning Board. Because the Bureau acted outside of its jurisdiction, its requirement that San-Ken further improve the Subdivision's road is unreasonable, unlawful, and should be removed as a condition of exemption under the Act.

II. BACKGROUND

By deed recorded with the Hillsborough County Registry of Deeds ("Registry") on December 5, 2005, the Subdivision's developer—112 Chestnut Street, LLC ("112 Chestnut")—took title to certain property located in New Ipswich. Certified Record ("CR") at 69. At the same time, 112 Chestnut granted a mortgage to TD Banknorth, N.A. encumbering title to such property. CR at 469, 488. Thereafter, 112 Chestnut obtained various state and local land use permits, including from the Town's Planning Board, allowing for the development of the property into the Subdivision, which consisted of a total of 16 lots. CR at 588-589, 634-647.

The Subdivision was accepted and originally approved by the Town's Planning Board on June 7, 2006.[1] CR at 474. The Subdivision contains a single private roadway known as Old Beaver Road ("Road"), which provides access from the Subdivision's lots to the adjacent public way. CR at 111. Under cover letter dated August 11, 2006, 112 Chestnut applied with the Bureau for Exemption from Registration pursuant to RSA 356-A:3, II. CR at 463. The Bureau issued a Certificate of Exemption concerning the Subdivision dated October 27, 2006, and such

[1] While they are not directly relevant in this case, and are not part of the Certified Record, the Bureau has acknowledged the existence of the Town's subdivision regulations. See CR at 427 n. 2.

certificate was recorded with the Registry on November 1, 2006 at Book 7762, Page 2345. CR at 674-675.

Thereafter, 112 Chestnut constructed the Road but did not install a second topcourse of asphalt on the Road. CR at 5. That said, in its current form, the Road exceeds DOT minimum standards in width and paving and provides safe access to the Subdivision's lot owners. CR at 5. During its ownership of the Subdivision, 112 Chestnut conveyed seven of the lots within the Subdivision to third parties. CR at 4. Prior to 112 Chestnut's conveyance of such property, it did not establish homeowner's association for maintenance purposes. CR at 4. Moreover, the Town previously discharged a portion of the bond that 112 Chestnut posted to secure the performance of the Road and then allowed the remaining security to expire. CR at 2, 5.

Upon default of the conditions set forth in 112 Chestnut's mortgage, its mortgagee foreclosed on the remaining portion of the Subdivision by foreclosure sale held on May 13, 2014. CR at 65, 67. By Foreclosure Deed recorded with the Registry on June 19, 2014 at Book 8668, Page 996, San-Ken purchased its nine lots within the Subdivision. CR at 61. After San-Ken's application for a building permit was denied by the Town, CR at 42, San-Ken sought to amend the Subdivision conditions to reflect the Road as it existed. CR at 186-189. The amendment included certain repairs and maintenance required by the Planning Board. Id. On September 17, 2014, at a duly noticed public hearing, the Planning Board agreed with San-Ken and amended the Subdivision by modifying its prior conditions of approval. CR at 186-189. In part, the September 17, 2014 amendment of the Subdivision stated that:

2. *The existing road constructed within the subdivision (with one course of asphalt), is satisfactory as a private road, with no second asphalt course required*, subject to the following improvements to be performed within 90 days from the date of this approval by and at the expense of the owner of the 9 remaining unimproved lots in the subdivision (presently San-Ken Homes, Inc.):

-fix cracks by cleaning and filling
- seal coat the entire road
- repair all potholes

* * * *

4. *No further security will be required by the Planning Board for any future road or infrastructure improvements.*

CR at 189 (emphasis added). No appeal was taken of the Planning Board's modification of the Subdivision, and all conditions of the September 17, 2014 amendment to the Subdivision were timely satisfied by San-Ken. As such, prior to San-Ken's application for exemption of its nine lots, pursuant to the Act's 50-lot exemption, the was Road was complete and fully compliant with the Planning Board's rules and regulations. Moreover, the Town requires no further bonding related to the Road. CR at 189.

Notwithstanding the above, the Bureau takes the position that San-Ken is a "successor subdivider" of the Subdivision in context of RSA 356-A, and that San-Ken must apply for registration or exemption by the Bureau, as to its nine lots. CR at 426-428. San-Ken has consistently disputed this and objects that it is a successor subdivider and contends that RSA 356-A's registration requirements do not apply to San-Ken's nine lots of the Subdivision. CR at 812. The Bureau also takes the position that San-Ken is obligated to further improve the Road by paying for a topcoat to be installed on the existing base coat. CR at 426-428. San-Ken

disputes that it is obligated to further improve the Road or post a bond or other surety guaranteeing performance of such improvements. CR at 812.

Under protest and while reserving all rights and defenses, but in an attempt to free its lots from the conveyancing restrictions of the Act, on November 20, 2014 San-Ken filed its application for exemption from registration with the Bureau, pursuant to RSA 356-A:3, I-a(a). CR at 217, 217, 254-263, 386. As the exemption application process unfolded, as a condition of approval the Bureau required San-Ken to modify the Subdivision by installing a topcoat on the Road. CR at 812. Notably, San-Ken was ***willing to pay for its proportional share of a topcoat upgrade***, but objected to being forced to pay for the upgrades that should be borne by the other lot owners in proportion to each owner's interest in the Subdivision. See, e.g., CR at 11. The Bureau's position mandates that San-Ken bear all of the upgrade costs, notwithstanding that it does not own all of the Subdivision's lots.

In order to allow San-Ken to move forward with the development and sale of its lots despite the Bureau's condition requiring San-Ken to further improve the Road, the parties entered into a Road Escrow Agreement whereby San-Ken agreed to provide the Bureau with a performance bond in the amount of $50,106.00, to secure the Road improvement demanded by the Bureau. CR at 73-74, 812-820. This compromise was always intended to allow San-Ken to seek judicial relief on the disputed issues, while providing reasonable assurances to the Bureau that the Road upgrades would take place if the Bureau's legal position was ultimately upheld. CR at 691, 812-814.

By Certificate of Exemption dated May 1, 2015 and recorded with the Registry that same day, the Bureau exempted San-Ken's nine lots under RSA 356-A. CR at 77. This appeal by San-Ken followed. After the instant matter was commenced, certain neighbors who failed to

appeal the Planning Board's 2014 modification sought to intervene in this case. Their Motion to Intervene was denied by this Court (Garfunkel, J.) under Notice dated November 25, 2015. At a Trial Management Conference held on February 18, 2016, a hearing on the merits was scheduled for March 3, 2016, with supporting legal memoranda due on March 1st.

II. STANDARD OF REVIEW

This is an administrative appeal for judicial review filed pursuant to RSA 356-A:14, I, which states:

> Any person aggrieved by a decision or action of the attorney general may, by petition, appeal from said decision or action to the superior court for review. The superior court may affirm, reverse, or modify the decision or action of the attorney general ***as justice may require.***

(Emphasis added.) New Hampshire case law does not expound upon the scope of this standard in context of the Act. That said, in context of RSA 76:17 (regarding tax abatements), the phrase "as justice requires" "has been held to confer jurisdiction upon the superior court to issue equitable orders . . ." Tau Chapter of Alpha XI Delta Fraternity v. Town of Durham, 112 N.H. 233, 236 (1972). See also LSP Ass'n v. Town of Gilford, 142 N.H. 369, 373 (1997) (referring to the phrase as conferring "broad discretion and equitable powers upon the superior court to abate taxes."). The phrase has also been touched upon in context of RSA 281:14, regarding the allocation of costs incurred by workman's compensation employee action against a third party. See Del Rio v. N. Blower Co., 574 F.2d 23, 28 (1st Cir. 1978). There, the First Circuit looked to the words "as justice may require" to confirm that the court's duty was to simply act fairly in its duty to apportion costs. Id. (emphasis added). Even so, New Hampshire case law is not particularly helpful in articulating the Act's standard of judicial review.

New York state courts, however, have interpreted the phrase more directly, which is instructive in this case.

> The phrase "as justice requires" means "that there are no 'as matter of law' requirements one way or the other as to those matters which are to be dealt with in the discretion of the courts, on all the facts" . . . . It grants the court a broad discretion, but not one unrelated to the facts . . . . What it grants is a judicial discretion, which though it "is a phrase of great latitude * * * never means the arbitrary will of the judge" . . . . Rather, it vests in the court "a discretion which is not to be exercised arbitrarily, and which is subject to review in the Court of Appeals, but only as to whether or not it has been abused and not on its merits" . . . .

Matter of Estate of Greatsinger, 67 N.Y.2d 177, 181 (1986) (internal citations omitted) (analyzing the phrase in context of an award of attorneys' fees resulting from a New York will contest).[2]

In this context, it is important to note that the Bureau exists within a division of the New Hampshire Attorney General's Office, see RSA 21-M:2; RSA 21-M:9, and the Bureau is charged with enforcing and administering the provisions of the Act. RSA 356-A:2. As the Bureau is an administrative body, its power and jurisdiction are limited and special to its enabling statute. See In re Campaign for Ratepayers' Rights, 162 N.H. 245, 250 (2011). Notably, the Bureau cannot confer jurisdiction upon itself. Id. Furthermore, a tribunal that "exercises a limited and statutory jurisdiction *is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation.*" In re Campaign for Ratepayers' Rights, 162 N.H. 245, 250, 27 A.3d 726, 731 (2011) (quoting Figueroa v. C and S Ball Bearing, 237 Conn. 1, 675 A.2d 845, 847 (1996)) (emphasis added). In other words, the Bureau cannot lawfully step outside of the specific authority delegated to it under RSA 356-A.

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[2] In context of the Restatements of Contracts, the legal scholar E. Allan Farnsworth once explained that the phrase "as justice requires," was "restatementese" for judicial discretion. Jean Braucher, E. Allan Farnsworth and the Restatement (Second) of Contracts, 105 Colum. L. Rev. 1420, 1424 (2005).

Finally, as this case involves issues of statutory construction, this court is tasked with determining the "legislature's intent as expressed in the words of the statute considered as a whole." Zorn v. Demetri, 158 N.H. 437, 438-39 (2009). Courts

> first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning. 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. . . . We construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result. Moreover, we do not consider words and phrases in isolation, but rather within the context of the statute as a whole. 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. (internal citations omitted). Courts "will not add words that the legislature did not see fit to include, nor delete those that it did." State v. Duran, 158 N.H. 146, 155 (2008).

In light of the above, the Act's standard of review confers this Court with broad discretion over the instant appeal, to interpret the Act and to rule upon the pending matter in a fair and equitable manner. As applied to the facts of this case, which San-Ken believes are undisputed, justice requires a finding that the Bureau over-stepped its statutory jurisdiction when it required San-Ken to register under the Act and when it unilaterally mandated a modification of the Subdivision.

III. ARGUMENT

A. San-Ken is an Aggrieved Party and has Standing to Appeal the Bureau's Decision Pursuant to RSA 356-A:14.

In first requiring San-Ken's compliance with the Act, and in further imposing the condition that San-Ken improve the Road beyond what is required by the Planning Board, the Bureau's decision that is the subject of this appeal plainly impairs San-Ken's direct and definite property interest in the Subdivision. But for the Bureau's action, San-Ken would not have had to undertake the time-consuming and expensive exemption process, which spanned more than five

months (from November 2014 to May 2015), and which prevented San-Ken from freely conveying its land during that time. Moreover, San-Ken only posted a bond with the Bureau (in the amount of approximately $50,000.00) because the Bureau required it as a condition of exemption. Thus, San-Ken is a "person aggrieved" under the Act and has standing to appeal the Bureau's lawfulness of the Bureau's decision.

Case law on aggrievement and standing is consistent and well-defined. See, e.g., In re Guardianship of Williams, 159 N.H. 318, 331-32 (2009) (Dalianis, J., concurring).

> ***Our construction of the phrase "person ... aggrieved" is well-settled and long-standing.*** See, e.g., Johnson v. Town of Wolfeboro Planning Bd., 157 N.H. 94, 99, 945 A.2d 13 (2008) (to be a "person [ ] aggrieved" under RSA 677:15 (2008), "a litigant must have a ***direct definite interest in the outcome of the proceedings***"); In re Estate of Kelly, 130 N.H. 773, 777, 547 A.2d 284 (1988) (to be a "person ... aggrieved" under RSA 567–A:1, in the context of a will contest, a person must have a "***direct pecuniary interest***" in the testator's estate (quotation omitted)); Hutchins v. Brown, 77 N.H. 105, 106, 88 A. 706 (1913) (to be a "person ... aggrieved" under predecessor to RSA 567–A:1, in the context of proceeding to appoint guardian for minor child, person must have "***some private right which is affected thereby***" (quotation and brackets omitted)); cf. Appeal of Richards, 134 N.H. 148, 154, 590 A.2d 586 (to be a person "directly affected" by an administrative agency decision and, thus, to have standing under RSA 541:3 (2007) to appeal that decision, person must show that "***he has suffered or will suffer an injury in fact***" (quotation omitted)), cert. denied, 502 U.S. 899, 112 S.Ct. 275, 116 L.Ed.2d 227 (1991); Weeks Restaurant Corp. v. City of Dover, 119 N.H. 541, 543, 404 A.2d 294 (1979) ("There is no significant distinction between 'persons directly affected,' and 'persons aggrieved.' " (citations omitted)). "[T]he legislature is presumed to know the meaning of the words it chooses and to use those words advisedly." State v. Njogu, 156 N.H. 551, 554, 937 A.2d 887 (2007).

Id. (emphasis added).

Here, San-Ken's financial and property rights in the Subdivision have been directly affected by the Bureau. In order to advertise or convey their lots, San-Ken was required to subject their property to the provisions of the Act; San-Ken must use certain forms mandated by the Bureau; and, finally, San-Ken was forced to either perform the road improvements or provide the Bureau with a bond in the amount of approximately $50,000.00, which is currently held by

the Bureau. In light of the above, San-Ken clearly suffers a legal injury to its definite interest in the Subdivision as a direct result of the Bureau's determinations under the Act.

Moreover, as a matter of equity, in attacking San-Ken's standing, the Bureau ignores the Escrow Agreement, the specific purpose for which was to allow San-Ken's lots to be released during an appeal of the Bureau's determinations, while providing the Bureau with security in case such appeal failed. To now allege that San-Ken lacks standing to take this appeal flies in the face of the parties' agreement and the Bureau's prior conduct. In light of the above, the Bureau should be estopped from arguing that San-Ken lacks standing to appeal.

B. San-Ken is Not a "Subdivider" and its Nine Lots Are Exempted Under the Plain Language of RSA 356-A:3, I(a).

The Bureau claims that San-Ken is the Subdivision's successor subdivider, and must register its lots under the Act accordingly. In this regard, the Bureau has erred because San-Ken is not a "subdivider" in context of the Act. RSA 356-A:1, V defines a "subdivider" as

> a person who is an owner of subdivided land or one who offers it for disposition. Any successor of the person referred to in this paragraph who comes to stand in the same relation to the subdivided lands as his predecessor did shall also come within this definition; . . .

Here, the record is clear that (1) San-Ken purchased nine of the Subdivision's lots; (2) the other seven lots were sold to bona fide third parties before San-Ken's purchase; and (3) the Subdivision's Road was already constructed prior to San-Ken's purchase without the creation of a Homeowner's Association. As such, there is no doubt that San-Ken does not "stand in the same relation" to the Subdivision, as compared to how 112 Chestnut did. Whereas 112 Chestnut owned the fee interest in the property that is now the Subdivision, and all of the related ownership rights, San-Ken simply purchased a portion of those rights at a foreclosure sale. For the purposes of the Act, San-Ken stands in the shoes of 112 Chestnut no more or less than each

of the owners of the other seven lots, and should be treated no differently. As such, San-Ken is not a subdivider subject to the Act.

Moreover, it is important to recall that San-Ken's interest in the Subdivision is limited to nine lots. As such, the plain language of RSA 356-A:3, I(a) exempts such lots from registration under the Act. RSA 356-A:3, I(a) states, in relevant part, that the Act "***shall not apply to any offer or disposition of***: (a) ***Subdivided lands if not more than 15 lots***, parcels, units or interests ***are included in such subdivided lands***; . . ." (Emphasis added.)[3] In this case, because seven lots within the Subdivision were conveyed to third parties prior to 2014, San-Ken is only able to offer or dispose their nine lots. As the fifteen-lot threshold is not triggered, the plain language of the Act does not require registration of San-Ken's lots.

The Bureau argues that because the Subdivision was originally sixteen lots, San-Ken must register under the Act, regardless of how many lots they purchased. This position relies upon the Act's expansive definition of the term "subdivided lands." See RSA 356-A:1, VI (defining the terms "subdivision" and "subdivided lands" to mean "any land . . . which is, or has been, or is proposed to be, divided for the purpose of disposition into lots . . . and also include any land whether contiguous or not if said lots . . . are offered as a part of a common promotional plan of advertising and sale; . . ."). However, the Bureau's interpretation does not account for the fact that San-Ken does not own seven of the lots within the Subdivision. Moreover, and more importantly, the Bureau fails to accept that the Act's definition of "subdivided lands" is modified and tempered by the introductory clause ("shall not apply to any offer or disposition")

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[3] The Act defines "dispose" or "disposition" as "any sale, contract, assignment, or any other voluntary transfer of a legal or equitable interest in a lot, parcel, unit or interest in subdivided lands, except as security for a debt[.]" RSA 356-A:1, I. "Offer" means any "inducement, solicitation, or attempt to encourage any person or persons to acquire any legal or equitable interest in a lot, parcel, unit or interest in subdivided lands, except as security for a debt[.]" RSA 356-A:1, II.

that limits the reach of the statute to lots that are to be offered or disposed. Because San-Ken can only offer or dispose its nine lots, and has no interest in the previously owned lots, the Act's plain language exempts registration here.

Had the legislature wished for the Act to apply in instances such as this, where a buyer purchases fifteen or fewer lots of a larger subdivision, the legislature could have simply removed the phrase "any offer or disposition of[.]" But such language was included in the Act and must not be ignored. To interpret the Act as the Bureau suggests requires the phrase "any offer or disposition of" to be rendered superfluous, which is contrary to accepted canons of statutory interpretation. See Petition of State, 159 N.H. 456, 457 (2009) ("We must give effect to all words in a statute, and presume that the legislature did not enact superfluous or redundant words."). Moreover, San-Ken's interpretation is consistent with the purpose of the Act, as evident through its plain language, which is to investigate the sellers of subdivided lots of a certain number, in the name of consumer protection. Notably, the legislature has determined that 15-lot subdivisions and smaller do not trigger the Act's jurisdiction. See RSA 356-A:3, I(a). In the same way that a nine-lot subdivision does not require registration under the Act, San-Ken's nine-lot purchase should not either.

Furthermore, the Bureau's interpretation offers no guidance or explanation of how San-Ken's purchase of nine lots is any different that the sale of a single lot. In other words, the logical conclusion of the Bureau's argument requires the purchaser of a single lot to register under the Act, which is an absurd result which should be avoided. See Cayten v. New Hampshire Dept. of Environmental Services, 155 N.H. 647, 653 (2007). Assuming the Bureau's interpretation, neither the Act nor the Bureau's regulations provide any guidance on when registration of fifteen or fewer lots is required, and when it is not. This unreasonable position is

the epitome of arbitrary and capricious action given the absence of an underlying or determining principle. "The common meaning of 'arbitrary' is a decision 'based on random or convenient selection or choice rather than on reason,' WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 110 (Unabridged 1961), or one made '[w]ithout adequate determining principle ... nonrational ... capriciously.' BLACK'S LAW DICTIONARY 96 (5th ed. 1979)." Appeal of Bd. of Trustees of Univ. Sys. of New Hampshire for Keene State Coll., 129 N.H. 632, 636 (1987). Likewise, "capricious" is "characterized by or guided by unpredictable or impulsive behavior; likely to change one's mind suddenly or to behave in unexpected ways[,]" or "contrary to the evidence or established rules of law." BLACK'S LAW DICTIONARY (10th ed. 2014). Put another way, the Bureau's interpretation puts the Attorney General's Office (and not the legislature) in the powerful position of determining whether or not an owner of lots must register their land under the Act, at the Bureau's whimsy and convenience, and without providing owners with reasonable notice of the applicable legal framework. Such conduct by the Bureau is also unreasonable as it unlawfully pushes the agency outside of the limits of its enabling legislation. Cf. In re Campaign for Ratepayers' Rights, 162 N.H. 245, 250 (2011). In short, the Bureau's interpretation of the Act is unreasonable and unjust and should be rejected.

C. The Bureau Has No Authority to Require Further Improvement of the Road.

Even if San-Ken is deemed to be a "subdivider" under the Act, and even if its nine lots trigger the Act's jurisdiction, the Bureau has absolutely no authority to modify the Subdivision by requiring San-Ken to further improve the Road as a condition of exemption from the Act. In demanding that San-Ken improve the Road (and post a related bond), the Bureau has impermissibly veered outside of its jurisdiction and into matters that are expressly delegated to the Town's Planning Board. Nothing in the Act or the Bureau's promulgated regulations allows

for the Bureau to exact infrastructure improvements beyond what is approved by the Town. As such, the Bureau's condition requiring San-Ken to improve the Road should be stricken and San-Ken's bond should be immediately released.

The Act and the Bureau's regulations contain no provisions that allow the Bureau to exact infrastructure improvements as a condition of exemption. That said, to justify its actions the Bureau cites to Jus 1304.07, CR at 427, which states:

> (3) If the streets or roads providing access to the subdivision and to the lots, parcels, units, or interests for which exemption is applied ***are not complete at the time the application is filed,*** the subdivider shall post surety ***acceptable to the town or city*** as follows:
>
> a. The surety shall be in the full amount of the cost of completing the streets or roads to assure completion to local standards and;
>
> b. The surety shall be in the form prescribed by Jus 1304.14;

Jus 1304.07(a)(3) (emphasis added). In other words, if a subdivider seeks registration under the Act before the completion of the roads, the Bureau is then authorized to require surety in an amount set by the local municipality. That, however, is a far cry from the facts of this case. Here, it is undisputed that the Road was complete before San-Ken filed its application for exemption, and that the Town (by and through its Planning Board) specifically determined that no further bond is required. Neither Jus 1304.07, nor any other regulation promulgated under the Act, confer the Bureau with the authority to overrule the Planning Board and require infrastructure improvements or related surety on its own terms. As the Bureau is a creature of statute whose jurisdiction is limited to its enabling authority, the Bureau has acted unreasonably and unlawfully in demanding a condition that it does not have the specific authority to do.

Moreover, the Bureau's attempt to unilaterally modify the Subdivision ignores the fact that the Planning Board is delegated with the authority to regulate the subdivision of land in the Town. See RSA 674:35, II (stating, in part, that "[t]he planning board of a municipality shall

have the authority to regulate the subdivision of land under the enactment procedures of RSA 675:6."). Once subdivision jurisdiction is delegated to the Planning Board, that jurisdiction is exclusive. See RSA 674:42. Once again, the Bureau's position disregards that the Planning Board has unambiguously determined that the Road is complete and that no bond is required – a decision it made prior to San-Ken's application for exemption under the Act. Because the Planning Board is vested with exclusive control over the Subdivision, the Bureau's condition that seeks to un-do the Planning Board's 2014 modification is unreasonable, unjust, and should be held to be an unlawful exercise of its authority.

D. Conclusion

Here, the Bureau has erred as a matter of law in attempting to impose executive-level oversight into the local land use process, a process which the legislature has specifically and exclusively delegated to the Planning Board. Likewise, the Bureau was unreasonable in applying the Act to San-Ken's nine lots given the plain language of the Act and the particular facts of this case. In light of the above, San-Ken should not have been required to subject its lots to the Act and the Bureau should have been allowed to exact a modification of the Subdivision without the authority of its enabling statute and regulations.

WHEREFORE, the Petitioner respectfully requests that this Honorable Court:

A. Order that San-Ken is not the successor subdivider in context of RSA 356-A;

B. Order that San-Ken's nine lots in the Subdivision are not subject to RSA 356-A;

C. Order that the Bureau exceeded its authority and acted unreasonably and unlawfully in requiring San-Ken to further improve or bond future Road improvements;

D. Strike the condition of the Bureau requiring that San-Ken further improve the Road and order the Bureau to immediately release the related bond;

E. Issue final judgment in favor of San-Ken; and

F. Grant such further relief as may be equitable and just.

Respectfully submitted,
San-Ken Homes, Inc.
By its attorneys,
Bernstein, Shure, Sawyer & Nelson, P.A.

Michael A. Klass Esq., Bar# 18947
mklass@bernsteinshur.com
P.O. Box 1120
Manchester, NH 03105
603.623.8700

Dated: February 29, 2016

CERTIFICATE OF SERVICE

I hereby certify that on February 29, 2016, a copy of the foregoing PETITIONER'S TRIAL MEMORANDUM was mailed via US Postal Service to the following individuals:

John W. Garrigan, Esq.
33 Capitol Street
Concord, NH 03301

Michael A. Klass, Esq.

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
SOUTHERN DISTRICT

SUPERIOR COURT

SAN-KEN HOMES, INC.

V.

NEW HAMPSHIRE ATTORNEY GENERAL,
CONSUMER PROTECTION AND ANTITRUST BUREAU

226-2015-CV-281

STATE'S MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S APPEAL OF CERTIFICATE OF EXEMPTION PURSUANT TO RSA 356-A:14

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, and respectfully moves this Court to deny the Petitioner's appeal and affirm the actions taken by the Consumer Protection and Antitrust Bureau in the underlying matter. In support thereof, the State of New Hampshire states as follows:

INTRODUCTION

The Petitioner, San-Ken Homes, Inc. ("San-Ken") appeals the decisions of the New Hampshire Department of Justice, Consumer Protection and Antitrust Bureau ("The Bureau"), requiring the Petitioner to apply for a certificate of exemption from the Land Sales Full Disclosure Act ("The Act"), and requiring the Petitioner to complete a subdivision road to the same standards required of the prior subdivider as a condition of granting that exemption.

The State respectfully moves the Court to affirm the Bureau's actions and to find (1) that the Petitioner is a subdivider under RSA 356-A:1, V, (2) that the Bureau did not act unlawfully or unreasonably by requiring the Petitioner to apply for a certificate of exemption under RSA 356-A:3, (3) that the certificate of exemption issued to the prior subdivider in 2006 is not valid

for the Petitioner, and (4) that the Bureau did not act unlawfully or unreasonably by requiring the Petitioner to complete Old Beaver Road to the same construction standards required of the prior subdivider as a condition of granting the certificate of exemption under RSA 356-A:3, II.

FACTS

1. On December 5, 2005, 112 Chestnut St. LLC obtained and recorded title to a property tract on N.H. Route 123-A in New Ipswich, New Hampshire. CR[1] 492-493, See also Hillsborough County Registry of Deeds, Book #7595, Page #471.

2. The property was mortgaged through TD Banknorth and H.G.A. Ltd. on December 5, 2005. CR 488 – 490, 528 – 533.

3. 112 Chestnut St. LLC planned a 16-unit subdivision named Oakwood Common. CR 198-199. The Subdivision plan was approved by the town on June 7, 2006. Id.

4. The subdivision plan includes a roadway named Old Beaver Road. Id.

5. 112 Chestnut St. LLC posted a surety bond through TD Bank payable to the Town of New Ipswich guaranteeing the construction of Old Beaver Road in accordance with N.H. Admin. R. Jus. 1304.07(a)(3) and local requirements. An irrevocable standby letter of credit for $301,823 was issued by T.D. Bank for the full amount on December 5, 2005. CR 592.

6. On August 11, 2006, 112 Chestnut St. LLC applied to the Bureau for a certificate of exemption from the subdivider registration requirements of RSA 356-A. CR 463-673.

7. 112 Chestnut St. LLC stated in its application for exemption that, "The roadway servicing the subdivision ("Old Beaver Road") shall be constructed by the Applicant and held as a private way by the future owners of the Lots." CR 470. 112 Chestnut St. LLC further stated in the application that "The road servicing the subdivision will be built to town specifications and

[1] Cites to the certified case record submitted earlier to the Court and the Petitioner shall be made to the Bates stamped pages and shall be abbreviated "CR" for the purpose of this pleading.

owned and maintained by the Lot owners ..." CR 474. The town planning board also requires private roads to be built to full town standards. CR 4.

8. The Bureau granted the exemption for 112 Chestnut St. LLC and Oakwood Common and issued a certificate of exemption on October 27, 2006. CR 674.

9. 112 Chestnut St. LLC subsequently developed and sold seven lots in Oakwood Common between 2007 and 2010. CR 4, 5. Charles Watt, owner of 112 Chestnut St. LLC, made oral promises to each buyer that the road would be built to the town specifications and would be completed once all of the lots were formed and the home owners association created. CR 5-6.

10. The homeowners have estimated that each of the first seven home buyers invested approximately $20,000 of the purchase money for their homes towards the completion of the road. CR 8.

11. Town regulations state that private roads must be built to town road specifications. CR 4, 25, See also Subdiv. Regs of the Town of New Ipswich, NH, at 3:12. Town road specifications require 2" of "base course" pavement and 1" of "wear course" top-coat pavement. CR 25, See also Subdiv. Regs of the Town of New Ipswich, NH, at Appendix B:03 (P).

12. 112 Chestnut St. LLC began construction on Old Beaver Road. Only approximately ½" of base course pavement was applied to form Old Beaver Road. No top-coat pavement was applied. CR 3, 6, 37-38.

13. On March 11, 2014, T.D. Banknorth foreclosed on the nine remaining Oakwood Common lots for mortgage default. CR 67-71. The nine lots were sold as one parcel at auction on May 13, 2014. CR 65-66.

14. The Petitioner purchased the nine-lot parcel for $150,000. Id. The Petitioner obtained the deed for the nine lots on June 17, 2014 and recorded the deed on June 19, 2014. CR 61-64.

15. In July 2014, the Petitioner applied for a building permit from the Town of New Ipswich. CR 2, 4. The New Ipswich Board of Selectmen, acting on the recommendation of the town Planning Board, denied the permit until Old Beaver Road could be completed to the town road standards. CR 2, 15, 41, 42. The Planning Board requested an inspection of Old Beaver Road to determine the amount of the bond needed to cover the remaining road work. CR 2.

16. On August 4, 2014, Brown Engineering, LLC submitted a report on the condition of Old Beaver Road to the New Ipswich Planning Board. The report stated that the base pavement was only ¼" to ½" thick, well below the town standards. The report noted that Old Beaver Road did not have the required 1" top coat of pavement. Brown Engineering estimated that adding 1 ½" of base course and 1" of top coat to the existing road would cost $83,783. Brown Engineering recommended that at the very least a 1" top coat of pavement should be added to the roadway at an estimated cost of $43,446. CR 37-39.

17. The Petitioner and some of the Oakwood Common property owners appeared before the New Ipswich Planning Board on August 6, 2014. CR 4-7. The Planning Board acknowledged that the road construction bond put up by the prior subdivider had been lost through the foreclosure and sale process. CR 4. Counsel for the Petitioner argued that it was only an "assumption" that the Petitioner is a subsequent subdivider and therefore responsible for bonding the remaining road construction work. CR 3, 4. The town attorney suggested that the Petitioner could move the Board to amend the original town subdivision plan with respect to the required road standards. Id.

18. The Petitioner and property owners again appeared before the town Planning Board on September 3, 2014. CR 8-14. The Petitioner submitted a request to modify the original road requirements. CR 8. The Petitioner argued that he can only be considered an individual owner of

nine lots and not the subdivider of the remaining nine lots. CR 8-9. The property owners objected, stating that they were told when they purchased homes in Oakwood Common that the developer was responsible for the road and that the Petitioner is now in the same position as 112 Chestnut St., LLC. Id. The town attorney took the position that the Petitioner is not the developer and that the town is not a guarantor of the completion of road improvements in general. CR 10. The town attorney added that "the Planning Board is not the advocate of the existing owners." Id.

19. September 17, 2014. The Petitioner asked the Board to amend the local subdivision plan for Oakwood Common to withdraw the requirement that Old Beaver Road meet town road standards. The Petitioner proposed a plan to apply a seal coat to the ½" base pavement course and to fill in a number of potholes in the road. CR 16.

20. The town's attorney produced a motion to amend Oakwood Common's prior town subdivision approval. The motion read, in part:

> 2. The existing road constructed within the subdivision (with one course of asphalt), is satisfactory as a private road, with no second asphalt course required, subject to the following improvements to be performed within 90 days from the date of this approval by and at the expense of the owner of the 9 remaining unimproved lots in the subdivision (presently San-Ken Homes, Inc.):
>
> - Fix cracks by cleaning and filling
> - Seal coat the entire road
> - Repair all potholes
>
> (CR 18)

21. The Board sided with the petitioner and voted to adopt the motion to amend the town subdivision approval. The Board required the improvement work to be approved by the town road agent. CR 17.

22. The Petitioner completed the sealing and pothole repair on or around October 22-24, 2014. CR 27, 739.

23. The town road agent has acknowledged that the road is in bad condition and will require major repairs in five to six years. CR 27.

24. On November 11, 2014, the Petitioner applied to the Bureau for a certificate of exemption under RSA 356-A:3, II and JUS 1304.07. CR 254-332.

25. On April 21, 2015, the Petitioner and the Bureau entered into a 24 month escrow agreement under which the Petitioner secured a bond for $50,106 to guarantee full completion of Old Beaver Road. CR 812-821. This completion includes adding a 1 ½" pavement course on top of the existing pavement, which would bring the total thickness of the pavement to an amount equivalent to town road standards. CR 812, 816-817. The bond is payable to the Bureau. CR 74-75, 812, 816-817.

26. The Petitioner's obligation to post the bond for the road improvements was a prerequisite to the issuance of a certificate of exemption to the Petitioner.

27. On May 1, 2015, the Bureau issued a certificate of exemption for all nine lots to the Petitioner. CR 77.

STANDARD OF REVIEW

28. The Act does not stipulate a standard of review for Superior Court appeals.

29. RSA 356-A:14, I states as follows:

> Any person aggrieved by a decision or action of the attorney general may, by petition, appeal from said decision or action to the superior court for review. The superior court may affirm, reverse, or modify the decision or action of the attorney general as justice may require.

30. The most appropriate standard of review to apply to this case is the standard applied to administrative appeal cases because this case presents the appeal by the Petitioner of certain actions and decisions made by the Attorney General's Office in the administration and enforcement of the Act and its attendant administrative rules.

31. New Hampshire courts "will not overturn agency decisions or orders, absent an error of law, 'unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable.'" Appeal of Dell, 140 N.H. 484, 487-488 (1995) (quoting Appeal of Stetson, 138 N.H. 293, 295 (1995).

32. "[T]he construction of a statute by those charged with its administration is entitled to substantial deference." New Hampshire Retirement Sys. v. Sununu, 126 N.H. 104, 108 (1985). The deference afforded, however, is not absolute. Appeal of Weaver, 150 N.H. 254, 256 (2003). The courts "are still the final arbiter of 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 (2012).

ARGUMENT

THE PETITIONER IS A SUCCESSOR SUBDIVIDER AND IS SUBJECT TO THE PROVISIONS OF THE ACT

33. The Petitioner has claimed that it is not a subdivider or a successor subdivider. CR 4. Instead, the Petitioner states that it is merely another lot owner in the Oakwood Common subdivision, that the Act does not apply to it, and that the Bureau acted unreasonably by determining that the Petitioner is a successor subdivider. Petitioner's Appeal, ¶18, 27. The Bureau did not act unreasonably or unlawfully because the Petitioner is both a subdivider and a successor subdivider as defined in the Act.

34. RSA 356-A:1, V provides the following definitions:

> Subdivider means a person who is an owner of subdivided land or one who offers it for disposition. **Any successor of the person referred to in this paragraph who comes to stand in the same relation to the subdivided lands as his predecessor did shall also come within this definition**; provided, however, the term "subdivider" shall not include any homeowners association which is not controlled by a subdivider. (Emphasis added)

35. 112 Chestnut St., LLC originally owned the 16 lots that comprise Oakwood Common. 112 Chestnut St., LLC originally intended to build residences on the lots in the Subdivision and to offer them for disposition to private consumers. In accord with the provisions of the Act, 112 Chestnut St., LLC registered as the subdivider for Oakwood Common and was granted a certificate of exemption in 2006.

36. Between 2006 and 2014, 112 Chestnut St., LLC sold seven lots to private consumers. TD Bank foreclosed on the remaining nine lots owned by 112 Chestnut St., LLC in March, 2014. 112 Chestnut St., LLC was still the registered subdivider on record at the time of the foreclosure.

37. The Petitioner purchased the remaining nine lots from TD Bank on May 13, 2014. Like 112 Chestnut St., LLC, Petitioner intends to build residences on the lots and to offer them for disposition to private consumers. In this way, Petitioner has come to "stand in the same relation" to the entire Oakwood Common subdivision as his predecessor.

38. Therefore, the Petitioner is a subdivider because the Petitioner is the owner of subdivided land and is offering it for disposition, and a successor subdivider under RSA 356-A:1, V. There is no possible reading of the Act under which the Petitioner can have any other status.

THE LAND SALES FULL DISCLOSURE ACT REQUIRES THE REGISTRATION OF SUBDIVISIONS BEFORE THE SUBDIVIDER MAY OFFER LOTS IN THE SUBDIVISION FOR SALE TO THE PUBLIC

39. The Petitioner argues that the Bureau acted unreasonably when it required the Petitioner to apply for a certificate of exemption. Petitioner's Appeal, ¶27. The Bureau did not act unreasonably because the Petitioner is a subdivider subject to the Act and the Act requires subdividers to be registered or exempted by the Bureau.

40. RSA 356-A:4, I prohibits subdividers, including successor subdividers from offering or disposing of subdivided lands prior to being either registered or exempted by the Bureau.

41. The statute states:

> Unless the subdivided lands or the transaction is exempted by RSA 356-A:3:
>
> I. No subdivider may offer or dispose of any lot, parcel, unit or interest in subdivided lands located in this state, nor offer or dispose in this state of any lot, parcel, unit or interest in subdivided lands located without this state prior to the time the subdivided lands are registered in accordance with this chapter;

42. RSA 356-A:3, I(a) states that the provisions of the Act do not apply to any offer or disposition of subdivided lands of 15 or fewer lots, parcels, units, or interests are included in the subdivision.

43. Oakwood Common is a 16-lot subdivision and, as such, the subdivider of Oakwood Common must obtain a registration or exemption from the Bureau prior to disposing of any lots.

44. RSA 356-A:3, II gives the Attorney General the authority to grant limited exemptions from the Act through the rulemaking process. The statute states:

> The attorney general may from time to time, in accordance with rules adopted by it pursuant to RSA 541-A, exempt from any of the provisions of this chapter any subdivision or any lots, parcels, units or interests in a subdivision if it finds that the enforcement of all of the provisions of this chapter with respect to such subdivision or lots, parcels, units or interests is not necessary in the public interest and for the protection of purchasers by reason of the small amount involved or the limited character of the offering, or because such property, in the discretion of the attorney general, is otherwise adequately regulated by federal, state, county, municipal, or town statutes or ordinances, or because such property has been registered and approved pursuant to the laws of any other state.

45. The Department of Justice has adopted administrative rules relating to the Act under JUS chapter 1300.

46. JUS 1304.07 allows a subdivider of 50 or fewer lots to apply to the Bureau for an exemption from the registration requirements of RSA 356-A:5.

47. The Petitioner was properly eligible to apply for a certificate of exemption under RSA 356-A:4, I and JUS 1304.07 prior to selling any lots because the Petitioner is the successor

subdivider of the 16-lot Oakwood Common subdivision and subdividers of 16-50 unit subdivisions are required to receive a certificate of exemption prior to disposing of any lots.

48. Because the Act applies to the Petitioner, the Bureau is bound by the Act to require the Petitioner to apply for a certificate of exemption under JUS 1304.07 and, as such, did not act unreasonably or unlawfully by doing so.

THE REGISTRATION OR EXEMPTION IS PERSONAL TO THE SUBDIVIDER AND DOES NOT RUN WITH THE LAND

49. The Petitioner has also claimed that it should be allowed to sell lots in the Subdivision pursuant to the original subdivider's certificate of exemption. Petitioner's Appeal, ¶27. The Bureau did not act unreasonably by requiring the Petitioner to independently apply for a certificate of exemption because the application and exemption process is personal to each subdivider. For the following reasons, the Petitioner's argument presents a fundamental misunderstanding of the structure and function of the Act.

50. New Hampshire courts "apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme." Soraghan v. Mt. Cranmore Ski Resort, Inc., 152 N.H. 399, 401 (2005).

51. The Act is intended to prevent "false, deceptive or misleading advertising to offer or dispose of any lot, parcel, unit or interest in subdivided lands" and to protect consumers by requiring subdividers to publically disclose financial and business plan details and by granting a right of rescission for subdivision home contracts. RSA 356-A:10, II, See also RSA 356-A:6, RSA 356-A:4, II. To effectuate this goal, the legislature vested authority to enforce the provisions of the Act in the Attorney General and the Bureau. RSA 356-A:2.

52. No subdivider may offer or dispose of any unit in any covered subdivision until the Bureau has issued either a certificate of registration or exemption to the subdivider. RSA 356-A:4.

53. The Bureau reviews data related to the plan of development and marketing of the lots in the subdivision before issuing such a certificate. RSA 356-A:5.

54. The Bureau must determine whether the subdivider is of good character and is reasonably likely to be financially capable of completing the subdivision as planned. RSA 356-A:7. See Also N.H. Admin. R. Jus 1306 and Form CPLS170, the Principal's Background Statement. Only after completing its review, may the Bureau issue a certificate of registration or exemption.

55. The Act requires subdivision developers to fully disclose their business plan, capital assets, and past experience in handling subdivision projects to the Bureau. Much of the information required is personal to the individual subdivider. Significantly, the Act requires subdividers to submit the following:

- Personal contact and employment information for the past five years for each director, principle, president, vice president, treasurer, clerk, partner, trustee, or member, including detailing the any interest that each of those people hold in relation to the subdivided lands. RSA 356-A:5, I(e) and (f).
- If the subdivider is a corporation, personal information about the identity and occupations of each stockholder owning more than 10 percent of outstanding shares. RSA 356-A:5, I(g) and (h).
- Past subdivision projects that the subdivider has been associated with. See Form CPLS122.
- Proof of clear title for the subdivided lands. Id.

- List of outstanding liens. Id.
- List of proposed improvements and amenities promised in each phase of construction and the projected costs thereof. Id.
- List of numerous required local and state approvals and permits. Id.
- Financing plans. JUS 1306.05.
- Development and marketing costs. JUS 1306.06.

56. The Act also requires that the subdivider provide personal background information relevant to his or her character. See Form CPLS 170. Included in this are the requirement to disclose to the Attorney General facts such as whether the subdivider is a licensed realtor, and if so, whether the subdivider has ever been subject to a license suspension or revocation, whether the subdivider has ever been adjudicated as engaging in unfair or deceptive acts or practices relevant to land sales, whether the subdivider has ever been subject to a cease-and-desist order relevant to land sales. Id. The subdivider must also provide five credit references and five character references. Id.

57. This information relates entirely to the applicant subdivider, and weighs heavily in the Attorney General's determination on whether to issue the certificate of registration or exemption. Any change in these facts would require the Bureau to revisit its determination regarding the applicant's eligibility for registration or exemption. RSA 356-A:8, V.

58. RSA 356-A:6 then requires subdividers of large projects to disclose a significant portion of that information to prospective purchasers through public offering statements and purchase and sale agreements.

59. Because the issuance of the certificate of registration or exemption is dependent upon facts related specifically to the subdivider who applies for the certificate, the certificate is

personal to the applicant. When a subdivision is transferred to a successor, that successor must also go through the registration or exemption process.

60. Accordingly, the Petitioner may not simply adopt the original subdivider's certificate of exemption and the Bureau did not act unreasonably by requiring the Petitioner to apply for its own certificate of exemption.

THE TOWN'S ACTION HAS NO EFFECT ON THE REQUIREMENTS OF THE ACT

61. The Petitioner lastly argues that the Bureau acted unreasonably by requiring the Petitioner to further improve Old Beaver Road as a condition of issuing the certificate of exemption because the New Ipswich Planning Board's decision on September 17, 2014 absolves it of the obligation to complete the roadway to the specifications set out in the town's subdivision regulations. Petitioner's Appeal, ¶19, 20, 28. Furthermore, the Petitioner has stated that if the homeowners wish to have the road completed as set out in the town's regulations, they are to bear the cost for such construction. CR 10 – 12.

62. The Bureau did not act unreasonably by requiring the Petitioner to further improve Old Beaver Road because (1) the prior subdivider was required to complete the road to full town standards, (2) the town planning board's decision is not binding on the Attorney General's Office, and (3) it would be fundamentally unfair to the current homeowners to allow the successor subdivider complete the road to a lower standard when they have invested purchase money with the promise of a fully completed road.

63. Before a subdivider is eligible for an exemption from registration, the Act requires that the subdivider be able to show that it is financially able and has made provisions to bear the cost of completion of the roadways servicing the subdivision.

64. Specifically, N.H. Admin. R. JUS 1304.07 states, in part:

(a) The bureau shall exempt a subdivision from the registration and annual reporting requirements of RSA 356-A:4, I and RSA 356-A:5 through RSA 356-A:9 if the following conditions are met:

...

(3) If the streets or roads providing access to the subdivision and to the lots, parcels, units, or interests for which exemption is applied are not complete at the time the application is filed, the subdivider shall post surety acceptable to the town or city as follows:

a. The surety shall be in the full amount of the cost of completing the streets or roads to assure completion to local standards and;

b. The surety shall be in the form prescribed by Jus 1304.14;

65. Accordingly, the Bureau is required to ensure that the subdivider demonstrate that it has made provisions to complete the construction of the roadway to the standards set out in the town's subdivision regulations as a prerequisite to the issuance of the certificate of exemption.

66. Town of New Ipswich Subdivision Regulations state that private roads shall be "built to town road specifications." Subdiv. Regs. of the Town of New Ipswich, NH, at 3:12.

67. New Ipswich town road specifications require 2" of "base course" pavement and 1" of "wear course" top-coat pavement. Id. at Appendix B:03 (P). This enumerated road construction standard is considered to be the "local standard" by the Bureau for the purposes of Jus 1304.07.

68. In compliance with the Act, the original subdivider, 112 Chestnut St., LLC, agreed to complete Old Beaver Road to the standards specified in the town's subdivision regulations. In accordance with the Act and the subdivision regulations, 112 Chestnut St., LLC, posted a bond to cover these costs. The homeowners who purchased lots from 112 Chestnut St, LLC were thus assured that Old Beaver Road would be completed to full town standards and understood that a portion of the purchase money paid for their respective houses would be applied to the completion of the road.

69. The town's decision to issue building permits despite the Petitioner having not completed Old Beaver Road to established town specifications constitutes, at best, a determination by the local planning board not to enforce its established rules.

70. The Act comprises a fundamentally different area of subdivider oversight than local planning board regulations. The town subdivision and planning regulations are not intended to protect consumers. The town's attorney has stated that "[t]he planning board is not the advocate of the existing owners." CR 10. Rather, the explicit purpose of the local regulations, "is to protect the health, safety, convenience and welfare of the inhabitants of the Town of New Ipswich and to preserve the natural scenic beauty and rural character of its residential areas, and to promote orderly, planned growth." Subdiv. Regs. of the Town of New Ipswich, NH, at 2:02. In contrast, the Bureau enforces the Act to protect consumers from unfair or deceptive business practices by developers by ensuring that the future infrastructure and development plans promised to home purchasers are carried out by the subdivider.

71. While the Town is focused on issues related to good governance and fiscal responsibility, the Bureau is focused on the enforcement of the Act and the protection of consumers. This difference in focus and purpose explains the differing conclusions drawn.

72. While the town planning board may waive the enforcement of their own regulations (See Subdiv. Regs. of the Town of New Ipswich, NH, at 5:03), there is no provision within those regulations or the Act that allows the town planning board to bind the Attorney General to certain interpretations of state subdivision and consumer protection laws.

73. Further, "even when a local ordinance does not expressly conflict with a State statute, it will be preempted when it frustrates the statute's purpose." Forster v. Town of Henniker, 167 N.H. 745, 756 (2015). In this instance, the consumer protection purposes of the Act would be frustrated by the town planning board's actions because the promise of a fully-completed road

made to the existing homeowners, and required by JUS 1304.07, would be undercut by the planning decision of a local board.

74. In this case, in accord with the statutory and regulatory requirements of the Act as well as the local planning board's rules, the original subdivider bonded the completion of the road servicing the subdivision. The Petitioner, as successor subdivider, has come to stand in the same relation to the homeowners as the original subdivider and is bound by the same requirements.

75. Even if all this were not true, it would remain fundamentally unfair to allow the Petitioner to require current residents of Oakwood Common to pay again to have the Old Beaver Road completed when they have already paid approximately $20,000 each to receive a fully completed roadway. Based on the current $50,106 completion estimate, the prospective additional cost to each homeowner to complete the road would be $3,131.

76. As such, the Bureau did not act unreasonably by requiring the Petitioner to complete Old Beaver Road to the same full-town specifications as required of the original subdivider.

CONCLUSION

77. The Petitioner is a subdivider under RSA 356-A:1, V because the Petitioner has come to stand in the same in the same relation to the subdivided lands as the previous subdivider and the Petitioner is offering subdivided land for disposition.

78. The Bureau did not act unlawfully or unreasonably by requiring the Petitioner to apply for a certificate of exemption under RSA 356-A:3 because the Petitioner is a subdivider and the Act requires a subdivider to either register the subdivided lands or apply for an exemption from registration before that subdivider may offer or dispose of any lot, parcel, unit or interest in subdivided lands.

79. The Bureau did not act unlawfully or unreasonably by determining that the certificate of exemption issued to the prior subdivider in 2006 is not valid for the Petitioner because the intent and purpose of the Act is for each subdivider to register with the Bureau and not for the prior registration to run with the land.

80. The Bureau did not act unlawfully or unreasonably by requiring the Petitioner to complete Old Beaver Road to the same construction standards required of the prior subdivider as a condition of granting the certificate of exemption because the original subdivider had promised to complete the road to the town road standards, the town planning board cannot waive state consumer protection laws, and it would be fundamentally unfair to the existing homeowners to not require the successor subdivider to fulfill the promises made by the original subdivider.

REQUESTED RELIEF

WHEREFORE, the Attorney General requests that this Honorable Court:

A. Deny the Petitioner's appeal under RSA 356-A:14;

B. Affirm the Bureau's actions and decisions in the proceeding under review;

C. Order the Petitioner to comply with the May 1, 2015 Escrow Agreement; and,

D. Grant such other relief as this Court deems just and equitable.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

Joseph A. Foster
Attorney General

Dated: March 1, 2016

John W. Garrigan
NH Bar # 21001
Attorney
Consumer Protection and Antitrust Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, New Hampshire 03301
(603) 271-1252

Certification of Service

I hereby certify that a copy of the foregoing pleading has been forwarded to Michael A. Klass, Esq., attorney for the Petitioner at Bernstein, Shur, Sawyer & Nelson, P.A., P.O. Box 1120, Manchester, NH 03105.

Dated: March 1, 2016

John W. Garrigan

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

JUN 27 2016

Hillsborough Superior Court Southern District
30 Spring Street
Nashua NH 03060

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF FINAL DECISION

MICHAEL A. KLASS, ESQ
BERNSTEIN SHUR SAWYER & NELSON PA
670 NORTH COMMERCIAL STREET SUITE 108
PO BOX 1120
MANCHESTER NH 03105-1120

Case Name: **San-Ken Homes Inc. v. New Hampshire Attorney General, Consumer Protection and Antitrust Bureau**
Case Number: **226-2015-CV-00281**

Enclosed please find a copy of the court's order of June 21, 2016 relative to:

ORDER (ON THE MERITS)

Unless a post-disposition motion or appeal is submitted, final judgment shall be entered 31 days from the date of this notice of decision. After the order becomes final and judgment entered, a Certificate of Judgment, Writ of Execution, or certified copy of the Final Order may be obtained upon request.

June 23, 2016

Marshall A. Buttrick
Clerk of Court

(564)

C: John W. Garrigan, ESQ

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT
226-2015-CV-0281

San-Ken Homes, Inc.

v.

New Hampshire Attorney General,
Consumer Protection and Antitrust Bureau

ORDER

The plaintiff, San-Ken Homes, Inc. ("San-Ken"), on May 29, 2015, appealed an order of the New Hampshire Attorney General, Consumer Protection and Antitrust Bureau ("Bureau"), pursuant to RSA 356-A:14. The appeal asserts that the Bureau lacked authority to require San-Ken to be registered under RSA 356-A, the Land Sales Full Disclosure Act ("Act") and, specifically, lacked authority to require San-Ken to make improvements to Old Beaver Road in the Oakwood Common subdivision in New Ipswich, New Hampshire.

Deirdre Daley and Bernard Satterfield, owners of lots in Oakwood Common, moved to intervene. Their intervention requests were denied on November 25, 2015 (Garfunkel, J.). The parties filed a certified record ("CR") on July 13, 2015, and on March 1, 2016, they each submitted memoranda of law.

The Court conducted a bench trial on March 3, 2016. After consideration of the evidence, the Court finds and rules as follows.

Background and Facts

The parties agree on the relevant facts of the history of Oakwood Common, which is a 16 lot subdivision originally developed by 112 Chestnut Street, LLC ("112"). The New Ipswich Planning Board ("Board") approved the subdivision on June 7, 2006. (CR 198-199.) Among the conditions of approval was that 112 pave Old Beaver Road to Town standards. 112 agreed and established an irrevocable letter of credit to ensure the work would be completed. (CR 592.) On August 11, 2006, 112 applied for a certificate of exemption from the Act, RSA 356-A:3, II. 0 The Bureau granted the exemption on October 27, 2006. (CR 674.) In the application for exemption, 112 committed that the "road servicing the subdivision will be built to town specifications and owned and maintained by the Lot owners..." (CR 474.)

112 constructed Old Beaver Road but did not meet the Town's required paving standards. 112 put on a ½" base course rather than a 2" base course, and no topcoat wear course, when a 1" wear course was required. (CR 37-38.) A report of an engineering firm confirmed the substandard paving and recommended an additional 1½" base course be applied, at an estimated cost of $83,783; at a minimum it recommended an additional 1" should be applied, at an estimated cost of $43,446. (Id.)

By 2010, 112 had developed and sold seven lots but was unable to complete the subdivision or finish the work on Old Beaver Road. TD Banknorth foreclosed on the remaining nine lots. San-Ken, which had no relationship to 112, bought these nine lots as a single parcel for $150,000 and recorded title to the property on June 19, 2014. (CR 61-64.)

San-Ken applied for building permits in July of 2014; the Board of Selectmen denied the request until a road bond was posted or Old Beaver Road was completed to Town standards. (CR 41-42.) At a hearing on August 6, 2014, after San-Ken argued it should not have to pave to the 2006 standards, the Board suggested an option for San-Ken would be to seek modification of the road requirements. A public hearing was scheduled for September 3, 2014, to consider modification of the original subdivision approval. (CR 6-7.)

Four lot owners within Oakwood Common appeared before the Board on September 3, 2014, arguing that San-Ken was now in the position of developer and they had been promised a road that would meet Town specifications. They opposed modification to the original approval; one lot owner estimated that approximately $20,000 of the purchase price of each lot was for road paving. (CR 8-14.) The matter was continued to September 17, 2014.

On September 17, 2014, the Board heard further discussion regarding San-Ken's commitment to form a homeowners association, repair cracks and pot holes and seal coat the road, pay 9/16ths of the cost of a top coat, and reduce its voting strength to eight votes so that it could not unilaterally force decisions on other lot owners. (CR 16.) The Board approved the modified road requirements. (CR 16-18.) San-Ken completed the sealing and pot hole and crack repairs by October 24, 2014. (CR 739.)

On November 20, 2014, San-Ken approached the Bureau to obtain a certificate of exemption from the Act, pursuant to RSA 356-A:3, II and N.H. Admin. Rules, Jus 1304.07. (CR 254-332.) Exemption would allow San-Ken to market the nine lots. The Bureau required, as a condition of obtaining a certificate of exemption, that San-Ken

repair and pave the road to the Town's original specifications. The Bureau concluded that San-Ken was a "successor subdivider" under the Act and as such was responsible for completion of the amenities provided in the 2006 Declaration of Subdivision. The paved road was not only a Town requirement, it was an amenity promised to all purchasers under the subdivision documents. (CR 426-428.)

San-Ken disagreed with the Bureau's interpretation that registration or exemption from registration was required but, in order to be able to market the lots, it sought a certificate of exemption "without prejudice and while reserving all rights and defenses." (Ex. 6A, letter of January 29, 2015.) On April 21, 2015, San-Ken obtained a bond in the amount of $50,106, payable to the Bureau, to guarantee application of 1½" of pavement to Old Beaver Road. (CR 812-821.) The Bureau issued the certificate of exemption on May 1, 2015. (CR 77.)

Land Sales Full Disclosure Act and Authority of the Bureau

Although San-Ken's regulatory status and the authority of the Bureau is in dispute, the parties do not disagree on most of the essential provisions and interpretation of the Act. The Act is designed to protect purchasers of subdivided residential lots by requiring developers of subdivisions to be registered under RSA 356-A before lots are offered for sale.

RSA 356-A:4, I requires registration of any subdivision prior to lots being offered for sale, unless the subdivided land is exempted from registration by RSA 356-A:3. RSA 356-A:3, I exempts from registration subdivided lands if there are not more than 15 lots. If Oakwood Common had originally been designed as a nine lot subdivision,

therefore, the Act would not have applied. If a development is built in phases, however, each phase must be registered, even if a particular phase comprises fewer than 16 lots.

RSA 356-A:3, II authorizes the Bureau the discretion to "exempt from any of the provisions of this chapter any subdivision or any lots, parcels, units or interests in a subdivision if it finds that the enforcement of all of the provisions of the chapter with respect to such subdivision, lots, parcels, units or interests is not necessary in the public interest and for the protection of purchasers by reason of the small amount involved or in the limited character of the offering, or because such property, in the discretion of the [Bureau], is otherwise adequately regulated by federal, state, county, municipal, or town statutes or ordinances . . ."

A subdivider is "a person who is an owner of subdivided land or one who offers it for disposition. Any successor of the person referred to in this paragraph who comes to stand in the same relation to the subdivided lands as his predecessor did shall also come within this definition; provided, however, the term "subdivider" shall not include any homeowners association which is not controlled by a subdivider." RSA 356-A:1, V. When a new daveloper takes over a project, then, it must register as a "successor subdivider" and is responsible for the terms approved by the Bureau before any sales are offered.

The Bureau takes the position that San-Ken is not simply an owner of nine lots and is also not a developer of a new nine lot subdivision. Rather, San-Ken, according to the Bureau, is a successor subdivider of Oakwood Common and must be registered or exempted and abide by all terms of the certificate before lots are offered for sale. The Bureau argues it must impose successor subdivider status on San-Ken in order to

protect the interests of the lot owners who purchased from 112 under the Declaration of Covenants, which committed to a paved road. It argues the certificate of exemption granted to 112 does not run with the land and cannot be extended to San-Ken, as the purpose of the Act is to protect consumers by preventing false, deceptive or misleading offers to sell divided lands, and evaluating tha financial and business plan details of the developer. A successor developer certificate requires new disclosures and Bureau scrutiny. See, RSA 356-A:5 (Application for Registration), RSA 356-A:6 (Public Offering Statement), and RSA 356-A:7 (Inquiry and Examination).

The Act does not establish a threshold number of units that make a buyer a successor subdivider. Upon questioning at trial, the Bureau argued an owner of two lots, and conceivably even one lot, could be considered a successor subdivider. The Bureau also stated there could be situations in which there are multiple successor subdividers, if more than one entity purchased lots with the intention of resale. When asked whether a person who purchases two lots, one for himself and one for resale to a family member, could be a successor subdivider, the Bureau stated that was possible. Then again, the Bureau stated there could be instances in which a buyer purchases one or more lots with the intention of resale without triggering a successor subdivider registration requirement and that there are no statutory provisions or administrative rules establishing when a purchaser is a successor subdivider.

San-Ken argues the successor subdivider provisions do not apply to a purchaser in its position, in that San-Ken does not "stand in the same relation to the subdivided lands as his predecessor did." See RSA 356-A:1, V. San-Ken argues it has no relationship to the original developer, has never held itself out to be the developer of the

subdivision, and had no notice or any way of knowing that purchase at foreclosure would carry with it an obligation to complete the development. San-Ken asserts it only sought registration in order to market the lots. It argues the Bureau has no authority to require registration or exemption from registration, and has no jurisdiction to countermand the 2014 determination of the Board modifying the paving requirements. If the Board found the modified terms for Old Beaver Road acceptable, the Bureau is without authority to demand otherwise, according to San-Ken.

Standard of Review

The standard of review for this administrative appeal is not fully set forth in statute. RSA 356-A:14, I states "[a]ny person aggrieved by a decision or action of the attorney general may, by petition, appeal from said decision or action to the superior court for review. The superior court may affirm, reverse, or modify the decision or action of the attorney general as justice may require." San-Ken urges a standard of broad discretion to achieve a fair and equitable result, relying on tax abatement cases that construed RSA 76:17 ("as justice requires")[1], a First Circuit workers compensation case that construed RSA 281:14 ("as justice may require")[2] and a will contest under New York law ("as justice requires")[3].

The Bureau urges instead that the Court apply the standard of review used in workers compensation and board of registration in medicine administrative appeals.[4] These cases held that New Hampshire courts "will not overturn agency decision or orders, absent an error of law, 'unless the court is satisfied by a clear preponderance of

[1] Tau Chapter of Alpha XI Delta Fraternity v. Town of Durham, 112 N.H. 233 (1972); LSP Ass'n v. Town of Gilford, 142 N.H. 369 (1997).
[2] Del Rio v. N. Blower Co., 574 F. 2d 23 (1st Cir. 1978).
[3] Matter of Estate of Greatsinger, 67 N.Y. 2d 177 (1986).
[4] Appeal of Dell, 140 N.H. 484 (1995); Appeal of Stetson, 138 N.H. 293 (1994).

the evidence before it, that such order is unjust or unreasonable.'" Stetson, 138 N.H. at 295 (citation omitted). The Bureau further argues the agency, charged with the statute's administration and construction, is entitled to substantial deference. New Hampshire Retirement System v. Sununu, 126 N.H. 104, 108 (1985).

The Court finds the standard of review in this instance to be that advocated by the Bureau. The Court will grant the agency substantial but not absolute deference. Appeal of Weaver, 150 N.H. 254, 256 (2003). The Court will not overturn the agency's determination unless a clear preponderance of the evidence demonstrates the order is unjust or unreasonable. Stetson, 138 N.H. at 295.

Analysis

1. San-Ken's Regulatory Status

San-Ken purchased nine of the original 16 lots in a single transaction, for development and resale to individual purchasers. All lots would be subject to the original Declaration of Covenants and individual owners would be members of the homeowners association as set forth in those Covenants. The Board granted San-Ken's request to modify the original approval, holding San-Ken to certain improvements to Old Beaver Road. This demonstrates that the Board considered San-Ken to bear some relationship to the future build out of Oakwood Common.

The Court does not necessarily agree with the Bureau regarding all instances in which a purchaser would be considered a successor subdivider. For example, it is hard to envision how or why purchase of a single lot for resale would trigger registration under the Act. San-Ken's purchase of 9 of the 16 lots, application to the Selectmen for building permits, negotiations with the Board for some improvements to Old Beaver

Road, and commitment to create a homeowners association, however, are sufficient to demonstrate that San-Ken has come "to stand in the same relation to the subdivided lands as his predecessor did." San-Ken has failed to demonstrate by a clear preponderance of the evidence that the Bureau's determination that San-Ken is a successor subdivider was unjust or unreasonable. Requiring registration or exemption from registration under the Act, therefore, was just and reasonable.

2. Bureau's Road Improvement Condition

When granting the certificate of exemption from registration, the Bureau required Old Beaver Road be improved to the specifications the Town imposed on 112 in 2006, and not to the modified specifications the Town imposed on San-Ken in 2014. The Bureau argues it must impose the original standard in order to protect the initial lot owners who relied on the representations in the Declaration of Covenants regarding road construction.

The Bureau's purpose is no doubt well-meaning and an attempt to meet its mandate to protect purchasers of subdivided lands under the Act. The Court finds no authority, however, for the Bureau to disregard and countermand the Board's modification of the original road standards. The Bureau argues that the actions of the Town frustrated purposes of the Act and thus are preempted, citing Forster v. Town of Henniker, 167 N.H. 745 (2015). Forster, however, addresses whether a municipal ordinance is impliedly preempted when it conflicts with a statutory scheme, which is not the situation in the instant case. To the contrary, the Bureau insists on enforcing the local ordinance regarding road paving specifications despite the Board's vote to modify the road requirements.

Neither party presented case law squarely on point and the Court is not aware of other cases in which the Bureau has disregarded a municipal determination and imposed a requirement that the municipality no longer seeks to impose. The Bureau has presented no persuasive basis for its proposition that it has the authority to impose a condition that the Board voted not to impose. The Court finds by a clear preponderance of the evidence that the imposition of the 2006 road specifications as a condition of granting an exemption from registration to be unjust and unreasonable. That term of the certificate of exemption is invalid. The road improvements shall be as required by the Board in 2014, namely, to fix cracks, repair pot holes and apply a 1/2 " seal coat, all of which appear to have been completed by October 24, 2014. The bond held by the Bureau for further road paving shall be returned to San-Ken.

3. Conclusion

The Court AFFIRMS the Bureau's determination that San-Ken is a successor subdivider. The Court REVERSES the request that the 2006 road specifications be met. The certificate of exemption shall be modified consistent with this order.

So ordered.

June 21, 2016

AMY L. IGNATIUS
Presiding Justice

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT

SAN-KEN HOMES INC.

V.

NEW HAMPSHIRE ATTORNEY GENERAL,
CONSUMER PROTECTION AND ANTITRUST BUREAU

226-2015-CV-00281

STATE'S MOTION FOR PARTIAL RECONSIDERATION

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, and respectfully moves this Court to reconsider the final order issued in this matter. In support thereof, the State of New Hampshire states as follows:

INTRODUCTION

1. The Petitioner appealed certain actions of the Consumer Protection and Antitrust Bureau of the New Hampshire Department of Justice ("The Bureau") in accordance with RSA 356-A:14, I.

2. A hearing was held in front of the Court on March 3, 2016. A final order was issued by this Court on June 21, 2016 with notice given to the parties on June 23, 2016.

3. The Bureau respectfully moves this Court to reconsider certain parts of its final order. Specifically, the Bureau requests that this Court reconsider and reverse part #2 of its order stating that the Petitioner be relieved from the condition that it complete Old Beaver Road to the 2006 road specifications required of the prior subdivider.

4. This motion was timely filed in accordance with Sup. Ct. Rules 2 and 12 as July 3rd was a Sunday and July 4th is a legal holiday as specified in RSA 288:1.

STANDARD OF REVIEW

5. Superior Court Rule 12(e) states in relevant part that:

> The Motion [to Reconsider] shall state, with particular clarity, points of law or fact that the court has overlooked or misapprehended and shall contain such argument in support of the Motion as the movant desires to present...

ARGUMENT

MISAPPREHENSION OF BUREAU'S LEGAL ARGUMENTS

6. Respectfully, the Court misapprehended the Bureau's legal authority to condition the issuance of the certificate of exemption to the Petitioner on the Petitioner finishing Old Beaver Road to the standards promised to the early homebuyers.

7. The Court states that the "Bureau insists on enforcing the local ordinance regarding road paving specifications despite the Board's vote to modify the road requirements."

8. The Court has misapprehended the Bureau's legal position on this point.

9. RSA 674:35 and 674:36 grants municipalities the exclusive right to regulate subdivisions for health, safety, prosperity, and the "harmonious development of the municipality and its environs." RSA 674:36, II(b). Local subdivision regulations allow the Board the discretion to enforce road construction ordinances as a matter of infrastructural interest.

10. RSA 356-A grants the Attorney General and the Bureau the exclusive right to enforce consumer protection laws contained within the Land Sales Full Disclosure Act regarding the marketing and sale of subdivided lands.

11. RSA 356-A:3, II grants the Attorney General significant discretion in granting exemptions from the requirements of RSA 356-A in accordance with the rules in JUS 1300.

12. JUS 1304.07(a) requires the Bureau to exempt a subdivision containing 50 or fewer lots if a list of enumerated disclosures and conditions are met. JUS 1304.07(a)(3) requires

a subdivider who is seeking a 50 lot exemption to assure the completion of the roads servicing a subdivision as a matter of consumer protection.

13. JUS 1304.07(b) states that "Notwithstanding the provisions of Jus 1304.07(a), above, an exemption shall not be granted if it does not protect purchasers pursuant to RSA 356-A." The Bureau has the discretion to determine what conditions need to be met in order to "protect purchasers" under RSA 356-A:3, II and its accompanying regulations.

14. Taken together, RSA 674:35 and RSA 356-A create a scheme of concurrent regulatory jurisdiction over subdivisions in this state.

15. In insisting on the road improvement condition, the Bureau was not seeking to enforce the local road construction ordinance on behalf of the Town of New Ipswich.

16. Rather, the Bureau was enforcing state level consumer protection regulations, RSA 356-A and JUS 1304.07, to "protect purchasers" by ensuring that the prior homebuyers fairly received the quality of road that they were promised and that they have already paid a significant amount of money for.

17. Under RSA 356-A:3, II and JUS 1304.07(b), the Bureau acted within its discretionary authority to "protect purchasers" by conditioning the certificate of exemption in this case on the Petitioner agreeing to complete road improvements.

18. "State law also impliedly preempts local law when there is an actual conflict between the two. A conflict exists when a municipal ordinance or regulation permits that which a State statute prohibits or vice versa. Moreover, even when a local ordinance does not expressly conflict with a State statute, it will be preempted when it frustrates the statute's purpose." Town of Carroll v. Rines, 164 N.H. 523, 528 (N.H. 2012) (Internal citations omitted).

19. In this case, there is a conflict within the concurrent regulatory efforts of the Bureau in enforcing the consumer protection-based road requirement and "protect purchasers" requirement of RSA 356-A and JUS 1304.07 and the Board in granting the Petitioner's request to modify the town's infrastructural road requirement for Old Beaver Road.

20. As the conflict is between the actions of a municipal planning board and a state level consumer protection statute, the state statute requirements should be held to take precedence over the municipal planning board's decision.

MISAPPREHENSION OF FUTURE DAMAGE TO CONSUMER PROTECTION EFFORTS

21. Respectfully, the Court has not considered the harmful effects that will occur to future efforts to enforce RSA 356-A against bad actors if part #2 of its order is not reconsidered.

22. The Court's order opens the door to subdividers subverting state consumer protection requirements by lobbying municipal boards for relief from infrastructural promises made to the Bureau and to the early homebuyers as a condition of securing registration or exemption under RSA 356-A.

23. Conceivably, a situation could arise where a subdivider receives exemption from the Bureau based on a development and marketing plan that promises that the road servicing the subdivision will have numerous street lights to promote safety. The subdivider may have several homebuyers purchase lots or homes in the subdivision based on that promise of increased lighting. Under the Court's current order, the subdivider could later approach the town board and complain that the costs of installing the street lights are too high and, despite a local regulation requiring street lights, lobby the board to modify or waive the streetlight requirement. If the board agrees and the street light requirement is vacated, then the Bureau will have no ability to

enforce the streetlight provision as a matter of consumer protection for the early buyers who purchased homes or lots based on the streetlight promise.

24. Such a result would gravely damage the consumer protection goals and functions of RSA 356-A by allowing developers to use an end-around of the Bureau's exclusive consumer protection authority by petitioning local boards to amend infrastructure promises.

MISAPPREHENSION OF FUNDAMENTAL FAIRNESS

25. Respectfully, the Court misapprehended the fundamental unfairness that would be inflicted on the original seven home buyers if the Petitioner, as successor subdivider, is not required to complete the improvements to Old Beaver Road.

26. Under the Act, successor subdividers are considered to stand in the same relation to the subdivided lands as the previous subdivider. As such, the successor subdivider stands in the shoes of the prior subdivider and should be required to fulfill the promises made by the original subdivider in order to fairly protect the investments made by the home buyers and because the successor subdivider stands to gain all of the benefits of selling lots or homes in the subdivision.

27. 112 Chestnut, the first subdivider, sold homes to the seven original home buyers on the promise that a road would be built to town specifications.

28. The Petitioner, as successor subdivider, should be bound to uphold that promise as San-Ken stands in the same relation to the early homebuyers as 112 did.

29. It would be unjust for the Petitioner to claim that he had no way of knowing about the prior conditions. The Petitioner is a sophisticated real estate business with talented and knowledgeable attorneys on retainer. A simple inquiry to the Bureau could have readily

uncovered the conditions by which the prior subdivider received exemption from the Bureau. The Petitioner's failure to make such an inquiry should not be held against the home buyers.

30. Put simply, the purpose of the RSA 356-A is to protect subdivision home buyers by ensuring that promises made are promises kept.

31. In this case, the home buyers were promised a certain quality of road. The successor subdivider should be held to keep that promise.

32. It would be fundamentally unfair to allow the Petitioner to avoid fulfilling the promises made to the original home buyers.

WHEREFORE, the State of New Hampshire respectfully requests that this Honorable Court:

(A) Reverse part #2 of the Court's June 21, 2016 order relating to the road improvements of Old Beaver Road;

(B) Order the Petitioner to complete the improvements to Old Beaver Road as required by the parties' May 1, 2015 Escrow Agreement; and

(B) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorney,

JOSEPH A. FOSTER
ATTORNEY GENERAL

Date: July 5, 2016

John W. Garrigan
NH Bar #21001
Assistant Attorney General
Consumer Protection & Antitrust Bureau
33 Capitol Street
Concord, NH 03301-6397
(603) 271-1252
john.garrigan@doj.nh.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Reconsider was sent via email and first class mail to Michael A. Klass, Esq, counsel of record for the Petitioner, at Bernstein, Shur, Sawyer & Nelson, PA, PO Box 1120, Manchester, NH 03105.

Date: July 5, 2016

John W. Garrigan
Assistant Attorney General

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, ss
SOUTHERN DISTRICT

SUPERIOR COURT

Docket No. 226-2015-CV-00281

SAN-KEN HOMES, INC.,

v.

NEW HAMPSHIRE ATTORNEY GENERAL,
CONSUMER PROTECTION AND ANTITRUST BUREAU.

PETITIONER'S OBJECTION TO THE STATE'S MOTION FOR PARTIAL RECONSIDERATION

NOW COMES the above-captioned Petitioner, San-Ken Homes, Inc. ("San-Ken" or "Petitioner"), by and through counsel Bernstein, Shur, Sawyer & Nelson, P.A., and hereby objects to the Motion for Partial Reconsideration ("Motion") filed by the Office of the Attorney General, Consumer Protection and Antitrust Bureau ("Bureau"). In support of this objection, San-Ken states the following:

I. Introduction.

This matter concerns San-Ken's appeal of a conditional Certificate of Exemption issued by the Bureau, pursuant to RSA 356-A (the "Act"), and concerning nine lots within a sixteen-lot subdivision ("Subdivision") located in New Ipswich ("Town"). Generally stated, this case involves Petitioner's objection to the Bureau's determination that San-Ken is a successor subdivider who was required to register its nine lots under the Act. Petition further objects to the Bureau's conditional exemption which required San-Ken to make certain improvements to the Subdivision's road beyond what are required by the Town's Planning Board ("Planning Board"). By Order dated June 21, 2016 ("Order") this Court ruled, in part, that the condition of the Bureau

imposing those certain road specifications was unjust and unreasonable. Order at p. 10. In the Motion, the Bureau now seeks reconsideration of such ruling by this Court.

In support of the Motion, the Bureaus contends that (1) this Court misapprehended the Bureau's legal arguments, see Motion at pp. 2-4, (2) this Court misapprehended alleged future damages to consumer protection efforts, id. at pp. 4-5, and (3) that this Court misapprehended fundamental fairness. Id. at 5-6. In response to these arguments, San-Ken contends that the Motion should be denied without a hearing for the following reasons.

II. The Motion States No Points of Law or Facts that this Court has Overlooked or Misapprehended.

Rule 12(e) of the Superior Court Rules requires a Motion for Reconsideration to "state, with particular clarity, points of law or fact that the court has overlooked or misapprehended . . . ." A hearing on such motion is not permitted except by court order. Id. As an initial matter, the substance of two of the three arguments contained within the Motion were already presented to, considered, and ultimately rejected by this Court in the Order. The Bureau has already articulated its position that it has the jurisdiction to regulate subdivision infrastructure in the name of consumer protection as a result of RSA 356-A and its promulgated rules, including JUS 1304.07. See State's Memorandum of Law in Opposition to Petitioner's Appeal ("Bureau's Memo") at pp. 13-16. Likewise, the Bureau has already presented this Court with its argument that it would be fundamentally unfair to find in favor of the Petitioner. See, e.g., Bureau's Memo at ¶62 (alleging that it would be unfair to allow for the road exist as modified by the Planning Board); ¶75 (alleging unfairness to require residents to pay for future road improvements); ¶80 (arguing unfairness if San-Ken was not forced to fulfill alleged promises made by 112

Chestnut).[1] Thus, these arguments are simply re-statements of the Bureau's prior legal positions and provide no basis for reconsideration. Given that the Motion fails to state a point of law or a fact that this Court has overlooked or misapprehended, such arguments should be denied.

III. **The Bureau's Arguments that Were Raised for the First Time in the Motion for Reconsideration, But which were Readily Apparent from the Onset of this Case, Should be Ignored.**

As the second basis for the Motion, the Bureau contends that this Court misapprehended the alleged harmful effects of the Order. Motion at pp. 4-5. The Motion appears to be first instance that the Bureau has raised this argument, which ultimately flows from the Petitioner's position that the Bureau lacks jurisdiction to exact infrastructure demands in context of RSA 356-A. In other words, this argument speaks to a central issue in the case. Given that this argument has been readily apparent since before the Petitioner commenced the instant appeal, the Bureau should not be allowed to raise it by means of a motion for reconsideration. See Appeal of Vicky Morton, 158 N.H. 76, 79 (2008); see also Mountain Valley Mall Associates v. Municipality of Conway, 144 N.H. 642, 654-55 (2000).

Even if this issue was properly preserved by the Bureau, it should be dismissed on its merits. This case is not about subversion of RSA 356-A; rather, it is an instance where the Bureau has overreached its statutory jurisdiction. Moreover, the facts in this case are unique and not likely to open the floodgates as the Bureau suggests. In fact, it is difficult to envision how the issues raised in the Motion will impact the Bureau's lawful jurisdiction in any way. The Motion's hypotheticals in this respect are not relevant to this case and are premised on the faulty conclusion that the Bureau has jurisdiction over subdivision regulation.

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[1] The Motion does not contain citations to the Certified Record. San-Ken objects to the extent that the Motion alleges facts that are not cited to or that are not contained within the certified record before this Court.

On the other hand, should the Bureau be allowed to unilaterally expand its jurisdiction into the realm of local land use control, the implications would be significant and far-reaching. There is no hyperbole in stating that the Bureau's position seeks to turn an established area of law (as enacted by state statute) on its head. To subject developers, builders, financing institutions, and municipalities to a new and separate layer of regulatory control would be contrary to the plain language of the statute and would result in countless severe and unintended consequences. As such, the implications of the Order, as alleged by the Bureau, do not justify its reconsideration.

IV. The Bureau is not a Super Planning Board, and RSA 356-A Does Not Allow for so-called "Concurrent Jurisdiction" Over Subdivision Control.

Notwithstanding the above, Petitioner briefly responds to the substance of the Bureau's arguments. As noted, the Bureau first argues that this Court misapprehended its legal arguments, particularly with respect to the Bureau's alleged right to require additional infrastructure improvements beyond what is required by a local planning board. In support of this argument, the Bureau cites to JUS 1304.07 and claims that it has the authority to require additional subdivision improvements in the name of protecting purchasers. See Motion at 2-4. The Motion contains no citations to case law that supports the Bureau's contention that it has lawful jurisdiction over subdivision control. Moreover, the Bureau's position is belied by the plain language of the state statute that enables subdivision regulation, which clearly and unequivocally delegates subdivision control exclusively to the planning board of a municipality—not to the Office of the Attorney General. See RSA 674:35, II ("The planning board of a municipality shall have the authority to regulate the subdivision of land under the enactment procedures of RSA

675:6.").[2] See also RSA 674:42 (stating in relevant part that "[a]fter a planning board is granted platting jurisdiction by a municipality under RSA 674:35, ***the planning board's jurisdiction shall be exclusive, . . . All statutory control over plats or subdivisions of land granted by other statutes shall be given effect to the extent that they are in harmony with the provisions of this title. The planning board shall have all statutory control over plats or subdivisions of land.***") (emphasis added); see 15 P. Loughlin, New Hampshire Practice, Land Use Planning and Zoning § 26.03, at 461 (stating that "[o]nce jurisdiction has been granted to a planning board to approve or disapprove subdivisions, ***that jurisdiction is exclusive)*** (emphasis added). In light of the plain language of the enabling statute, the Bureau's argument alleging concurrent jurisdiction is proven false and should be denied.

V. Fairness Does Not Support the Bureau's Position.

Finally, the Bureau contends that fairness requires that the Petitioner be responsible for the road improvements that 112 Chestnut failed to provide. More specifically, the Bureau alleges that fairness to the original seven home buyers requires that San-Ken be held liable for the purported promises of 112 Chestnut. Motion at ¶ 28. However, to the extent that such neighbors entered into contracts with 112 Chestnut, the responsible party is 112 Chestnut—not San-Ken. Moreover, the Bureau's argument fails to acknowledge the fact that the Town discharged a portion of the bond that 112 Chestnut posted and allowed the remaining security to expire. See CR at 2, 5. Finally—and most importantly—the Bureau ignores the fact that the very neighbors that the Bureau now seeks to protect were involved in the underlying Subdivision amendment. Those neighbors expressed their concerns to the Planning Board and chose not the

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[2] RSA Chapter 674 is titled "Local Land Use Planning and Regulatory Powers." Sections 674:35 through 674:42 are grouped together under the sub-title "Regulation of Subdivision of Land."

appeal the Planning Board's decision that is substantively at issue in this case. In light of the above, Petitioner suggests that the Bureau's interpretation of the case fails to account for its full background and ignores the failure to appeal by any of the original buyers. Petitioner contends, in part, that fairness supports the reliance upon un-appealed local land use decisions.

IV. Conclusion.

In light of the above, the Motion fails to state any point of law or fact that this Court has overlooked or misapprehended. Thus, Petitioner respectfully requests that this Court deny the Bureau's Motion for Reconsideration.

WHEREFORE, Petitioner prays that this Honorable Court:

1. Deny the Bureau's Motion for Partial Reconsideration, without a hearing;
2. Order that the Bureau release and return the road paving bond to San-Ken; and
3. Grant such other relief as the Court deems just and proper.

Respectfully submitted,
San-Ken Homes, Inc.
By its attorneys,
Bernstein, Shure, Sawyer & Nelson, P.A.

Michael A. Klass Esq., Bar# 18947
mklass@bernsteinshur.com
P.O. Box 1120
Manchester, NH 03105
603.623.8700

Dated: July 13, 2016

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Hillsborough Superior Court Southern District
30 Spring Street
Nashua NH 03060

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

Michael A. Klass, ESQ
Bernstein Shur Sawyer & Nelson PA
670 North Commercial Street Suite 108
PO Box 1120
Manchester NH 03105-1120

Case Name: **San-Ken Homes Inc. v. New Hampshire Attorney General, Consumer Protection and Antitrust Bureau**
Case Number: **226-2015-CV-00281**

Enclosed please find a copy of the court's order of October 14, 2016 relative to:

COURT ORDER ON MOTION FOR PARTIAL RECONSIDERATION

October 18, 2016

Marshall A. Buttrick
Clerk of Court

(293)

C: John W. Garrigan, ESQ

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT
226-2015-CV-0281

San-Ken Homes, Inc.

v.

New Hampshire Attorney General,
Consumer Protection and Antitrust Bureau

ORDER

The plaintiff, San-Ken Homes, Inc. ("San-Ken"), on May 29, 2015, appealed an order of the New Hampshire Attorney General, Consumer Protection and Antitrust Bureau ("Bureau"), pursuant to RSA 356-A:14, asserting that the Bureau lacked authority to require San-Ken to be registered under RSA 356-A, the Land Sales Full Disclosure Act ("Act") and, specifically, lacked authority to require San-Ken to make improvements to Old Beaver Road in the Oakwood Common subdivision in New Ipswich, New Hampshire. After a bench trial on March 3, 2016, the Court found the Bureau had the authority to require San-Ken to be registered as a successor subdivider but did not have the authority to require San-Ken to complete the road to the specifications initially required by the Town of New Ipswich as part of its 2006 subdivision approval.[1] See Order dated June 21, 2016.

Positions of the Parties

The Bureau, on July 5, 2016, moved for partial reconsideration, arguing the Court misconstrued the Bureau's argument regarding the purpose and authority of the Bureau

[1] In 2014, the New Ipswich Planning Board modified the road specifications imposed on the original developer, substituting lesser construction and paving requirements for San-Ken.

to require San-Ken to meet the initial road specifications imposed by the Planning Board. San-Ken objected, on July 14, 2016. The Court heard arguments of the parties on August 9, 2016. After consideration, the Court finds and rules as follows.

The Bureau argues the Court apparently misunderstood its position when it concluded the Bureau sought to impose its judgment regarding road completion, despite the Planning Board's 2014 vote to modify the road specifications. The Bureau asserts its position is not to substitute its own standards for road construction or impose its views in contravention of the municipality's vote. Rather, it seeks to enforce the consumer protection laws related to subdivision of lands pursuant to RSA 356-A and protect purchasers who relied on the approved subdivision documents. The Bureau argues it has an obligation to enforce the original subdivision documents' commitments, on which those initial purchasers relied, even if the Planning Board no longer chooses to impose that level of road construction.

The Bureau argues the exclusive jurisdiction in municipalities to regulate subdivisions, pursuant to RSA 674:35 and 674:36, and the exclusive jurisdiction in the Bureau to enforce the consumer protection provisions of the Land Sales Full Disclosure Act, RSA 356-A, "taken together . . . create a scheme of concurrent regulatory jurisdiction over subdivisions in this state." Motion for Partial Reconsideration at 14. Ultimately, according to the Bureau, the Court's order is unfair to purchasers who relied on the approved subdivision documents. Further, the Court's order will allow developers to subvert consumer protections by promising certain amenities to the Bureau during the regulatory process, as well as early purchasers, and then seeking modification from municipal authorities to escape from those early promises.

San-Ken disagrees, arguing the Court rightly rejected the Bureau's efforts to substitute its judgement for that of the municipality and impose terms the municipality no longer mandated. Because there was no fact or law that had been overlooked or misapprehended, the motion to partially reconsider should be denied. Further, the Bureau should not be allowed to argue any damage the decision might have on the Bureau's ability to enforce consumer protections or to protect purchasers from unscrupulous developers, as those arguments could have been, but were not, raised previously.

San-Ken reiterates its position that the Bureau has overreached in its authority and its concept of "concurrent jurisdiction" is not supported by law, specifically RSA 674:35,II and 674:42. Finally, as to fairness, San-Ken argues it is not responsible for the failures of the initial developer and when the Planning Board agreed to modify the road conditions in 2014, the purchasers filed no appeal despite being fully aware of the decision.

Analysis

"A motion for reconsideration is designed to bring to the trial court's attention points of law or fact that the Court has overlooked or misapprehended." Farris v. Daigle, 139 N.H. 453, 455 (1995) (citing Super. Ct. R. 59-A (1)); see also Webster v. Town of Candia, 146 N.H. 430, 444 (2001). Whether to entertain a motion for reconsideration is in the sound discretion of the trial court. See Webster, 146 N.H at 444 ("We will uphold a trial court's decision on a motion for reconsideration absent an abuse of discretion."); Smith v. Shepard, 144 N.H. 262, 265 (1999) (explaining that "the trial court had the discretion to [ ] not consider the issue").

The Court did not fully appreciate the Bureau's arguments on the law and thus GRANTS partial reconsideration. The bulk of the June 21, 2016, order addressed San-Ken's regulatory status as successor subdivider and the appropriate standard of review under this unusual set of circumstances. The Court has now considered more fully the Bureau's arguments regarding its authority to enforce the subdivision documents under which the original 7 purchasers bought lots. It is undisputed that those 7 purchasers have not received the level of road construction and paving they were promised in the original subdivision documents, for which one purchaser estimates they paid approximately $20,000 per lot.

Upon reconsideration, the Court finds the Bureau is within its authority under RSA 356-A to require the successor subdivider San-Ken to complete Old Beaver Road to the original specifications, even if the municipality no longer cares to impose such standards. Its duty to enforce the consumer protection provisions under the approved Declaration of Subdivision is independent of the municipality's decision to modify the road construction and paving requirements.

If there were no purchasers from the initial developer, the analysis might be different. In this case, however, 7 of the 16 lots were sold under clear provisions regarding the level of construction and paving being conveyed, representing a significant value. The Court agrees that its June 21, 2016, order would be unfair to those purchasers and could undermine the authority of the Bureau to enforce consumer protections in future cases. While it is true that the purchasers could have, and perhaps should have, appealed the Planning Board's 2014 modification, that failure to appeal does not obviate the authority of the Bureau to enforce the subdivision commitments

made during the regulatory process.

Finally, the Court disagrees with San-Ken's statement that the Bureau failed to raise the potential for its diminished capacity to protect consumers if the Court did not hold San-Ken to the 2006 road requirements. Although the phrasing was not entirely similar, the issue was identified during trial.

Because the Court did not fully understand the Bureau's arguments on the law, the motion for partial reconsideration is GRANTED. San-Ken, as successor subdivider, shall complete the road to the 2006 specifications, as set forth in the approved Declaration of Subdivision.

So ordered.

October 14, 2016

AMY L. IGNATIUS
Presiding Justice

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Hillsborough Superior Court Southern District
30 Spring Street
Nashua NH 03060

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

File Copy

Case Name: **San-Ken Homes Inc. v. New Hampshire Attorney General, Consumer Protection and Antitrust Bureau**
Case Number: **226-2015-CV-00281**

Enclosed please find a copy of the court's order of December 09, 2016 relative to:

ORDER ON PLAINTIFF'S MOTION FOR RECONSIDERATION

December 09, 2016

Marshall A. Buttrick
Clerk of Court

(293)

C: Michael A. Klass, ESQ; John W. Garrigan, ESQ

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT
226-2015-CV-0281

San-Ken Homes, Inc.

v.

New Hampshire Attorney General,
Consumer Protection and Antitrust Bureau

ORDER

The petitioner, San-Ken Homes, Inc. ("San-Ken") seeks reconsideration of the Court's October 14, 2016 order, for the limited purpose of clarifying the road improvements sought by the New Hampshire Attorney General in this case involving a successor subdivider of land in New Ipswich, New Hampshire.

The petitioner is correct in noting that the court mistakenly ordered that Old Beaver Road be brought to the 2006 Road Specifications. In fact the court intended to require road improvements to meet the Escrow Agreement specifications set forth in the trial record.

The court therefore GRANTS the petitioner's motion to reconsider for the purpose of this clarification. In all other respects, the October 14, 2016 order remains unchanged.

So ordered.

December 9, 2016

AMY L. IGNATIUS
Presiding Justice