

# Analysis of the Pease Development Authority Compliance with State Law

\* Updated May 2, 2024

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## Overview

- 1) The Pease Development Authority [**PDA**], Division of Ports and Harbors [**DPH**] operates and manages the Rye Harbor Marine Facility [**RHMF**] in the Town of Rye New Hampshire. This analysis focuses collectively upon two private business owners located at the facility:

Rye Harbor Lobster Pound LLC is a private business operated and managed by Nathan Hanscom at 1875 Ocean Blvd Unit #5, Rye, NH, 03870, USA. Mr Hanscom is an 85 year old veteran and owner of the building situated on a plot of land known as Right of Entry [**RoE**] #5 including the building's contents, equipment and utility connections.

Rye Harbor Lobster LLC is a private business operated and managed by Sylvia Cheever at 1870 Ocean Blvd, Unit #6, Rye, NH, 03870, USA. She is Mr. Hanscom's daughter and owner of the building situated on a plot of land known as RoE #6 including the building's contents, equipment and utility connections.

- 2) For the purpose of this analysis, these two businesses will be collectively referred to herein as Rye Harbor Lobster [**RHL**].

## State Government and its Agencies

- 3) *"State agencies work under the direction of the Governor. The heads of the agencies are appointed by the Governor and Council but because of their terms of office, they may work under a different Governor and Council than the one that appointed them. The functions of the agencies are defined by the laws passed by*

*the legislature and by executive order of the Governor. The responsibilities of state agencies include public health and safety, education, cultural affairs, environmental protection and economic development. Agencies promulgate rules to assist them in carrying out their duties. The rules have the force of law."*

[See: [https://gc.nh.gov//rules/about\\_rules/listagencies.aspx](https://gc.nh.gov//rules/about_rules/listagencies.aspx)]

4) The "New Hampshire, Drafting And Procedure Manual, For Administrative Rules" is a 279 page document to help state agencies "promulgate rules". "The purpose of the New Hampshire Drafting and Procedure Manual for Administrative Rules is to set out in one understandable and usable document for state agencies all the requirements relative to administrative rule making and declaratory rulings under RSA 541-A, the Administrative Procedure Act, in order that agencies can know not only what the law requires but also how to comply with it."

### Creation of the Pease Development Authority

5) The former Pease United States Air Force Base, a former Strategic Air Command facility, was situated in the Town of Newington [60%], the City of Portsmouth [40%] and a small portion in the Town of Greenland. Military personnel began leaving the base in June 1990, and Pease AFB was officially closed on 03/31/1991. The retired air base was subsequently turned over to the State of New Hampshire.

6) As a result of the base closure, the state legislature passed RSA 12-G which "created a body politic and corporate of the state, to be known as the Pease development authority, to carry out the provisions of this chapter ... management of the authority shall be vested in a board of 7 directors" appointed pursuant to RSA 12-G:4. "The authority is hereby deemed to be a public instrumentality, and the exercise by the authority of the powers conferred by this chapter shall be deemed and held to be the performance of public and essential governmental functions of the state."

7) With this legislation, the PDA became a new organization as part of New Hampshire's Resource Protection and Development organization charged with managing and controlling a majority portion of the former airbase footprint, excluding 220 acres retained by the New Hampshire National Guard. Its purpose was to reuse the property as a civilian airport and commercial center and was essentially created in response to the local economic impact created by the base closure.

8) For the last twenty four years, PDA has administered what is now the 3,000 acre Pease International Tradeport and the 1,100 acre Great Bay National Wildlife Refuge formerly operated by United States Department of Fish and Wildlife. The Tradeport consists of an international airport, a golf course, office space, an industrial park and vacant land.

9) PDA Board of Directors [**BoD**], as a body politic and corporate of the state, and its governing body, acts as in compliance with RSA 91-A to discuss, deliberate and vote certain actions that lie within the statutory authority set forth by the legislature. The board operates as a collective decision-making body. An individual member of the board may act independently only if specifically authorized by the board.

10) The PDA Executive Director is subject to the direction and control of the board, and acts as the chief executive, administrative officer and secretary of the authority. The Executive Director has general and active supervision and direction over the day-to-day business and affairs of the authority and its officers and employees.

## Creation of the Division of Ports and Harbors Advisory Council

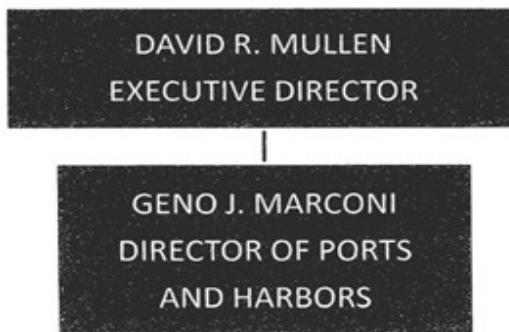
11) Rye Harbor became part of the Department of Natural and Cultural Resources, Division of Parks & Recreation in 1936 and operated in that department until 2001. Management of the harbor was transferred by the legislature pursuant to RSA 12-G:43 to the DPH, as a new division of the PDA.

12) The legislature also created the DPHs Advisory Council [**DPHAC**] pursuant to RSA 12-G:44, consisting of 8 members. Its Director reports to Executive Director.

13) Below is the April 2024 organization chart listed on the Secretary of State's Internet web site regarding the DPH Director pursuant to RSA 15-A, Financial Disclosure. [RE: <https://sos.nh.gov/administration/ethics/financial-interests-rsa-15-a-and-12-g/organizational-charts/>]

### New Hampshire Secretary of State

#### PEASE DEVELOPMENT AUTHORITY ORGANIZATION CHART- STATEMENT OF FINANCIAL INTEREST



14) The mission of the DPHAC is that it "*shall consult with and advise the division director with respect to the policy, programs, and goals of the division, the operation of the port, the selection of harbor masters and assistant harbor masters, and the procurement of services of a port terminal operating firm.*"

15) This is accomplished by proposing Administrative Rules [**rules**] pursuant to RSA 541-A: "*The division director shall present all rules proposed to be implemented by the authority under RSA 12-G:42, X to the council for consideration prior to filing a notice of proposed rule under RSA 541-A:6.*"

16) The rule making process is set forth in RSA 12-G:44, V: "*The council may propose rules to the authority for adoption under RSA 12-G:42, X. The authority shall adopt rules proposed by the council unless, within 15 days of their proposal, the authority, by 5 affirmative votes of the authority and after presenting a written reply to the council detailing the reasons for adopting the rule over the objections of the council.*"

17) While PDA has broad state agency rule making authority under RSA 12-G, the DPH is subject to the RSA 541-A rule making process pursuant to RSA 12-G:42, X. And, as a state agency, it must prepare rules as set forth in the "New Hampshire, Drafting And Procedure Manual, For Administrative Rules".

## Pease Development Authority - Policy and Procedure Manuals

18) PDA is without a strategic business plan [see: *04/20/23 PDA minutes, page 10*]. Without a strategic plan to measure long term success, decisions affecting long term planning are subject to change from meeting to meeting.

19) A RSA 91-A public records request was made on 01/31/2024 to the Chairman of the BoD: "*As I understand the response from Mr. Blenkinsop, all of the documents I requested [regarding the DPH] are set forth in 'within the minutes of the public meetings of the Board with supporting materials contained within each Board meeting agenda packet'. Presumably, there are no documents set forth in separate binders/books/files containing only policies, only zoning ordinances, only contract requirements, only standards, only methods & procedures, and the like.*"

20) PDA General Counsel responded by letter on 02/12/2024: "*The PDA Board has not enacted specific regulations, bylaws, or ordinance concerning the [DPH] properties referenced. ... the Board has approved various agreements allowing entities to operate on or at the referenced facilities pursuant to its authority to manage its properties under NH RSA 12-G. These agreements include such things as right of entry, concession agreements, and leases ... these agreements could be viewed as 'policies', 'Standards', 'Methods' or 'Procedures'.*

21) According, there are no separately published DPH policy, standards, methods or procedures manuals to best guide the non-paid BoD members, that change from time to time, in setting forth specific compliance measures and standards of operation to ensure uniformity and a fair application of terms and conditions in the BoD's on-going activities regarding creating, renewing and enforcing directives, contracts and agreements.

22) Instead, DPH agreements are set forth as ever changing individual and unique legal instruments in which time, manner and use conditions dynamically vary as a matter of record. Without a voted policy/standards manual, such circumstance fails to ensure that BoD decisions are uniformly applied, fair and just.

23) Regarding day-to-day administrative rules, the BoD has approved some 126 pages of rules: "*CHAPTER Pda 100 through 700 rules*" pursuant to RSA 541-A as recently as 08/17/2023. [[https://gencourt.state.nh.us/rules/state\\_agencies/pda.html](https://gencourt.state.nh.us/rules/state_agencies/pda.html)]

24) Discussed later herein is that General Counsel has stated correctly that the BoD has approved agreements "*include such things as right of entry, concession agreements*". However, none of the "*CHAPTER Pda 100 through 700 rules*" include references to either "*right of entry*" or "*concession*" agreements as required by RSA 541-A. As a result, such agreements cannot be enforced as set forth in RSA 541-A:22,I. This will be discussed later herein in more detail.

25) In summary, except for some of the DPH administrative rules that have been properly filed pursuant to RSA 541-A, measuring management success of the entire

DPH operation and ensuring that BoD decisions are fair, just and uniformly applied in BoD deliberations leaves some matters subjectively decided, and at times, inconsistent in application. DPH policies and baseline strategies, goals and objectives appear to change from meeting to meeting.

## RSA 91-A - Right To Know Law

26) The Pease Development Authority [PDA] is a state agency subject to RSA 91-A, the Right To Know law which states: "*Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussion and records of all public bodies, and their accountability to the people.*"

## PDA Right To Know Compliance

27) BoD motions are pre-packaged by the management before each meeting. Motions at times are absent of discussion and deliberation, Such circumstances suggests some level of ex parte decisions made before meetings.

28) PDA has posted BoD minutes for the last two years on its new Internet web site. However, such does not include related meeting agenda "*board packets*" which lend critical context, substance and transparency regarding the decision making process.

29) RSA 91-A digital public record documents are provided in a restricted PDF format which cannot be directly word searched with a standard PDF viewer. This format frustrates research of all RSA 91-A Right To Know provided documents.

30) As with agenda items that bear upon approval of agreements/contracts involving private business owners, some businesses are allowed collaborative discussions with the BoD, while other business owners, like RHL are routinely denied such access.

31) As an example, well prior to the BoD meeting of 06/15/2023, the Executive Director refused to grant RHL's requests to be placed on the BoD agenda to speak interactively with the board members when their draft concession agreement and two draft RoE agreements were discussed before such were finalized.

32) However, Aviation Avenue Group was allowed to speak interactively with the board members at that same meeting prior to a BoD vote on their revised concept plan.

33) During the 06/15/2023 discussion of RHL's draft version of their two RoE agreements and concession agreement, the Executive Director would only allow RHL to speak to the BoD in the public comment section of the meeting prior to the BoD taking up the matter. In short these draft agreements were not subject to negotiation, nor was an opportunity provided to correct errors in those agreements.

34) These agreements had a potential 5,000% higher cost requirement compared to the all prior years and more restrictive performance conditions. These agreements were still unsigned, in DRAFT form and not finalized by the Executive Director. Some opportunity should have made for RHL to speak to these matters.

- 35) Moreover, there were several remarks made by the Executive Director in that meeting that were untrue. RHL was not given an opportunity to rebut these erroneous statements.
- 36) Due process was further aggravated as a result of PDA not following the notice, public hearing and finalization process pursuant to RSA 541-A:3 through RSA 541-A:15 as it should have done for all DPH agreements that are predicated on what should be duly filed RSA 541-A rules. This rule issue will be discussed further herein.

### RSA 78-A - Tax On Meals And Rooms

- 37) RSA 78-A, Tax On Meals And Rooms, authorizes the Commissioner of the Department Of Revenue Administration the exclusive authority to administer a tax on meals defined as: *"any food or beverage, or both, including food products, prepared for human consumption and provided by a restaurant in such form as to be available for immediate consumption without further significant preparation ... The term 'meal' includes food or beverages sold on a 'take out' or 'to go' basis."*
- 38) Unlike the Commissioner of the Department of Revenue Administration, PDA has no taxing authority granted by the legislature, including requiring payment of a "fee" based on the sale of a "meal", whereby the nature of such PDA "fee" is materially and substantively same as a "meal" defined in RSA 78-A.

### The Difference Between a "Tax" and a "Fee"

- 39) A "Tax" is type of compulsory payment largely, or completely absent, of bearing direct relationship to a benefit received by the payer of the "tax", exemplified by New Hampshire's "Tax On Meals And Rooms".
- 40) A "Fee" is *"a charge required to be paid in return for a particular government service or program ... that benefits the payer in some manner different from the members of the general public not paying the fee."* [See: Burns V. Greenville County Council, June 30, 2021, Appellate Case No. 2018-002255, Supreme Court of South Carolina].
- 41) Discussed in more detail herein is PDA's concession fee of which one version is consistent with the definition of a "fee" at the other fitting the definition of "tax".

### RSA-541-A - Administrative Procedure Act

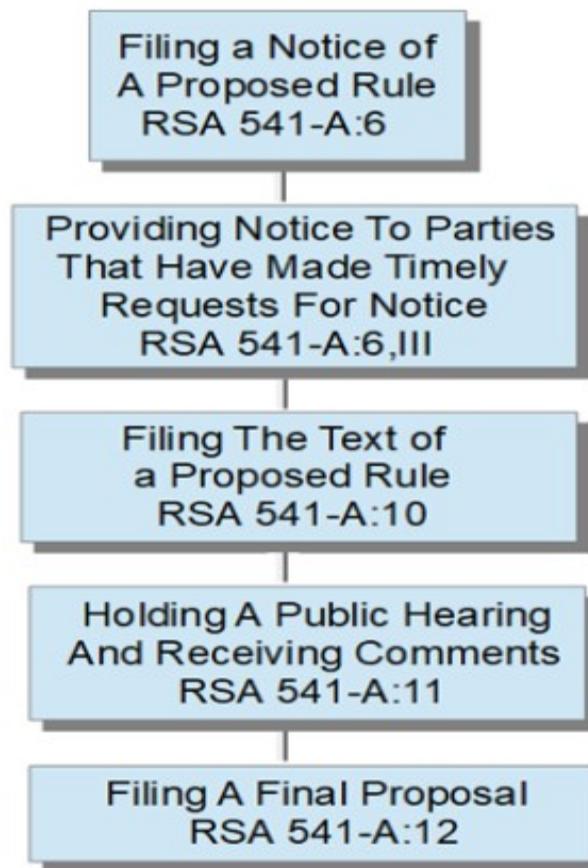
- 42) RSA 541-A, *"The Administrative Procedure Act"*, is a law that governs the process by which state agencies promulgate and adopt rules that must be filed by every state executive branch agency before they become operative [RSA 541-A:22].
- 43) The legislature has exempted some state agencies from certain parts of RSA 541-A which are found in RSA 541-A:21. *"Exceptions. I. Authority granted under the provisions of the following statutes shall be exempt from RSA 541-A".*
- 44) RSA 541-A:21, Section "(n)" applies: *"Except for rules adopted by the authority acting through the division of ports and harbors [DPH] under RSA 12-G:42, X, which shall be subject to the provisions of RSA 541-A:3 through RSA 541-A:15, RSA 12-G, relative to the Pease development authority."* PDA must comply with

RSA 541-A in its administration of the DPH.

45) RSA 541-A:22, I states: "*Validity of Rules. I. No agency rule, including a form, is valid or effective against any person or party, nor may it be enforced by the state for any purpose, until it has been filed as required in this chapter and has not expired.*".

46) Illustrated below is the proper RSA 541-A:3 through RSA 541-A:15 due process and notice rule making process as it applies to any proposal to add, change or delete a DPH Administrative Rule:

### Procedure for Adoption of RSA 541-A Rules



### Latest PDA Update of RSA 541-A Rules

47) PDA has participated in the DPH RSA 541-A rule making process for decades. A final vote to approve updated latest version RSA 541-A PDA rules presented by the Director of the DPH were to be voted on by the BoD on 06/15/2023.

48) It was at the meeting that the Board discussed the matter of requiring the RHL to arrange for police details to direct traffic and pay for such: "*Blenkinsop [General Counsel] read the condition from the April meeting, "Provision, at the expense of the Right of Entry holder, of a police detail during hours of operation on Saturdays, Sundays, and holidays, as determined necessary by DPH and scheduled in*

*consultation and coordination with DPH staff, subject to further review by PDA Board at its June and August meetings".*

- 49) There was no BoD discussion, especially by the DPH Division Director who implementing this new traffic enforcement proposal which would appear to trigger multiple new PDA rule proposals to the DPH Advisory Council for their consideration and action pursuant to RSA 541-A:3 through RSA 541-A:15 prior to PDA voting to implement such new traffic enforcement proposal.
- 50) This is a strong indication that PDA's legal counsel, board members, and remarkably by management, the lack of a basic understanding of their respective authorized powers and duties, and limitations thereof, in proposing to implement new DPH rules without compliance with the due process and public notice requirements of RSA 541-A:3 through RSA 541-A:15.
- 51) The approval of these new rules was deferred: "*Director Levesque moved the motion and Director Fournier seconded that item XI.B.1. regarding PDA rules be postponed to the next PDA Board meeting which is August 17, 2023.*"
- 52) On 08/17/2023, a long discussion between a Board member and the DPH Division Director centered on rules and how they were administered if a specific fee was not included. Distilling the discussion [*BoD minutes, page 12*], the DPH Division Director would not allow use of the RHMF in certain cases, but claimed discretion in certain other cases. A reading of RSA 541-A:22 appears to prohibit such discretion.
- 53) The objective of RSA 541-A is that agency administrative rules should reasonably contain all anticipated circumstances and should be updated as circumstances change by taking the matter to the DPH Advisory Council for resolution.
- 54) It appears that a RSA 541-A compliance training course should be made available to the PDA and training mandated where required.

### Due Process Rights Denied

- 55) There is no DPH rule filed regarding RoEs pursuant to RSA 541-A. Specifically, the DPH has no published policy or state agency administrative rules in place regarding RoE matters such as: fees, concessions, ownership, creation, transfers, modification, planning, penalties, enforcement and the like.
- 56) Pursuant to RSA 541-A:22, I, DPH rules must include RoEs before they are implemented. When PDA went ahead and implemented RoE related "fees", the PDA deprived interested parties, especially the RHL, of their constitutional rights to:
  - a. Due process and notice requirements [RSA 541-A:3 & 6];
  - b. Public hearings for interested parties to submit comments [RSA 541-A:11];
  - c. Two tier open meeting approval process as a check and balance [DPH & PDA];
  - d. Providing a detailed fiscal impact statement [RSA 541-A:5];
  - e. Rules may not violate the NH constitution [RSA 541-A:6];
  - f. Compliance with state and federal law [541-A:3-a];
  - g. Adopting and filing a final rule under [541-A:14].

- 57) Noteworthy are the BoD 06/15/2023 meeting minutes, "Public Comment" which paraphrased one comment: "*Pda Admin. Rules 600 does not reference the ROE or Concession fees or its update before the Board*" and "*The missing ROE and Concession Agreement fees have denied various parties in public meetings their due process rights pertaining to to Rye Harbor Marine facility fees*".
- 58) Later in the meeting, General Counsel spoke: "*Blenkinsop stated the PDA Board is well within its right under state law to issue the ROEs and Concession Agreement under the terms the Board deems appropriate.*" However, Counsel's statement was not entirely true. The PDA BoD is broadly empowered to make rules governing PDA operations. But not for rules applying to the DPH. Those rules must be promulgated pursuant to RSA 541-A:3 through RSA 541-A:15. Based on the nature of the DPH rule, filings may end up in different sections of the entire "*Pda 100 through 700*" rules filing, not just the "*Pda 600*" section.

### Is the DPH "Concession Fee" a "Meals Tax"?

- 59) At the 03/16/2023 PDA BoD meeting, "*Deputy Director and General Counsel Anthony Blenkinsop stated for clarity that a motion was made on the PDA rules which was seconded; the discussion has been on the report and draft agreements (Rye Harbor and draft ROE & Concession Agreements [CA])*".
- 60) There was an affirmative acknowledgment at that meeting that PDA rules do not address ROEs & CAs: "*Blenkinsop agreed but wanted to make sure the Board understood the PDA rules does not contain the ROE & CA documentation, they are separate matters.*"
- 61) He did not explain what "separate matters" meant or what happens when "*PDA rules do not contain the ROE & CA documentation*". There is no DPH RSA 541-A rule filed regarding a concession fee. That has been confirmed by the PDA General Counsel in a 04/18/2024 letter responding to a 04/09/2024 RSA 91-A Right to Know request. Thus, these proposed DPH RHMF rules did not go through the due process and a public notice requirements pursuant to RSA 541-A:3 through RSA 541-A:15 and cannot be legally enforced as set forth in RSA 541-A:22,I.
- 62) The Executive Director stated many times outside of BoD meetings that "*the BoD had little appetite to negotiate these [RHL] agreements*" or words to that effect. Searching BoD minutes, no such vote of the board is of record.
- 63) There were several draft versions of the RHL agreements set forth by the Executive Director beginning in March 2023. None were subject to negotiation. All were changed unilaterally by the Executive Director when objections to errors in them were identified by RHL and several changes were factually inaccurate.
- 64) In those new agreements beginning in March 2023, and still in DRAFT form on 05/11/2023, the Executive Director had created a new DPH contract element called a RoE "concession fee" which would presumably impose a cost on all DPH RoE agreements in the amount of "*10% of its gross revenues, excluding only sales tax and gratuities*" for only those RoEs selling "*prepared food and beverage items*".
- 65) A "concession fee" is broadly defined as: "*a payment made by the privilege holder in exchange for the permission to operate a service according to the guidelines of*

*an agreement.*" Some twenty or more businesses operate at the RHMF, thus may be all candidates to pay a fee as a shared contribution to fund the RHMF. While all RHMF businesses sell or market something of value, only food sellers were singled out to pay the new and substantial concession fee. RoE fees remained constant at \$1K.

- 66) RHL in the past operated at the RHMF for more than a decade paying only two \$1K RoE fees per year, one for each business, as was done for all of the other RoEs. This new concession fee was initially projected to be in the order of a \$50K annual fee, an increase of 5,000%.
- 67) As set forth by the management and represented to the BoD, all food seller RoEs would be charged a newly created DPH concession fee as a "*right and privilege to sell prepared food and beverage items.*" Only two of six DPH RoEs were actually assessed a food service concession fee in 2023.
- 68) The "prepared food and beverage items" would be "*Hamburgers, hot dogs, sandwiches, lobster roll, prepared shellfish, salads, mac and cheese, chowders/soups, packaged snacks, sodas, juices, coffee, tea and breakfast items.*"
- 69) The Commissioner of the "*Tax On Meals And Rooms*" is exclusively authorized to administer a state meals tax.
- 70) The basis of this new concession "fee" is substantively and materially of the same construct as the New Hampshire "*Tax On Meals*". That "tax" falls under the exclusive domain of RSA 78-A, "*Tax On Meals And Rooms*" and its commissioner.
- 71) The legislature has granted no taxing authority to the PDA. Thus PDA's collection of its so-called concession fee, substantially an unauthorized "tax", would have no application in law as applied to all affected DPH RoEs.
- 72) Moreover, RSA 541-A:3-b requires that: "*No agency may propose or adopt a rule under RSA 541-A:3 ... that incorporates by reference any code, rule, or document from another state government without specific authority in the authorizing legislation or specific legislative approval for such a rule.*"
- 73) Again, applying RSA 541-A:3-b, the BoD would not be authorized to impose a duplicate meals tax masquerading as a concession fee on the same food items set forth in RSA 78-A, "*Tax On Meals And Rooms*".
- 74) Accordingly, PDA would be prohibited from affecting a second meals tax renamed a concession fee on any RoE.

### Unfair and Unjust Fees

- 75) The RoE fee is basically an annual rental fee for the use of a small plot of DPH land. Each RoE had been uniformly assessed an annual RoE fee of \$1K for decades.
- 76) There are no DPH RSA 541-A rules filed that govern RoE fees or time, use and manner conditional requirements as there is for other RHMF activities such as: parking, moorings, dockings, pier use, pilotage, licensing, forms, applications, reports, storage, penalties, wait lists, enforcement, appeals, etc..
- 77) RHL has invested about \$150K in its RHMF operation manifest as buildings,

equipment and utilities. The DPH only provides a plot of land for RHL to use seasonally.

- 78) The BoD forced CAs on both RHL businesses. One is a restaurant operation, Rye Harbor Lobster LLC, serving "*prepared food and beverage items*" on a "*take Out*" basis. The other, Rye Harbor Lobster Pound LLC, is a lobster pound operation selling raw lobster and raw shellfish.
- 79) Even though both RHL RoEs are owned by two different LLCs as filed with the Secretary of State, the Executive Director has refused to recognize their legal status and combined the two RoEs as owned by "*Rye Harbor Lobster Pound LLC*".
- 80) The Executive Director insisted that RHL is one operation and erroneously stated that these two businesses were owned by the same person. He then forced a RoE fee and a "*10% of gross revenues*" concession fee on each business in June 2023 even though only one sold "*prepared food and beverage items*" on a "*take Out*" basis.
- 81) Rye Harborside located at the RHMF sells "*prepared food and beverage items*." The Executive Director forced a "*10% of gross revenues*" CA on this business.
- 82) Granite State Whale Watch, Inc. [GSWW] owns and operates both an estimated half million dollar harbor touring business and the Rye Harborside restaurant. The Executive Director did NOT combine these two GSWW owned businesses as was done with RHL. Only Rye Harborside was forced into a CA.
- 83) GSWW sells "*prepared food and beverage items*" and alcohol on its boat, but was not forced into a CA.
- 84) Rye Harbor Lobster Pound LLC does not sell "*prepared food and beverage items*", but was forced into a CA. However, two DPH Hampton Harbor lobster pounds that do sell "*prepared food and beverage items*" were not forced into a CA.
- 85) Grill 28 is a Pease Tradeport food service vendor and pays a "*10% of gross revenues*" concession fee for its Tradeport based food service operation. The PDA provides infrastructure and grounds. Thus, such fee is a fair quid pro quo arrangement: Grill 28 pays a "fee" and receives substantial benefit.
- 86) Great Circle Catering LLC [GCC] is another Pease Tradeport food service vendor. PDA provides that business with all of their facilities: floor space, equipment, security and the like. Accordingly, their "*17% of gross revenues*" concession fee is also a fair quid pro quo circumstance paying a "fee" and receiving a substantial offsetting financial benefit.
- 87) Grill 28 and GCC paid a concession fee related to benefit granted by the PDA with use of PDA facilities while RHL was unfairly treated because RHL provided all of their facilities and equipment and was additionally required to pay a concession fee.
- 88) The GSWW and two DPH Hampton Harbor businesses completely escaping a "*10% of gross revenues*" Concession Agreement which clearly illustrates a gross lack of fairness in the application of concession fees by the BoD.
- 89) In summary, without compliance with the RSA 541-A rules process, PDA has arbitrarily imposed concession fees on some DPH RoEs without uniformly and fairly

reflecting financial cost v. benefit impacts regarding all DPH RoEs. Moreover, the concession fee is a “carve-out” fee assessed only to food service operations. Other RoEs have a substantial impact of DPH operations with regard traffic, parking, trash disposal and operations, but merely pay only a \$1K RoE fee.

## Unsolved DPH Parking Problem

- 90) Critical to all take out businesses is adequate parking. Up until 2021, there were twelve 30 minute free parking spaces diagonally oriented located along the main entrance driveway and directly adjacent to eight of the nine RoEs at the RHMF. These spaces served short term customers of the facility well for scores of years.
- 91) There are nine DPH RoE buildings located at the RHMF which existed long before PDA took over control of the DPH in 2001. All of them for decades were provided a small plot of land by the DPH. The RoE business owners provided the building and all of the equipment needed to operate each of the nine private businesses. Thus, this arrangement is vastly different from the RoE businesses located at the PDA Tradeport where the PDA provides the land and buildings to these concessionaires.
- 92) The RHMF RoEs are all related to the fishing industry in some capacity. Only two sell fish related “*prepared food and beverage items*” on a “*take Out*” basis. Thus, RHMF vehicular traffic occurs largely at two different times and the rest are related to fishing and tourism. The fishing and tourism businesses typically are active in the morning and later in the afternoon when boats sail and then return to the harbor. The food sellers largely do business midday. For decades, the RHMF accommodated these two different traffic streams with \$5 all day parking for the fishing and tourism businesses and twelve 30 minute free parking spaces located along the entrance driveway directly adjacent to the RoEs to pick up food orders and leave.
- 93) During the China virus pandemic, most restaurants and tourism related businesses were closed. This created a large demand for take out food. As a result, the RHMF saw unprecedented traffic seeking take out food offered by the facility's two food vendors. The port was overwhelmed with these park visitors. This circumstance triggered a renewed effort to solve the decades old traffic problem at the facility due to its poorly designed two way driveway and unpaved parking areas.
- 94) The most critical requirement for the success of a food take out business is a having a good supply of short term parking. Reducing short term parking reduces the customer base and can reduce the probability of the business to stay in business.
- 95) In 2021, PDA management changed the use of the long existing twelve 30 minute free parking spaces. Prior to this time, these spaces were available to all port visitors. The new rule, absent of due process and a public notice requirement pursuant to RSA 541-A, was that each RoE was assigned one free 30 minute free parking space even though several RoEs routinely needed little or no free parking.
- 96) During midday most of the ten remaining 30 minute free parking spaces were unoccupied. This new unit-based restriction required RHL customers who came to the harbor and found the two 30 minute parking spaces occupied, ended up paying a \$5 all day parking fee just to pick up their take out orders. As a result, RHL either lost customers or reimbursed their customers for the \$5 all day parking. This circumstance created a poor customer experience for visitors of this state owned

facility, presumably there for every resident and visitor of the state to enjoy.

- 97) This decision also had an impact on traffic congestion. Some RHL customers would briefly drop off a party to pick up and pay for their order, drive away, turn around at the gatehouse and then return to stop once again to pick their party carrying the food order. In busy times, this two stop cycle, sometimes a three stop cycle, unnecessarily interrupted a smooth traffic flow because they were prohibited from parking in the nearby empty 30 minute free parking spaces reserved to other RoEs.
- 98) Some RHL customers, after briefly dropping off a party to pick up and pay for their order, would continue on to the back driveway accessing Harbor Road, continue on to Ocean Boulevard, then later re-enter RHMF's Ocean Boulevard entrance driveway to pick up their party. Again, this unnecessarily interrupted a smooth traffic flow because they were unable to park in a nearby empty 30 minute free parking space now reserved to other RoEs, but were not using them.
- 99) This parking space rationing also impacted parking enforcement because some RHL customers parked in an empty RoE space designated to another RoE. Enforcement resources were saddled with a new responsibility to deal with these customers as parking violators. This wasted time was a self inflicted traffic enforcement problem created solely by unnecessarily rationing 30 minute free parking spaces.
- 100) By the end of the 2021 season it was fairly obvious that rationing the twelve 30 minute free parking spaces resulted in:
  - (a) traffic enforcement personnel spending more time dealing with customers parked in the wrong space;
  - (b) RHL losing customers and/or lost revenues reimbursing customers for the unnecessary \$5 all day parking fees; and
  - (c) traffic flows were more frequently interrupted by vehicles momentarily stopping in the entrance driveway.
- 101) While it was obvious that rationing parking spaces made the traffic situation worse, the DPH Director took no substantive action in resolving the problem during the summer of 2021 and instead blamed RHL for this new traffic congestion problem.
- 102) On 11/18/2021, the BoD approved a \$12K expenditure to hire Appledore Marine Engineering, LLC [**AME**] of Portsmouth New Hampshire, consistent with their 10/12/2021 proposal, to:
  - (a) *"interview stakeholders to obtain input for consideration";*
  - (b) *"develop a base plan of the existing drive and parking lot";*
  - (c) *"Review and analyze ... to determine the volume of traffic ... during peak season";*
  - (d) *"develop a concept plan identifying potential improvements to traffic flow and parking".*
- 103) AME published a report on 01/24/2021 and revised it a year later on 02/10/2022. Both reports showed 4 driveway configuration options to solve the traffic problem:
  - (a) Options #1 and #3 retained the twelve 30 minute free parking spaces along the left side of the entrance driveway. The existing driveway would be one way

inward from Ocean Boulevard. A new exit driveway in the main parking lot to Ocean Boulevard would provide a good one way flow of traffic out to Ocean Boulevard. As a result, these configurations would avoid the problem of trailerd vehicles needing to turn around in the main parking lot, avoided numerous traffic points of conflict along Ocean Boulevard and avoided the typical traffic snarling created by vehicles turning around at the end of the entrance driveway opposite the parking management kiosk.

(b) Options #2 and #4 retaining the two way driveway entrance and eliminated all of twelve 30 minute free parking spaces along the driveway. These options sustained the problem of trailerd vehicles turning around in the main parking lot and at the end of the entrance driveway opposite the parking management kiosk creating congested traffic flows. These plans also had more undesirable traffic points of conflict which could contribute to traffic collisions in the driveway and along Ocean Boulevard compared to Options #1 and #3.

- 104) Volume of traffic reports were provided in November 2021 by the DPH staff. However, there were no details related to the use of the twelve 30 minute free parking spaces along the entrance driveway.
- 105) The AME study made no note of the need to implement a fire lane. None of the four options recommended a fire lane. No fire professionals provided written requests to create a new RHMF fire lane and remove the decades old twelve 30 minute free parking spaces along the left side of the entrance driveway. While flooding is a persistent RHMF problem, fires are rare, buildings are small and only one story.
- 106) A 03/31/2022 email sent from PDA Engineering Director to the DPH Director containing a graphic of the RHMF driveway stated: "*the most recent plan developed for the driveway at Rye Harbor*" oddly stated that "*the existing fire lane is converted to a loading zone*". However, pictured were the twelve 30 minute free parking spaces converted to a fire lane. Again, if the due process and a public notice requirements pursuant to RSA 541-A were followed, replacing the twelve 30 minute free parking spaces along the left side of the entrance driveway with an unneeded fire lane would have been a key part of the decision process.
- 107) The DPH Director prepared a new parking and driveway plan absent of the comprehensive details included in the \$12K AME study relating to four reconfiguration recommendations and its detailed graphics. The Director's plan, without using AME's graphics, re-purposed the driveway by removing the decades old twelve 30 minute free parking spaces and replacing them with a restricted ten foot wide fire lane along the entrance driveway.
- 108) That proposal also lacked detail and metrics explaining how this new plan would solve the traffic and driveway problem. By removing all of the driveway's the twelve 30 minute free parking spaces, such would only worsen the RHMF's traffic and parking problems and make handicapped access to all but one RoE more hazardous.
- 109) The DPH Director formally submitted a plan on 04/21/2023 to the BoD as an urgent matter requiring the BoD to waive the Request For Quote [**RFP**] sealed bid process and authorize a \$37K no-bid contract to James Jones dba Jones Snowplowing Service to reconstruct the driveway configuration without any reference to AME's

\$12K report. The James Jones quote was a handwritten undated document.

- 110) There is no evidence of record that James Jones snow plowing service was a well experienced and widely known paving contractor as was Pike Industries that provided a dated, detailed and professionally prepared quote.
- 111) The BoD waived the RFP process and approved the plan which required a super majority vote for a no-bid contract. The proposal made mention of marking out a fire lane on the entrance driveway and eliminating all of the twelve 30 minute free parking spaces along the left side of the entrance driveway.
- 112) There was no discussion regarding eliminating the 30 minute free parking, nor was there a report from any fire department identifying a need for a fire lane, nor was there a statement that this undertaking would solve the RHMF parking problem.
- 113) There was no written contract on record signed by James Jones, nor was a bond ensuring the integrity of the work.
- 114) After the work was completed, the Port Director allocated only nine of the former twelve free parking spaces in the main parking lot for use by the nine RoE units. Each RoE would be allocated one space even though several RoEs rarely if ever need a free parking space for customers.
- 115) It was clear prior to the 2023 summer season that the Rye Harbor Marine Facility still needed an effective strategic driveway and parking plan to resolve its long history of traffic problems.

### The New 10 Foot Rule

- 116) DPH building permits need to comply with the International Building code and uses must comply with applicable zoning ordinances and land use controls.
- 117) At some point in early 2023, Executive Director, absent of due process and the public notice requirements of RSA 541-A, created a new retroactive land use rule limiting the storage space in back of all RoEs. There could be no storage of equipment greater than 10 feet measured from the back of each RoE building.
- 118) There was no justification provided for the new "*10 foot rule*", nor is one available as a result of two recent public records requests, except verbal confirmation by the Executive Director that that one of the seven members of the BoD wanted this new rule. There is no RSA 91-A compliant BoD vote to implement this new rule on record.
- 119) For many years RHL has had equipment located 10 feet or more from the back of their buildings and this equipment was compliant with the International Building code and previous PDA, state and/or local approvals.
- 120) The Executive Director at a 06/29/2023 site visit determined that RHL's RoE #6 building was 14 by 20 feet, while the decades old building actually measures 12 by 40 feet. That put the RoE #6 building itself in violation of the new "*10 foot rule*".
- 121) It would be impossible for RHL to comply with this new rule without modifying their buildings and relocating their equipment at considerable expense.
- 122) The two RHL items of contention were a propane tank and a gray water storage

tank in the back of RoEs #5 and #6. Neither could be easily relocated in compliance with this new "10 foot rule". Without these tanks, RHL could no longer be in business.

- 123) Since the rule was of an ex post facto origin, with no substantive or material basis grounded in health or public safety considerations, a "grandfathered" use policy should apply as a matter of right, manifest as a legal non-conforming use, allowing an existing situation to continue while the new rule would apply to all future cases.
- 124) However, the Executive Director refused to consider a "grandfathered" use policy for this equipment and stated that the PDA had plenary land use and zoning control over the DPH RoEs, thus the PDA could make such rules as it sees fit.
- 125) As a function of several RSA 91-A Right To Know requests to the Chairman of the BoD, responses provided evidence that the PDA has voted no land use controls or zoning bylaws relating to the DPH. Accordingly, the Town of Rye's Zoning Ordinance § 190-6.2 Nonconforming Uses would be controlling and RHL's equipment most likely would be considered compliant as a legal "grandfathered" use.
- 126) RSA 541-A requires that all DPH activities must be supported by rules governing the administration of RoE and CA agreements in order for them to be enforced pursuant to "*RSA 541-A:22,I: No agency rule ... is valid ... nor may it be enforced by the state for any purpose, until it has been filed as required in this chapter...*".
- 127) In spite of the lack of due process, and RSA 541-A:22,I penalties, and failure to comply broadly comply with RSA 541-A, on 01/25/2024 PDA management demanded by letter that the tanks must comply with the new "10 foot rule".
- 128) PDA General Counsel in a 04/18/2024 letter has confirmed that the PDA BoD has not properly voted or filed a DPH "10 foot rule" pursuant to RSA 541-A. Thus, the new "10 foot rule" is unenforceable pursuant to RSA 541-A:22,I.
- 129) RHL has sent multiple letters to the DPH Director and BoD chairman requesting to be put on the agenda of a BoD meeting, but such requests have yet to be fulfilled.
- 130) This matter remains unresolved and likely will only be resolved by the courts.

### Unfair and Unjust Treatment by Management

- 131) Rye Harbor Lobster Pound LLC unit #5 managed by Nathan Hanscom and Rye Harbor Lobster LLC unit #6 managed by Sylvia Cheever have been subject to unfair, unjust and multiple incidents of harassment and financial penalties regarding their businesses at the RHMF.
- 132) Customers for decades had ordered and picked up their take out food orders and raw lobster and shellfish orders from these two businesses with relative ease utilizing about twelve thirty minute free parking spaces located directly adjacent to the Units #5 and #6. Some customers ordered their items by telephone and only stopped momentarily in front of unit #5 and #6 to pick up their orders.
- 133) From 2021 through 2023, management made representations to the BoD that RHMF parking needed to be better managed. However, during that time the Executive Director and the Director of the DPH have worked to make the parking problem worse for units #5 and #6.

- 134) Management has manufactured various harmful rules and requirements of questionable justification outside of the legislative rule making process causing the loss of unit's #5 and #6 customer base and implementing demonstrably unfair costs on these businesses compared to other similar DPH businesses, Tradeport private businesses and private businesses located outside of the PDA.
- 135) Specifically management has eliminating all twelve thirty minute free parking spaces located directly adjacent to the Units #5 and #6 and has routed traffic through the RHMF parking lot where a \$5 all day parking ticket is assessed, except for two spaces that would remain 30 minute free parking spaces.
- 136) Predictably, units #5 and #6 have lost many customers who refused to pay the \$5 all day parking fee just to fetch their purchases. And the traffic problem got worse because some customers found creative ways to avoid the \$5 parking fee.
- 137) Management commissioned the AME \$12K engineering study to improve the RHMF traffic flow. Two of the four plans would best solve the RHL traffic problem and two would make it worse. Plan #1 was the optimum solution followed by #3.
- 138) An overall recommendation to improve the parking and traffic flow based on AME's recommendation has never been presented to the BoD or considered in a public hearing. Instead, management ignored all of the AME recommendations and replaced the twelve 30 minute free parking spaces with a new "*fire lane*".
- 139) There was no justification presented to the BoD for these actions. Nor did the BoD ever ask the RHL to meet with them to present their side of the story or discuss a plan with RHL to resolve the outstanding parking issues. Instead the BoD refused RHL's requests to be put the BoD agenda to discuss the matter. Predictably, the traffic problem got worse.
- 140) In addition, the walking lane in front of all of the units was blocked off using wooden traffic barriers hindering handicap access. Then, the loop driveway to Harbor Road also was blocked using wooden traffic barriers. These bold counter productive traffic flow activities were never presented to the BoD or considered in a public hearing. Predictably, the traffic problem got even worse.
- 141) Until management is required, or is willing, to bring all parties together and negotiate in good faith, with the impacted and interested parties, a reasonable and workable solution to the parking and traffic problems, RHMF businesses and patrons will continue suffer plainly avoidable loses in time and cost.

## Summary

- 142) PDA has broad authority to create its own rules consistent with "New Hampshire, Drafting And Procedure Manual, For Administrative Rules" for the Tradeport and the Great Bay National Wildlife Refuge. Recent public records requests have revealed that no rules have been placed on file of this nature.
- 143) PDA must follow the requirements of RSA 541-A:3 through RSA 541-A:15 in its DPH administrative rule making process. Recent public records requests have confirmed that no rules have been placed on file, but have been implemented, regarding DPH RoEs and concession fees. Any rules adopted by the authority of this nature are unenforceable and invalid pursuant to RSA 541-A:22,I.
- 144) PDA as no taxing authority delegated to the authority by the legislature. Thus, the PDA has not been given the power to levy a meals tax constructively masquerading as a concession fee, thus rules of this nature are unenforceable and invalid pursuant to RSA 541-A:22,III(f).
- 145) PDA has unfairly and unjustly imposed substantive and material state agency rules upon RHL without satisfying the due process and notice statutory requirements of RSA 541-A:3 through RSA 541-A:15 to implement such rules. Any rules adopted by the authority of this nature are are unenforceable and invalid. Any fees collected as a result of invalid rules must be returned.
- 146) Critical to all take out businesses is adequate parking. PDA has taken extraordinary unfair and unjust measures by arbitrarily reducing RHL's access to the twelve 30 minute free parking spaces to only two resulting in substantial lost revenue to RHL and a diminished customer base.
- 147) Lastly, PDA has failed its public duty to collaboratively discuss with all stakeholders a solution to the well known overall RHMF parking, traffic and fee issues in a fair and just manner. Bad faith and mismanagement of this nature needs to be investigated and put right by state government leaders and legislators.

## Recommendation

- 148) The information contained herein is ample evidence to recommend that the New Hampshire state legislature needs to restructure the DPH organization's command chain by removing its direct control from the PDA control and making it a separate agency directly reporting to the Resource Protection and Development Department under the control of the Governor and Executive Council as a result of mismanagement, persistently violating the Administrative Procedure Act, economic discrimination, treating citizens unjustly and unfairly and animus toward RHL.

\* An update to the original publication of this document was undertaken to reflect new information received as a result of multiple RSA 91-A Right To Know document requests made to the PDA. While many documents were provided on paper, most were digital documents and are available on the Internet at: <https://pda-dph.com>. Please contact the author at [contact@pda-dph.com](mailto:contact@pda-dph.com) with comments or questions.