

**STATE OF NEW HAMPSHIRE
DEPARTMENT OF SAFETY
DIVISION OF FIRE SAFETY**

**PERFORMANCE AUDIT REPORT
NOVEMBER 2001**

To The Fiscal Committee Of The General Court:

We have conducted an audit of the Department of Safety's Division of Fire Safety to address the recommendation made to you by the joint Legislative Performance Audit and Oversight Committee. We conducted our audit in accordance with the standards applicable to performance audits contained in *Government Auditing Standards* issued by the Comptroller General of the United States. Those standards require that we plan and perform the audit to provide a reasonable basis for our findings and conclusions. Accordingly, we have performed such procedures as we considered necessary in the circumstances.

The purpose of our audit was to assess whether the Division of Fire Safety exceeded its statutory authority in its enforcement of the State Fire Code. The audit period encompassed fiscal years 1995 through 2001.

This report is the result of our evaluation of the information noted above and is intended solely for the information of the Department of Safety and the Fiscal Committee of the General Court. This restriction is not intended to limit the distribution of this report, which upon acceptance by the Fiscal Committee is a matter of public record.

Office Of Legislative Budget Assistant
Office Of Legislative Budget Assistant

November 2001

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**STATE OF NEW HAMPSHIRE
DIVISION OF FIRE SAFETY**

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ABBREVIATIONS

BOCA Building Officials and Code Administrators
NHFIRS New Hampshire Fire Incident Reporting System

**STATE OF NEW HAMPSHIRE
DIVISION OF FIRE SAFETY**

SUMMARY

Purpose And Scope Of Audit

This audit was performed at the request of the Fiscal Committee of the General Court consistent with the recommendation of the joint Legislative Performance Audit and Oversight Committee. It was conducted in accordance with generally accepted government auditing standards. This report addresses the concern that the Division of Fire Safety (the division) exceeds its statutory authority in its enforcement of the State Fire Code (the Code). In addition, the report describes the division and reviews management controls over its operations. The audit period includes the seven years from fiscal years 1995 through 2001.

Background

The division is organizationally located within the Department of Safety. The division's mission is to prevent deaths, injuries, and property loss due to fires; to promote the establishment of a fire-safe environment for the citizens of New Hampshire; to investigate fires, including all that result in loss of life; and to ensure the safe and efficient coordination of hazardous materials emergencies. The State Board of Fire Control and the Electricians' Board are administratively attached to the Department of Safety.

The Code is comprised of provisions of the National Fire Protection Association code and the Building Officials and Code Administrators (BOCA) code. The Code is a de facto statewide building code for all buildings except single and multi-unit dwellings. By statute, locally adopted fire codes cannot be less restrictive than those adopted by the State Fire Marshal.

The division also has oversight of the State's modular building program, which monitors modular building manufacturers through the use of State approved third-party inspection agencies. Third-party inspection agencies are responsible for ensuring the manufacturers comply with State and local fire and building codes. Inspection labels are affixed by the third-party inspection agency to modular buildings that meet the codes.

Results In Brief

The division's work in investigating fires received praise from many organizations that have dealings with the division. However, questions were raised regarding the division's legal authority to enforce the State Fire Code when it differs from local codes, and its authority to require costly improvements to municipal buildings and schools. We provided the division six observations with recommendations: two related to improving management oversight of the division and four compliance issues. In addition, we identified and discussed a number of issues and concerns the Legislature and the division may want to review.

Results In Brief (Continued)

Division Has The Authority To Enforce The State Fire Code On Local Governments

The Attorney General does not view the division's enforcement of the State Fire Code on municipally-owned buildings (such as schools) as an unfunded State mandate on local government. There had been concerns that the division was exceeding its authority, specifically in regards to Part 1, Article 28-a of the New Hampshire Constitution, which prohibits State actions that would necessitate additional local expenditures. While the Attorney General's office does not rule out the possibility that some provision of the Code may be found to be an unfunded mandate, no such example has been identified.

Many Fire Investigations And Inspections Not Documented

We found fire investigation and inspection files for calendar year 1999 were either missing or incomplete. We did not find reports for 50 percent of the inspections and 22 percent of the fire investigations we sampled. In fact, over half of one investigator's fire investigations could not be located in the files. Given the importance of these reports, it is very troubling that division management has little, if any, formal reporting standards and an ineffective tracking system.

Division Not Fulfilling All Of Its Statutory Requirements

We found a number of instances where the division is not meeting its statutory requirements. The division is not systematically inspecting State-owned buildings; only some buildings are inspected regularly. The division cannot consistently report when some State buildings were last inspected. The division has not enforced a statute requiring all fire chiefs to report certain fires to the division. Less than half of the chiefs regularly report these fires to the State, potentially putting them in violation of State law. In addition, the State Fire Marshal has not provided annual evaluations to electrical inspectors statutorily assigned to him.

State Law Allows Inconsistent Enforcement Of State Fire Code

There are no statutory requirements that buildings be checked for compliance with the State Fire Code. Both the State Fire Marshal and local fire chiefs have the authority to enforce the Code, but neither have a mandate to enforce it. In some communities the local fire chief enforces either the local or State Fire Code, in other communities there is no local enforcement. The State Fire Marshal usually will inspect a building when asked or if complaints are filed. While State law requires that buildings meet the Code, the law does not ensure compliance through mandated inspections or plan reviews, resulting in the Code not being consistently enforced statewide.

**STATE OF NEW HAMPSHIRE
DIVISION OF FIRE SAFETY
RECOMMENDATION SUMMARY**

Observation Number	Page	Legislative Action Required	Recommendation	Agency Response
1	25	No	Develop policies, procedures, and a case management system to track and properly document inspections and investigations.	Concur
2	28	No	Segregate duties in the modular building program.	Concur
3	29	No	Prioritize and increase mandated inspections of State-owned buildings.	Concur
4	30	Yes	Clarify State law related to the installation of sprinkler systems in certain buildings.	Concur
5	32	No	Inform fire chiefs of their statutory obligation to report certain fires to the division.	Concur
6	33	No	Conduct performance evaluations for electrical inspectors.	Concur

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**STATE OF NEW HAMPSHIRE
DIVISION OF FIRE SAFETY**

INTRODUCTORY SECTION

On February 9, 2000, the Fiscal Committee of the General Court adopted a recommendation by the joint Legislative Performance Audit and Oversight Committee for the LBA to examine whether the Division of Fire Safety (the division), commonly known as the State Fire Marshal's Office, has been operating within its statutory authority. As a result of the information gathered during the planning phase, we identified some weaknesses and made recommendations to the division. We also determined that adequately assessing whether the division has exceeded its statutory authority in enforcing the State Fire Code (the Code) would require a legal opinion from the Attorney General. In cooperation with the division, we developed a number of questions to clarify the division's statutory authority to enforce the Code. The Department of Safety submitted some of these questions to the Attorney General's Office for a legal opinion.

1.1 Overview

According to statistics gathered by the National Fire Data Center (the center), fires kill more Americans than all natural disasters combined. The United States has the highest death rate due to fire for all the industrialized countries in the world. In addition, the center reports that fires kill thousands of Americans, injure tens of thousands, and cause billions of dollars in property loss each year.

In New Hampshire, the division is charged with promoting the establishment of a fire-safe environment for the citizens of New Hampshire and ensuring the safe and efficient coordination of hazardous materials emergencies. In addition, the State Fire Marshal must investigate any death caused by fire in New Hampshire. The State Fire Marshal fulfills the division's mission mainly through the following responsibilities established by RSA 21-P:12 and RSA 153:

- investigating the causes and circumstances of fires;
- promulgating fire safety administrative rules known as the State Fire Code;
- supervising and enforcing all laws and regulations relative to the protection of life and property from fire, fire hazards, and related matters;
- approving all plans for construction or revision of State buildings and properties as to compliance with fire safe measures;
- approving, disapproving, or allowing exceptions to any fire safety rule of any State agency (except fire safety rules established under RSA 227-L);
- regulating the safety of certain liquid propane gas pipelines;
- investigating the causes and circumstances of the release of carbon monoxide (other than from a motor vehicle);
- investigating the causes and circumstances of building collapses;
- providing fire safety education;
- certifying private firefighting units;
- approving fire protection and warning devices for health care facilities; and
- coordinating the State's response to hazardous materials accidents.

1.1 Overview (Continued)

While the State Fire Marshal has some specific authority, he also has more ambiguous statutory directives guiding his relationship with local authorities. Under RSA 153:14 and RSA 153:18, the State Fire Marshal has clear authority to conduct building inspections (excluding single family dwellings and multi-unit dwellings containing two units) and all fire and building collapse investigations. However, other statutes repeatedly call for cooperation and assistance between the State Fire Marshal and local authorities. For example RSA 153:4-a requires the State Fire Marshal to:

- assist the counties, cities, towns, village districts, and precincts in supervising and enforcing local laws, bylaws, and ordinances;
- coordinate the activities of his office with duly authorized city, town and village districts, fire and building department officials and other State and local agencies required and authorized by State statutes or local ordinances to develop or enforce fire safety regulations; and
- assist, cooperate with, advise, and counsel the officials responsible, as designated by local ordinance or charter, for the organization and efficient operation of fire departments and other fire protection organizations when held to be in the best interest of public safety.

1.2 Scope, Objectives, And Methodology

This report describes the overall organization and function of the Division of Fire Safety between fiscal years 1995 and 2001. We focused our attention on management controls over the division's activities and on its role in enforcing the Code. In 1993, the U.S. Fire Administration provided "management assistance" to the division's¹ fire investigation activities. On page 13 we discuss the division's implementation of a number of the recommendations from that evaluation.

Scope And Objectives

The scope of this performance audit was to determine if the division exceeded its statutory authority in its enforcement of the Code. During our planning phase, we determined that we needed clarification of the division's authority to enforce the Code. The division's authority to require costly improvements to municipal and school buildings has been questioned. There was concern that such actions may be in opposition to the unfunded mandate article in the State's Constitution:

Part 1, Article 28-a [Mandated Programs.] The State shall not mandate or assign any new, expanded or modified programs or responsibilities to any political subdivision in such a way as to necessitate additional local expenditures by the political subdivision unless such programs or responsibilities are fully funded by the State or unless such programs or responsibilities are approved for funding by a vote of the local legislative body of the political subdivision.

¹ Known as the Bureau of Fire Safety in 1993.

1.2 Scope, Objectives, And Methodology (Continued)

Methodology

This performance audit was conducted in accordance with generally accepted government auditing standards and included such procedures as we considered necessary in the circumstances. In order to gain an understanding of the division during the planning phase of this audit, we conducted a literature search, reviewed pertinent State laws and administrative rules, division documents, and newspaper articles. We interviewed the Fire Marshal, Deputy Fire Marshals, the modular building program administrator, fire investigators, school officials, building officials, Electricians' Board personnel, and fire chiefs. In addition, we conducted a file review of fire investigation reports, fire inspection reports, and canine use reports.

Through the Department of Safety and the division, we sought and obtained an Attorney General's opinion of the Fire Marshal's authority. The Attorney General took ten months to issue the opinion; during which time, this audit was put on hold. Using the Attorney General's opinion and the knowledge we gained during our planning phase of the audit, we determined no further audit work was required. We also examined certain management control issues during our planning work and we have developed several observations that, if acted upon, could lead to operational improvements for the division.

1.3 Division Administration

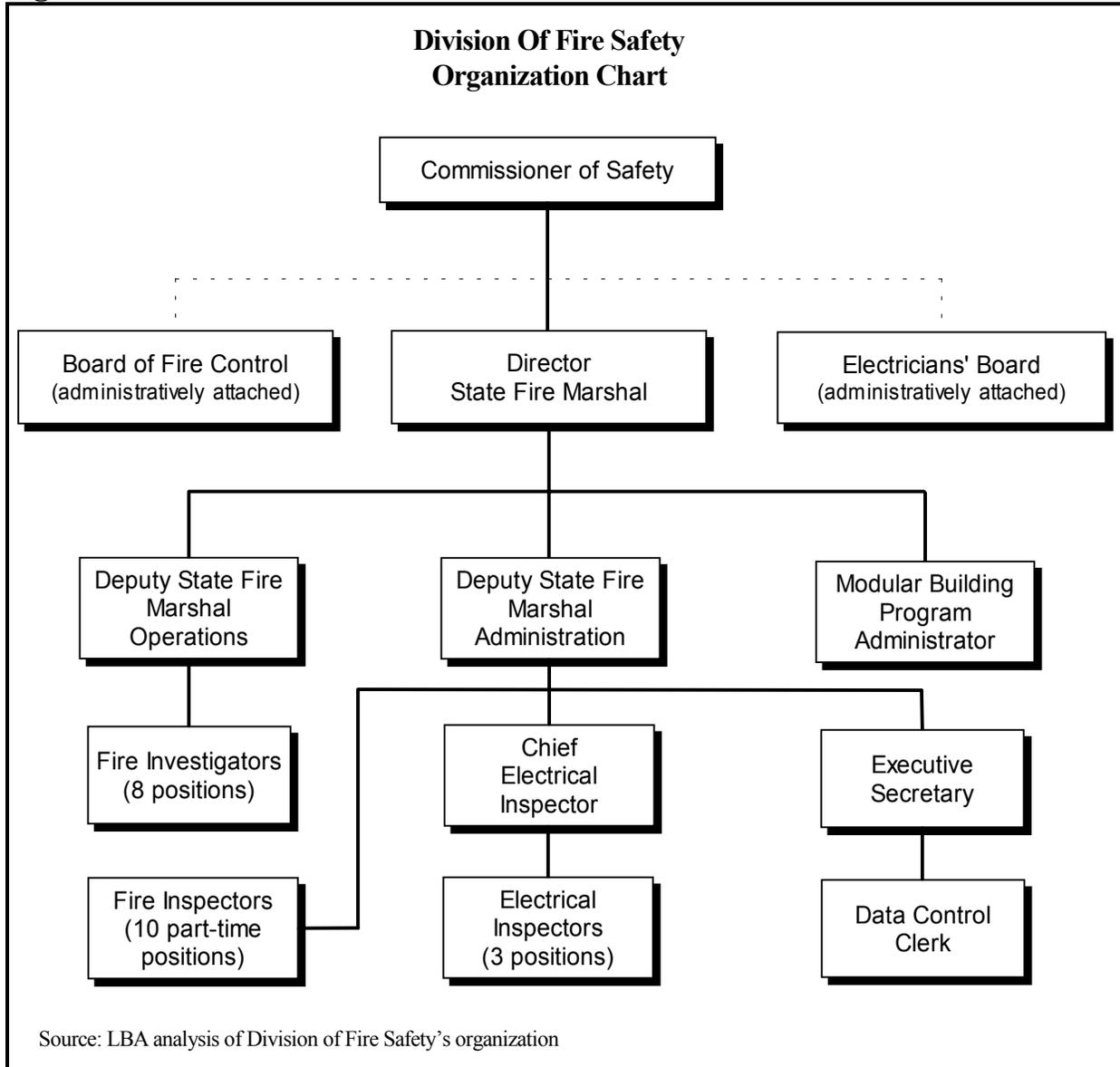
The Division of Fire Safety is organizationally located within the Department of Safety (the department). The State Board of Fire Control and the Electricians' Board are administratively attached to the department (Figure 1). The department is also responsible for administering the modular building program established by RSA 205-C.

Chapter 389:8, Laws of 1994, changed the Bureau of Fire Safety to the Division of Fire Safety. The State Fire Marshal remained the top administrator as the division director. In addition to the State Fire Marshal, the division employs: two deputy fire marshals, eight fire investigators, ten part-time inspectors, one administrator for the modular building program, and two support staff. The division currently has two dogs trained to assist in fire investigation by searching for accelerants. Additionally, the State Fire Marshal is responsible for the administration and supervision of the electrical inspectors.

The Commissioner of Safety is empowered to grant the State Fire Marshal, deputy fire marshals, and fire investigators authority to detain and make arrests as peace officers and to serve criminal processes, if they have received appropriate law enforcement training. The fire investigators are sworn law enforcement officers, having completed training at the New Hampshire Police Standards and Training Academy. Fire investigators have limited law enforcement power and have had much of the same training as law enforcement officers, but they do not carry firearms.

1.3 Division Administration (Continued)

Figure 1



As part of its goal to reduce the death, injuries, and property losses associated with fire, the division develops the Code, tracks fire statistics through the New Hampshire Fire Incident Reporting System (NHFIRS), and regulates modular buildings coming into the State to ensure they meet the current fire and building codes of the State and its communities. In addition, the division reviews building plans for schools and State-owned buildings, as well as any building plans submitted by a locality, for compliance with the Code.

1.3 Division Administration (Continued)

Positions

RSA 21-P:12, establishes the State Fire Marshal as the Director of the Division of Fire Safety within the Department of Safety. The Commissioner of Safety, upon consultation with the Board of Fire Control, nominates a State Fire Marshal candidate for Governor and Council approval. The current State Fire Marshal is in his third four-year term.

The deputy fire marshal for operations supervises investigators and assists in fire investigations, especially those involving fatalities. The deputy fire marshal for administration manages the division's budget, oversees the NHFIRS, enforces the Hotel/Motel Safety Act, manages evidence, oversees interns, supervises the electrical inspectors, and supervises the part-time fire inspectors. Along with administrative duties, the deputies conduct training on various fire safety issues, respond to inquiries, interpret and enforce the New Hampshire fire laws (including the Code), and assist in issuing citations. Deputy fire marshals assume the responsibilities for all division activities in the absence of the State Fire Marshal.

A fire investigator identifies evidence and determines the causes and origins of fires, building collapses, and carbon monoxide releases in buildings; investigates deaths caused by fires, building collapses, and carbon monoxide; reviews building plans; inspects buildings to assess fire hazards; educates the public on various fire safety issues, including the Code; and testifies as an expert witness in arson trials and civil litigation cases. One of the eight fire investigators is responsible for the NHFIRS. Two fire investigators with specialized training are handlers for the two accelerant detection dogs used at fire scenes.

The part-time fire inspector positions are new to the division. The division was given permission to hire five part-time fire inspectors in fiscal year 2000 and five more in fiscal year 2001. They conduct inspections to assess fire hazards, review building plans for compliance with applicable laws and the Code, and advise local fire and building officials on proper interpretation of fire safety and building codes. Part-time fire inspectors work ten hours a week throughout the State.

The modular building program administrator is responsible for maintaining a list of approved modular building manufacturers and third-party inspection agencies. The administrator reviews initial applications to become third-party inspection agencies and conducts compliance audits of the agencies. Additionally, the administrator is responsible for reviewing plans for schools and State-owned buildings. The administrator also reviews building plans at the request of municipalities.

Electrical inspectors are supervised and administered by the division. They are responsible for investigating consumer complaints as directed by the Electricians' Board, assisting with electrical fire investigations and when necessary appearing in court. Inspectors also monitor the distribution and approval of electricians' licenses to ensure compliance with the electrical code, and develop, administer, and score the exams for electricians' licenses.

1.3 Division Administration (Continued)

State Fire Code

The Code is comprised of provisions of the National Fire Protection Association code and the Building Officials and Code Administrators (BOCA) code. The State Fire Code is a de facto statewide building code for all buildings except single- and two-family homes. Pursuant to RSA 153:5, local fire codes cannot be “less restrictive than those adopted by the fire marshal.”

The State Fire Marshal can enforce both the State Fire Code and local codes. In fact, sometimes the State Fire Marshal is called in to handle local inspections. Code enforcement can become a political issue in towns. According to division officials, local authorities may want State fire investigators to become the enforcer.

The State Fire Marshal has the sole authority to grant variances to the Code per RSA 153:5. The State Fire Marshal has stated he will not overturn variances granted through a formal process at the local level, such as a zoning board of adjustment. To obtain a variance from the State Fire Marshal, a written request needs to be submitted.

New Hampshire Fire Incident Reporting System

According to RSA 153:11, all fires resulting in death or resulting in losses over \$5,000 must be reported to the division by fire chiefs within ten days. The division is responsible for preparing instructions and forms the fire chiefs must use. This data is entered into the NHFIRS. According to a division official, this data is collected to track types of fires, identify trends, and aid in arson investigations. Data from NHFIRS is voluntarily submitted to the United States Fire Administration’s National Fire Incident Reporting System.

The software for the National Fire Incident Reporting System is in the process of being upgraded. The division is also upgrading the NHFIRS to the same version as the National Fire Incident Reporting System and plans to provide the new software to fire chiefs free of charge.

Modular Building Program

The division operates the State’s modular building program. The program is responsible for monitoring modular building manufacturers through the use of State-approved third-party inspection agencies. The third-party inspection agencies are responsible for ensuring the manufacturers comply with State and local fire and building codes. Inspection labels are affixed by the third-party inspection agency to modular buildings meeting the codes.

A modular building is any building of closed construction, assembled or manufactured off site, for installation or assembly at the building site. It does not include manufactured housing, such as trailer homes. As of July 2001, the State has licensed seven third-party inspection agencies to evaluate and certify building manufacturers and factory assembled modular construction. The division has approved 80 modular building manufacturers to conduct business in New Hampshire. The third-party inspection agencies and approved manufacturers renew their applications on a yearly basis.

1.3 Division Administration (Continued)

Each modular unit constructed after July 1992 must have a label of certification given to the manufacturer by the third-party inspection agency signifying the manufacturer has been evaluated to ensure conformity with State and local modular construction standards and applicable rules of the division.

1.4 Division Statistics

Table 1 represents the division's activities, including fire investigations, inspections, and plan reviews.

Table 1

Division Of Fire Safety Activities By State Fiscal Year							
Activities	1995	1996	1997	1998	1999	2000	2001
Modular Building Labels Issued	870	639	642	780	1,093	1,384	2,114
Fire Safety Inspections	475	418	311	268	387	353	278
Construction Plan Reviews	122	236	322	200	188	238	192
Fire Deaths	8	10	18	11	13	9	22
Fire Investigations:							
<i>Arson/Suspicious</i>	93	54	57	80	69	43	40
<i>Accidental</i>	100	79	97	121	113	119	108
<i>Undetermined</i>	63	51	68	51	85	65	70
Total Fire Investigations	256	184	222	252	267	227	218
Source: LBA analysis of unaudited Department of Safety Biennial Reports and division data.							

There are no reliable statewide totals for fires and fire investigation conducted by local fire departments. According to the division, juveniles account for over one-half of all arson fires in the State. According to a division official, the annual number of inspections can be misleading since one office building, which could take a few hours to inspect, is counted the same as a tent.

1.5 Revenues And Expenditures

The Division of Fire Safety is responsible for the division's budget as well as the budget for the modular building program, as detailed in Tables 2 and 3. The division receives 100 percent funding from the General Fund. The division's expenditures increased from \$702,428 in fiscal year 1995, to \$1,029,275 in 2001. On average 78 percent of the division's budget pays for salaries and benefits for the fire marshal, deputy fire marshals, fire investigators, fire inspectors, and executive secretary. The data entry clerk position is funded through the Department of Safety's Information Services budget. The budget submitted by the Electricians' Board includes funds for the electrical inspectors positions.

1.5 Revenues And Expenditures (Continued)

Table 2

Division Of Fire Safety Expenditures By State Fiscal Year							
Cost Categories	1995	1996	1997	1998	1999	2000	2001
Salaries and Benefits	\$ 610,947	\$ 606,955	\$ 567,436	\$ 616,914	\$ 620,790	\$ 738,962	\$ 769,155
Current Expenses	31,485	28,690	34,836	35,447	35,956	90,960	113,093
Equipment	29,280	89,572	94,772	70,379	35,336	133,891	91,518
In-State Travel	17,512	19,984	19,929	19,597	17,653	27,626	25,661
Building Maint & Operations	-	22,355	31,369	43,804	36,156	35,159	29,848
Other Expenditures	13,204	-	-	223	372	580	-
Total Expenditures	\$ 702,428	\$ 767,556	\$ 748,342	\$ 786,364	\$ 746,263	\$1,027,178	\$1,029,275

Source: LBA analysis of Statement of Appropriation reports.

The modular building program is funded through the General Fund. The program's expenditures were \$40,657 in fiscal year 1995 and increased to \$56,452 in 2001. Close to 90 percent of the expenditures for the modular building program are to pay the salary and benefits of the modular building program administrator, the sole employee of the program.

Table 3

Modular Building Program Expenditures And Revenues By State Fiscal Year							
Cost Categories	1995	1996	1997	1998	1999	2000	2001
Salaries and Benefits	\$ 38,393	\$ 41,272	\$ 43,587	\$ 45,625	\$ 46,183	\$ 50,498	\$ 52,159
Current Expenses	846	237	4,638	6,296	2,914	4,669	2,819
Equipment	272	-	-	-	-	-	-
In-State Travel	1,146	2,498	1,456	663	771	364	233
Third Party Inspections	-	788	337	-	2,957	2,853	1,241
Total Expenditures	\$ 40,657	\$ 44,795	\$ 50,018	\$ 52,584	\$ 52,825	\$ 58,384	\$ 56,452
Total Unrestricted Revenues	\$ 44,395	\$ 65,947	\$ 64,276	\$ 91,925	\$ 111,559	\$ 137,650	\$ 186,750

Source: LBA analysis of Statement of Appropriation reports.

The modular building program generates revenues that are credited to the General Fund. Revenues increased from \$44,395 in fiscal year 1995 to \$186,750 in 2001.

The division also manages a fund for its canine accelerant detection program that is comprised of private and corporate donations. These funds pay for all costs related to the program such as feeding, training, and veterinary care.

1.6 Significant Achievements

It is important to recognize that performance auditing by its nature is a critical process, designed to identify problems or weaknesses in past and existing practices and procedures. We mention here a number of successful and positive practices we observed and for which sufficient documentation was available.

1.6 Significant Achievements (Continued)

A 1993 United States Fire Administration report on the division lists twelve strengths of New Hampshire's fire investigation and arson control system:

- top management support,
- absence of turf battles,
- clear understanding of the leadership role the State has in arson control and prevention,
- personnel dedication,
- intra-agency cooperation,
- K-9 arson detection,
- juvenile intervention program,
- statutory authority,
- state training for local fire departments,
- legislative liaison capability,
- equipment and tools, and
- history of inter-agency prevention efforts.

While these strengths were identified eight years ago, we found no evidence to contradict these findings during our review.

This same report identified a number of problem areas, which the Department of Safety and the Division of Fire Safety have addressed including:

- granting fire investigators peace officer status,
- developing an agency mission statement and goals,
- assigning fire investigators to physically work out of the geographical area to which they are assigned,
- reorganizing the duties of the deputy fire marshals, and
- equipping fire investigators working in the field with laptop computers.

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**STATE OF NEW HAMPSHIRE
DIVISION OF FIRE SAFETY**

ATTORNEY GENERAL'S OPINION

The focus of this audit was to determine whether the Division of Fire Safety (the division) had exceeded its statutory authority in its enforcement of the State Fire Code (the Code). Questions were raised regarding the power of the division to supersede local codes and to require municipalities to pay more for renovations and new buildings than had been planned. Our preliminary audit work indicated there were some areas of the division's authority warranting further clarification. Through the Department of Safety, we sought an Attorney General's opinion on a number of questions regarding this issue. The Department of Safety submitted half of the questions to the Attorney General's Office in July 2000. The Attorney General issued an opinion in May 2001. (A copy of the Attorney General's opinion starts on the following page as Exhibit 1.) The State Fire Marshal then responded to the remaining questions.

As a result of the Attorney General's opinion, answers from the State Fire Marshal, and our audit work, we identified two related issues for Legislative consideration which can be found in our Other Issues And Concerns section beginning on page 35.

The Attorney General found the division has the authority to enforce the Code on buildings owned by municipalities. According to the Attorney General:

[b]ecause the Code predates Article 28-a and RSA 541-A:25 and because most subsequent changes to the Code have not created mandates, the vast majority of the provisions in the existing State Fire Code are fully enforceable against political subdivisions as responsibilities that existed prior to the adoption of the constitutional and statutory prohibitions against unfunded mandates....
[I]t is our advice that the State Fire Marshal is obligated by law to continue the process of updating the regulations under his authority.

The Attorney General acknowledges the possibility that some aspect of the Code could be determined to be an unfunded mandate and provides a line of "inquiry" that it would use to make that determination. The State Fire Marshal has no knowledge of any adopted codes that have imposed a prohibited unfunded mandate. In addition, the Office of Legislative Services, Division of Administrative Rules is unaware of any examples of the State Fire Marshal's rules contradicting Article 28-a.

2. Attorney General's Opinion (Continued)

Exhibit 1

**ATTORNEY GENERAL
STATE OF NEW HAMPSHIRE**
33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

PHILIP T. MCLAUGHLIN
ATTORNEY GENERAL



STEVEN M. HOURAN
DEPUTY ATTORNEY GENERAL

May 31, 2001

Mr. Richard M. Flynn, Commissioner
Department of Safety
James H. Hayes Bldg. 10 Hazen Dr.
Concord, New Hampshire 03301

Dear Commissioner Flynn:

You have asked this office to respond to a series of six questions regarding the authority of the Division of Fire Safety (State Fire Marshal's Office) to enforce the State Fire Code ("Code") and how that authority is affected by certain state statutes, local codes and Part I Article 28-a of the New Hampshire Constitution ("Article 28-a"). For the reasons set forth in the discussion beginning on page 2, our advice on these questions is as follows:

QUESTIONS AND SHORT ANSWERS

1. To what extent is a local fire chief mandated by state law to enforce the State Fire Code? If there is a mandate, is this mandate in compliance with Article 28-a?

State law does not require a local fire chief to enforce the Code. As there is no mandate, there is no issue of compliance with Article 28-a.

2. Under what circumstances can the enforcement of the current State Fire Code by the State Fire Marshal's Office, related to a school or municipal building, be considered an unfunded mandate by the State under Article 28-a?

An analysis of whether enforcement of the Code is an unfunded mandate which violates Article 28-a or its statutory counterpart, RSA 541-A:25, depends on specific legal and factual issues that are not easily addressed in the abstract. The date of adoption, the extent to which a new Code provision entails a preexisting duty, the alternatives available to compliance, contingency on local funding and other factual issues control whether enforcement of the Code would constitute a prohibited

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2. Attorney General's Opinion (Continued)

unfunded mandate. The analysis below should assist you in identifying Code provisions that may be enforced and the circumstances under which they may be enforced against a school or municipality in a manner that is constitutional and consistent with statutory requirements.

3. Under what conditions, if any, does the State Fire Code take precedence over local codes and regulations?

The Code takes precedence as a minimum standard that is enforceable independent of local codes and regulations. Nevertheless, local authorities are empowered to enact more restrictive local codes and regulations.

4. Is there a conflict between RSA 47:22 which grants cities the power to adopt nationally recognized codes, rules and regulations, establishing construction and fire protection standards, and RSA 153:5 which gives the State Fire Marshal's Office the power to adopt applicable fire safety and building laws?

No. State law allows a two-tier system of regulation and enforcement in which regulations on the same subject may be different at State and local levels. There is no conflict because the State Fire Marshal's enforcement of the State regulations is not limited by the local regulations.

5. Does the State Fire Marshal have the authority to overrule a variance or exception that has been issued by a local jurisdiction if he/she believes that the variance or exception is not consistent with the requirements of the State Fire Code?

No, but the State Fire Marshal may enforce the Code regarding a condition that otherwise may be allowed by the variance from the local rule.

6. If the local authority (fire chief or building official) does not enforce a requirement of the State Fire Code, does the State Fire Marshal have the authority to enforce the requirement?

Yes. The State Fire Marshal has broad authority to enforce the Code throughout the State.

DISCUSSION

Introduction

The analysis and understanding of the unfunded mandate issue raised by your first two questions is aided by a review of Article 28-a, its statutory counterpart RSA 541-A:25 and the statutory authority of both the State Fire Marshal and local

2. Attorney General's Opinion (Continued)

authorities. Article 28-a restricts unfunded mandates to local governments by the State. It was proposed by the Constitutional Convention and ratified by voters in 1984. Its statutory counterpart is directed at State agencies with rulemaking powers and restricts unfunded mandates. It was adopted in 1992 and is currently codified as RSA 541-A:25. Both provisions are quoted in full in the context of the discussion of question 2 below.

The Fire Marshal has authority to establish and enforce a State Fire Code using RSA 541-A rulemaking procedures.¹ Most provisions in the current Code predate Article 28-a and RSA 541-A:25 and are therefore fully enforceable as pre-existing responsibilities. The State Fire Marshal is required to assist local governments with fire-safety-related matters. While local governments may enact local rules on the subjects covered by the State Fire Code, those local rules must be equally or more restrictive.² Local governments have the authority to adopt local ordinances, bylaws, regulations, codes or rules (hereinafter "rules") related to the subject matters within the State Fire Marshal's jurisdiction.³

Analysis

1. To what extent is a local fire chief mandated by state law to enforce the State Fire Code? If there is a mandate, is this mandate in compliance with Article 28-a?

No statute or regulation mandates that local fire chiefs enforce the Code, although RSA 154:2 authorizes the local fire chief to enforce the Code. As there is no mandate, there is no issue of compliance with Article 28-a or RSA 541-A:25.

Statutes do mandate that local fire chiefs make inspections of certain buildings and authorize them to inspect others.⁴ For example, there are statutory provisions that require fire chiefs to enforce prohibitions on certain generally described hazards, such as decorations in public buildings. The Code may be relied upon to prove that a condition is a statutorily prohibited hazard because the Code defines and proscribes many of these hazards in terms more precise than exist in the statutes.⁵ Such use in fulfilling a mandate to enforce the statute does not constitute a mandate that the State Fire Code itself be enforced.

¹ See RSA 21-P:4, V-VIII; RSA 151:9; RSA 153:4-a; RSA 153:5; RSA 153:8-a; 153:10-a, III; RSA 153:10-a, VII; RSA 153:10-b I-II; RSA 153:10-b, V-VI; RSA 153:14; RSA 153:18; 153:19-21.

² See RSA 21-P:4, VII; RSA 21-P:14, II(s); RSA 153:4-a; RSA 153:5; RSA 153:8-a; RSA 153:10-a, III & V-VII; RSA 153:10-b, VII; RSA 153:12; RSA 153:14; RSA 153:17; RSA 153:23.

³ See RSA 31:117; RSA 47:22; RSA 47:28; RSA 126-A:21; RSA 153:10-b, VII; RSA 153:14; 154:2, II-III; RSA 154:18; RSA 154:19; RSA 155:1; RSA 155:3; RSA 155:17; RSA 155:34; RSA 155:38; RSA 674:51-52.

⁴ See RSA 153:10-a, RSA 153:10-b, RSA 155:1, RSA 155:3, RSA 155:34.

⁵ See e.g. NFPA-1 3-13.1.

2. Attorney General's Opinion (Continued)

Exercise of the State Fire Marshal's power under RSA 153:10-a, III and RSA 153:10-b to delegate inspection and enforcement responsibility to local authorities under some circumstances could create a mandate. Until delegated responsibility, the municipal authority has the power, but not the responsibility, to enforce regulations.⁶

2. Under what circumstances can the enforcement of the current State Fire Code by the State Fire Marshal's Office, related to a school or municipal building, be considered an unfunded mandate by the State under Article 28-a?

Part 1, Article 28-a⁷, of the New Hampshire Constitution provides:

The state shall not mandate or assign any new, expanded or modified programs or responsibilities to any political subdivision in such a way as to necessitate additional local expenditures by the political subdivision unless such programs or responsibilities are fully funded by the state or unless such programs or responsibilities are approved for funding by a vote of the local legislative body of the political subdivision.

N.H. Const. Pt. 1, Art. 28-a.

As a regulation adopted under RSA 541-A the State Fire Code is also subject to RSA 541-A:25, **Unfunded State Mandates**,⁸ which provides:

I. A state agency to which **rulemaking** authority has been granted, including those agencies, the rulemaking authority of which was granted prior to May 6, 1992, shall not mandate or assign any new, expanded, or modified programs or responsibilities to any political subdivision in such a way as to necessitate **further** expenditures by the political subdivision unless such programs or responsibilities are approved for funding by a vote of the local legislative body of the political

⁶ Once responsibility is delegated, the local fire chief becomes the enforcement authority required by RSA 153:10-a, VII to act upon observing a violation. If the conditions discussed in answer 2 below exist, an unfunded mandate to enforce these provisions of the State Fire Code could occur. To the extent the State Fire Marshal delegates inspection and enforcement authority which necessitates additional local expenditures, such delegation could be made contingent upon approval of funding by the political subdivision's legislative body in order to eliminate any Article 28-a or RSA 541-A:25 question.

⁷ Effective November 28, 1984.

⁸ Effective May 6, 1992. RSA 541-A:25, effective August 9, 1994, is a recodification of RSA 541-A:3 (I) which was effective May 6, 1992. Where the legislature repeals a statute and at the same moment enacts another in its precise terms there is no gap in statutory effect created. Lisbon v. Clark, 18 N.H. 234 (1846) see also State v. Wimpfheimer, 69 N.H. 166 (1897) (in substance and legal effect an ordinance repealed and at the same time re-enacted has been in force continuously since its first enactment).

2. Attorney General's Opinion (Continued)

subdivision. **Such programs include those functions of a nature customarily undertaken by municipalities whether or not performance of such functions is required by statute.**

II. Such programs also include, but are not limited to, functions such as police, **fire** and rescue, roads and bridges, solid waste, sewer and water, and **construction and maintenance of buildings and other municipal facilities** or other facilities or functions undertaken by a political subdivision.

III. Included in the scope and nature of such programs are those municipal functions which might be undertaken by a municipality or by a private entity and those functions which a municipality may legally choose not to undertake. (emphasis added).

RSA 541-A:25.

There are potentially different consequences for current State Fire Code provisions depending upon when a specific provision was adopted, before Article 28-a, after Article 28-a but before RSA 541-A:25 or after both RSA 541-A:25 and Article 28-a were adopted, as well as other factors discussed below.

The New Hampshire Supreme Court has held that “unless the mandated program or responsibility would expand the subject matter of a political subdivision’s obligation, and the augmentation would require increased expenditure,” State action is not an unfunded mandate. New Hampshire Mun. Trust Workers’ Comp. Fund v. Flynn, 133 N.H. 17, 27 (1990) (Souter J., dissenting, restating majority’s holding). In the Flynn case the Court found that a law creating a presumption that a firefighter suffering from cancer got the disease from fire fighting constituted an unfunded mandate because it would require local government to pay for a new responsibility, treatment of some cancers that were not actually work-related. In contrast, in Town of Nelson, the Court held that a reclassification of roads that increased local expenditures by shifting maintenance from the State to the locality was not an unfunded mandate because it affected a pre-existing responsibility. Town of Nelson v. New Hampshire Dept. of Transp., No. 98-068, slip op. (N.H. Mar. 1, 2001). In Town of Nelson, the Court distinguished Flynn’s new responsibility from the constantly evolving process of road classification that predates the adoption of Article 28-a. Flynn involved a statutory change and Nelson involved a ministerial act⁹ implementing the statute on road classification - - neither involved rulemaking and neither decision relied on an analysis of RSA 541-A:25.

⁹ The process of road reclassification is done by administrative action that does not involve rulemaking.

2. Attorney General's Opinion (Continued)

RSA 541-A:25 applies to acts by State agencies "to which rulemaking authority has been granted." Given the statute's placement in the provisions governing administrative rule making, it is facially ambiguous whether it applies to acts by such agencies other than RSA 541-A rulemaking. Because the State Fire Code must be adopted using RSA 541-A procedures, RSA 541-A:25 clearly applies to the State Fire Code. Although the Supreme Court has yet to interpret RSA 541-A:25, the dissent in Nelson used RSA 541-A:25 to support the argument that the road classification at issue was a prohibited unfunded mandate. Id. at 7.

RSA 541-A:25 provides that it applies to programs customarily undertaken by municipalities whether or not performance of such functions is required by statute. Addressing Article 28-a prior to adoption of RSA 541-A:25, the Court in Opinion of the Justices (Solid Waste Disposal), 135 N.H. 543 (1992), held that requiring the recycling of certain types of wastes did not mandate local expenditures where the duty would fall on individual citizens should the local government choose not to provide the service. When an administrative regulation is at issue, RSA 541-A:25 complicates the argument that no mandate exists where the local government can choose to cease the activity as an option to conforming to State regulation.

When attempting to determine whether enforcement of a provision of the State Fire Code might constitute an unfunded mandate the following inquiry should be made:

1. Was it adopted prior to November 28, 1984? If yes, neither Article 28-a nor RSA 541-A:25 would apply.
2. Was it adopted after November 28, 1984, but prior to May 6, 1992? If yes, Article 28-a applies but RSA 541-A:25 does not. A regulation may impose new, expanded, or modified programs or responsibilities that require additional political subdivision funding provided the political subdivision has the choice of either approving the funding and complying with the regulation or not providing the regulated program or responsibility.
3. Provisions adopted after May 6, 1992, are subject to both Article 28-a and RSA 541-A:25. Ask whether the program or responsibility is new, expanded or modified. The Court has held that a responsibility is not new where it was previously imposed under a different statutory or regulatory scheme. Nelson, slip op. at 5 (citing Nashua School Dist., 140 N.H. 457, 459-61 (1995)). The Court has held that a new development that alters the scope of an existing responsibility, such as changes in traffic patterns arising from evolution of the state highway system, does not impose a new, expanded or modified program or responsibility. Nelson slip. op. at 5-6. In contrast, adding new illnesses to the existing responsibility to provide benefits for employees with certain illnesses is adding a new responsibility. Id. (citing Flynn 133 N.H. at 25). If the program or responsibility is new, expanded, or modified, Article 28-a and RSA 541-A:25

2. Attorney General's Opinion (Continued)

apply only if the regulation requires additional local spending that is not contingent on local approval.

If a regulation falls within scenarios 2 or 3 above, imposes a program or responsibility that is new, expanded, or modified, and requires additional local spending that is not contingent on local approval, the regulation more probably than not constitutes a prohibited unfunded mandate. In such event, please contact us for assistance in analyzing the specific regulation in light of the specific circumstances presented. Creating a list of all the hypothetical circumstances where enforcement of the current State Fire Code would be a prohibited unfunded mandate is impractical. As the analysis above demonstrates, differences in the facts can lead to different outcomes. We can best provide effective legal counsel by analyzing specific fact situations as they arise.

3. Under what conditions, if any, does the State Fire Code take precedence over local codes and regulations?

The State Fire Code always stands as an independent regulation and takes precedence to the extent that it establishes minimum standards. The power of local government to enact codes in areas covered by the State Fire Code is limited to adopting equally or more restrictive provisions. The local code may not allow conditions prohibited by the State Fire Code.

Exceptions to the superiority of the State Fire Code exist but only to the extent that more restrictive local codes or regulations are to be enforced. For example, RSA 153:10-b VII, on healthcare facilities, provides that "If any local ordinance or bylaw or any rule adopted by a state agency contains more stringent requirements than the provisions of this section, the more stringent requirements shall be controlling." See also RSA 153:10-a VI; RSA 155:38.

State regulations adopted under RSA 153:14 for cities and towns without regulations do not apply in jurisdictions where the local governments have adequate local laws. RSA 153:17, however, gives the State Fire Marshal the authority to enforce the local regulations "upon complaint of any person or persons that compliance with such laws or ordinances is not being effected . . ." RSA 153:17.

4. Is there a conflict between RSA 47:22 which grants cities the power to adopt nationally recognized codes, rules and regulations, establishing construction and fire protection standards, and RSA 153:5 which gives the State Fire Marshal's Office the power to adopt applicable fire safety and building laws?

No conflict exists between RSA 47:22 and RSA 153:5. A two-tier system of regulation has been authorized that allows both the State and a municipality to establish codes that can be different. As explained above, RSA 153:5 requires that a local code be "no less restrictive than those adopted by the fire marshal." Towns and

2. Attorney General's Opinion (Continued)

village districts are authorized to adopt bylaws regulating the erection of public buildings, including school houses, but the statute limits that power by stating that “any bylaw relative to safety from fire in buildings and structures adopted by a town or village district of the state shall conform to the life safety code, which is in effect at the time the bylaw is adopted and as promulgated by the State Fire Marshal; . . .” RSA 155:1. The statute on public buildings, factories, and tenements provides that “When, in any specific case, different provisions of this chapter shall conflict with other state or municipal regulations, the most restrictive requirements shall govern.” RSA 155:38.

The Supreme Court has stated that “insofar as reasonably possible, [it] will construe the various statutory provisions harmoniously.” *Swiezynski v. Civiello*, 126 N.H. 142, 148 (1985). “Where two statutory provisions conflict, the specific statute controls over the general one.” *In re Petition of Crane*, 132 N.H. 293, 298 (1989). Therefore, regulations adopted under the general grant of authority in RSA 47:22 would still be subject to the more specific “equally or more restrictive” requirement of RSA 153:5. A similar result exists as to RSA 674:51 and :52, which grant local governments the power to adopt building codes.

5. Does the State Fire Marshal have the authority to overrule a variance or exception that has been issued by a local jurisdiction if he/she believes that the variance or exception is not consistent with the requirements of the State Fire Code?

No. The State Fire Marshal can insure public safety, however, by enforcing the State Fire Code. The State Fire Marshal’s power to enforce the State Fire Code statewide is not impaired by the creation of local regulations or the granting of exceptions to those local regulations. Therefore, while the State Fire Marshal has no power to overrule the local variance, he does have the power to enforce the State Fire Code.

6. If the local authority (fire chief or building official) does not enforce a requirement of the State Fire Code, does the State Fire Marshal have the authority to enforce the requirement?

Yes. The statutory scheme does not limit the authority of the State Fire Marshal to enforce the State Fire Code. “The State Fire Marshal shall be responsible for supervising and enforcing all laws of the state relative to the protection of life and property from fire, fire hazards and related matters . . .” RSA 153:4-a. The legislature has demonstrated its ability to require deference to local enforcement authorities by limiting the jurisdiction of State law enforcement officials.¹⁰ The absence of any limitation on the authority of the State Fire Marshal supports the

¹⁰ For example, RSA 106-B:15 limits State Police original jurisdiction in towns and cities with a population over 3000 people.

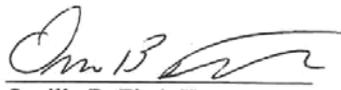
2. Attorney General's Opinion (Continued)

conclusion that the legislature intends that the State Fire Marshal have enforcement powers concurrent with local authorities' enforcement powers. RSA 153:17, granting the State Fire Marshal the authority to enforce certain local laws and ordinances, is further evidence of the legislature's intent that the State Fire Marshal be empowered to act even where local officials have been given authority and responsibility.

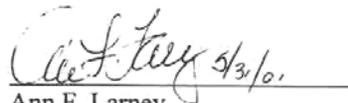
CONCLUSION

Because the Code predates Article 28-a and RSA 541-A:25 and because most subsequent changes to the Code have not created mandates, the vast majority of the provisions in the existing State Fire Code are fully enforceable against political subdivisions as responsibilities that existed prior to the adoption of the constitutional and statutory prohibition against unfunded mandates. Further, not all post adoption alterations to regulations will impose new, modified, or expanded programs or responsibilities. While enforcement of some changes to the State Fire Code may result in prohibited unfunded mandates, at least in some circumstances, it is our advice that the State Fire Marshal is obligated by law to continue the process of updating the regulations under his authority. Even where Article 28-a and RSA 541-A:25 may limit enforcement against political subdivisions, they should not be construed to prevent improvements to the State Fire Code. The State Fire Marshal is authorized to use "the most recent edition" of nationally recognized codes. RSA 153:5. This requirement and the prudent exercise of his responsibilities dictate that the State Fire Marshal incorporate advances in fire suppression theory and technology into the State Fire Code.

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**STATE OF NEW HAMPSHIRE
DIVISION OF FIRE SAFETY**

OBSERVATIONS AND RECOMMENDATIONS

We found the Division of Fire Safety (the division) had insufficient management controls over its operations. According to *Government Auditing Standards*, “Management controls, in the broadest sense, include the plan of the organization, methods, and procedures adopted by management to ensure that its goals are met. Management controls include the processes for planning, organizing, directing, and controlling program operations.” The four categories of management controls are: 1) program operations, 2) validity and reliability of data, 3) compliance with laws and regulations, and 4) safeguarding resources. The weaknesses we identify in the following six observations affect all four categories of management controls.

3.1 Management Oversight Of Operations

Observation No. 1

***Inspection And Investigation Files
Need To Be Complete***

Our review of inspection and investigation files at the division found incomplete report folders and numerous missing reports. As part of its manual case management system, the division uses various logbooks to track the work performed by division personnel. We chose a sample of cases for calendar year 1999 from the fire inspection, fire investigation, and canine logbooks and attempted to trace them to reports in the case files.

No documentation could be located in the files for 30 of the 60 fire inspection log entries randomly chosen for review. Many of the inspection reports located did not contain a reference to the log number. According to the State Fire Marshal, fire inspection log numbers might also be used when an inspection for a variance is done or when local officials ask for assistance with an inspection, thus no inspection report is filed. However, there is no indication of this in the fire inspection logbook.

Of the 50 fire investigation log entries randomly chosen for review, 11 files could not be located; and of the 39 files located, three did not contain a fire investigation cover sheet. The files missing cover sheets often contained photographs or some insurance information, but no information about the fire such as its location and preliminary findings. However, the fire investigation logbook does contain information such as the fire investigator assigned to the investigation, the town, the owner, and potential cause of the fire. The logbook does not contain information related to the origin of a fire. An agency official stated all investigations require a report, even if it is only a cover sheet in the file. The division has developed a standardized cover sheet form and a continuation of investigation report form to be used when conducting an investigation.

In the original sample of 50 log entries, four investigators were found to have at least one file missing. A second sample of 49 log entries from these four investigators was chosen for review. Of these, 17 files could not be located. Of the 32 files that were located, 11 did not contain a fire investigation cover sheet. Over half of one investigator’s fire investigations could not be located in the files.

3.1 Management Oversight Of Operations (Continued)

Observation No. 1: Inspection And Investigation Files Need To Be Complete (Continued)

Canine log numbers are not consistently found in the files. In some cases a separate file exists for the canine search, the canine search log is combined with a fire log, or no information can be found on the use of the canine other than the canine log entry. Reports documenting the use of the canines as part of an investigation are not standardized. Some canine search documents detail the number of alerts, collection of evidence, and area of search; other documents make a brief reference about the canine being used or only mention the handler involved with investigation.

Written inspection and investigation reports are an essential element in fire inspections and fire investigations, particularly when investigating arson cases. Prudent management practices dictate the need to establish effective management controls to help ensure the objectives of a program are met. As part of establishing controls, policies and procedures need to be developed to guide personnel on how and what to document and file so management can determine if objectives are being met. In addition, management should provide continuous review of documents and supervision of staff to ensure policies and procedures are being followed. The International Fire Service Training Association in its *Fire Inspection and Code Enforcement* manual suggests, “One of the most crucial functions carried out by any fire prevention bureau or division is that of maintaining accurate files and records of all occupancies they are responsible for inspecting.”

A 1993 review conducted by the United States Fire Administration recommended the division “establish a fundamental protocol for fire investigation reporting and monitoring” that would “permit a manager to easily recognize the status of each fire investigation.” According to the State Fire Marshal, “Fire investigators are required to submit an investigation coversheet immediately after initiating an investigation. Supplemental reports are submitted to indicate the progress of the investigation and the work that remains to be completed.” Our review of the files suggests investigators are not submitting investigation cover sheets or supplemental reports on a consistent basis and management is not providing adequate review to ensure the reports are filed in a timely fashion. Management should be able to track the individual assignments from the logbook and time spent on the assignment to the written report in the division’s files.

The division does provide some policies and procedures for completing investigation paperwork in the *Professional Standards of Conduct Manual*. The manual requires the investigator of record complete, at a minimum, an investigation cover sheet when conducting an investigation out of their assigned region. However, the manual does not address what is expected of investigators when conducting investigations in their own regions.

3.1 Management Oversight Of Operations (Continued)

Observation No. 1: Inspection And Investigation Files Need To Be Complete (Continued)

Insufficient management oversight has resulted in files that do not accurately reflect the contents of the logbook. Additionally, the lack of written policies and procedures on the use of the logbooks and the required documentation for conducting tasks such as fire inspections and fire investigations increases the likelihood that files will be incomplete and not standardized. Statistics regarding the workload of the division might be skewed if division personnel do not use the logbooks in a consistent manner and provide the appropriate documents for the files. In addition, the division risks losing important historical data by not adopting and enforcing a more formalized file management process.

Recommendation:

The division should:

- **develop policy and procedures to ensure inspections and investigations are properly documented, and**
- **integrate the case management system, time keeping system, and filing system to allow for better management oversight of personnel and their work products.**

Auditee Response:

We concur. The Division has recently purchased notebook computers for all field personnel. The Division of Fire Standards and Training/Division of Fire Safety local area network (LAN) has also been interconnected with the Department of Safety computer network. This has enabled us to establish standardized computer forms and an e-mail system for the transmission of fire inspection and fire investigation reports.

In addition to the above, the Deputy State Fire Marshal who is responsible for field operations meets regularly with fire investigators to review the status of cases.

In addition to the above:

- *Policy and procedures to ensure inspections and investigations have been implemented.*
- *The Division will purchase computer software to integrate investigation case management activities. We have identified a program that is utilized by many police departments throughout the state and that would be ideal for our needs. This program will be implemented no later than December 31, 2001.*
- *Manual logbooks for inspections and investigations have been converted to Microsoft Access® for ease in tracking activities. In addition, the inspection log has been modified to reflect the specific purpose of the inspection (i.e. hazard inspection, variance request, etc.).*

3.1 Management Oversight Of Operations (Continued)

Observation No. 2

Segregation Of Duties Needed In Modular Building Program

The division lacks sufficient controls over its modular building program. The administrator of the program is solely responsible for both collecting label fees and maintaining the program data. This lack of segregation of duties increases the likelihood that errors or fraud could occur and not be detected in a timely manner.

Payments for modular building labels mailed to the division are opened by one division employee and then forwarded to the administrator. The division employee who opens the mail is not documenting the arrival of checks nor stamping them with a restrictive endorsement to reduce the possibility of depositing in another account. The administrator reviews the material and hand delivers the checks to the Department of Safety's business office. The administrator prepares a transmittal form for each check, which is signed upon receipt by business office personnel and returned to the administrator.

The administrator also maintains the data related to the issuance of labels and the collection of fees on spreadsheets. Having one person responsible for the collection of label revenue and also being the only individual documenting label distribution, without mitigating controls, is an inadequate procedure. We note that modular building manufacturers and third-party inspection agencies mail their annual renewal fees directly to the Department of Safety's business office. The business office then notifies the division.

Recommendation:

The division should:

- **segregate the responsibility of initially recording all checks received through the mail from the administrator responsibility of maintaining program data, and**
- **stamp all checks with a restrictive endorsement as soon as the mail is opened.**

Auditee Response:

We concur. The division currently is working with the Division of Administration to implement this recommendation. Expected date of implementation: December 2001.

3.2 Compliance Issues

Observation No. 3

State Buildings Need To Be Inspected Regularly

RSA 155-A:4 requires the State Fire Marshal and the Commissioner of Transportation to “provide for periodic safety inspection of all occupied public buildings owned by the state.” According to division personnel and written documents, the division has not met this statutory requirement. The following statement was part of a March 2000 division budget request, “Due to the emergency nature of fire investigations and due to increases in the number of investigations, fire inspections mandated by statute are often postponed, delayed, or not done at all. Most public buildings throughout the State are not inspected on a regular basis.” For example, most State-owned liquor stores have never had a fire safety inspection by the division. According to a knowledgeable Liquor Commission employee, the division has only once inspected one of the ten State-owned liquor stores in 16 years. This is in contrast to the many fire inspections conducted by local fire inspectors of leased stores.

Many State-owned buildings are located in the Concord area. One fire investigator is assigned to Concord and the surrounding towns. Over half of this inspector’s time is spent conducting fire investigations, and he is responsible for the New Hampshire Fire Incident Reporting System. Inspecting all State-owned buildings is not a priority for this inspector or the division. In fact, the division cannot identify when each State-owned building was last inspected. However, certain State-owned buildings are inspected on a regular basis, such as the State Prison, State Hospital, and the Youth Development Center.

The State has a responsibility to provide a safe working environment for all of its workers and the public. Requiring the State Fire Marshal to conduct regular fire inspections of State-owned buildings is a reasonable preventative measure.

Recommendation:

The division should comply with State law and increase its efforts in inspecting State-owned buildings on a regular basis. The division should:

- **develop policies to prioritize and schedule these inspections, and**
- **allocate division resources to better meet this requirement.**

Auditee Response:

We concur. State buildings are inspected on a priority basis. High risk occupancies, such as correctional facilities (Concord, Goffstown, Laconia and Berlin), the Youth Development Center, New Hampshire Hospital, Philbrook Center, etc., are inspected on a regular basis. All new construction in state and university owned buildings is reviewed and inspected for compliance, and complaints of fire hazards in state owned buildings are addressed promptly. University system buildings are inspected by the local fire department; the State Fire Marshal’s Office is notified of serious hazards that require immediate attention.

3.2 Compliance Issues (Continued)

Observation No. 3: State Buildings Need To Be Inspected Regularly (Continued)

Presently, the Division has no additional resources to allocate to regular inspections of low-risk state owned buildings. We recently hired ten part-time inspectors who will assist with alleviating the overall inspection workload that has been placed on full-time fire investigators. We will continue to request funding for additional full-time investigators and inspectors.

We will explore the feasibility of establishing a self-inspection system for building managers and safety committees in state owned buildings. We believe that this will satisfy the statutory requirement to “provide for periodic safety inspection.”

Observation No. 4

<i>Inconsistency Between The Code And RSA 153:5 Needs To Be Resolved</i>

The division is not adhering to RSA 153:5, which exempts buildings or rooms containing electrical equipment from sprinkler system requirements. RSA 153:5 states the State Fire Marshal “may

adopt the most recent edition of the provisions of the national fire protection association... as rules, in whole or in part” and that:

such rules shall not require automatic suppressant or sprinkler systems... in rooms or areas containing either generators, transformers, telecommunications equipment or facilities or electronic data processing equipment, or in telecommunications or electric utility company equipment buildings or areas occupied exclusively for telecommunications equipment, electrical transformation and switching equipment, associated electrical distribution equipment, batteries and standby engines or generators, provided that those spaces or areas are equipped throughout with an automatic fire detection system.

However, the Building Officials and Code Administrators National Building Code and the National Fire Protection Association’s Life Safety Code, which have been adopted as part of the State Fire Code through the administrative rules process, require the installation of sprinkler systems in certain buildings. The requirement for installing a sprinkler system is generally dependent upon the size of the building, the construction type, and its occupancy use. The Code does not make the same exemptions to areas containing electrical equipment as found in RSA 153:5. According to the State Fire Marshal, in most cases design alternatives are available to avoid the installation of a sprinkler system.

According to division officials, when plans for new buildings or additions are reviewed by the division, they require sprinkler heads in those areas exempted by RSA 153:5. One official stated the Legislative intent was to exempt those companies or businesses having rooms or areas with larger transformers or more electronic equipment than normally found in most buildings. However, RSA 153:5 seems to include any room containing any equipment as described above. The State Fire Marshal acknowledges the inconsistency between State law and the State Fire Code. This inconsistency may increase the confusion for those individuals attempting to understand the requirements of laws and the State Fire Code when developing

3.2 Compliance Issues (Continued)

Observation No. 4: Inconsistency Between The Code And RSA 153:5 Needs To Be Resolved (Continued)

plans for new buildings or additions to existing buildings. In addition, the division may not have the authority to require sprinklers in newly constructed rooms or buildings meeting the statutory exceptions.

Recommendation:

The division should refrain from enforcing the State Fire Code related to this subject until such time as it has clarified this statute, either through legislation, rule making, or an Attorney General's Opinion.

Auditee Response:

We concur. While we acknowledge that there is an inconsistency between the state statute and the State Fire Code, we believe that this is a minor issue that can be easily corrected through a simple legislative change.

The existing statutory language that prohibits the installation of sprinkler heads in electrical and telecommunications rooms is outdated and runs contrary to good fire protection engineering practices. If a building is required to be sprinklered (due to its size, construction type, or occupancy use), all spaces must be protected by sprinkler heads. Only the sprinkler heads that are located immediately over the fire are activated. The presence of a sprinkler head in an electrical room serves to control a fire in the room and prevents its spread. The spray pattern of the sprinkler head prevents electrical arcing back to the sprinkler system. In the absence of a sprinkler head, firefighters would be required to enter the electrical room to extinguish the fire and would be exposed to the likelihood of electrocution.

As an example, the Seabrook Nuclear Generating Station is a fully sprinklered facility. The generators are sprinklered, and even the large outdoor transformers are protected with a water spray system. These requirements were self-imposed by the utility as part of their risk management policies.

The installation of a sprinkler head in an electrical room of a fully sprinklered building does not impose any additional costs. In fact, the installation of a special automatic fire detection system for these areas in lieu of the sprinkler head would be far greater. The possibility of a fire spreading from an unsprinklered electrical room and overwhelming the sprinkler system or the possibility of electrocuting a firefighter are of critical concern.

The Division will propose a legislative change in January 2002 to update RSA 153:5.

3.2 Compliance Issues (Continued)

Observation No. 5

Fire Chiefs Need To Comply With Reporting Requirements

According to RSA 153:11, all fires resulting in death or resulting in losses over \$5,000 must be reported to the division by fire chiefs within ten

days. The division is responsible for preparing instructions and forms the fire chiefs must use. Fire reports are entered into the division's New Hampshire Fire Incident Reporting System (NHFIRS). According to a division official, this information is collected to track types of fires and identify trends. The division voluntarily submits NHFIRS data to the United States Fire Administration's National Fire Incident Reporting System. Both the national and State reporting systems are in the process of being upgraded.

While some fires are reported to the division on official manual forms, many are electronically submitted through e-mail or mailed in on floppy disks on a monthly or quarterly basis. Some chiefs submit the fire reports annually. According to a division official, approximately 40 percent of the State's fire chiefs are reporting fires to the division. These chiefs represent communities that account for a majority of the State's population. However, 60 percent of the chiefs do not report fires, including a chief from one of the State's largest cities. Excluding this city's data and that of other smaller communities certainly distorts statewide statistics. The division plans to use data from NHFIRS in forthcoming annual reports.

RSA 153:23 states, "Any fire chief who refuses or neglects to comply, after due notice by the state fire marshal, with any of the requirements hereof shall be guilty of a violation for each offense." According to division officials, they have discussed the reporting requirement with fire chiefs but have not given due notice to fire chiefs who are not in compliance with fire reporting requirements found in RSA 153:11. They prefer to gain the cooperation of fire chiefs through education, not with threats of violations.

Recommendation:

The division should:

- **increase its formal efforts in informing fire chiefs of their statutory obligation to report fires and the potential consequences of not complying,**
- **provide the names of fire departments in compliance and not in compliance with RSA 153:11 when it produces its annual report, and**
- **seek to amend its statute regarding the ten-day reporting requirement to reflect the actual needs of the division.**

Auditee Response:

We concur. There is no excuse for fire departments with full-time personnel not to report their fire incidents. However, the division is extremely sensitive to the demands that are placed on volunteer or on-call departments because of their limited resources to perform routine administrative tasks. Until now, the National Fire Incident Reporting System has been extremely cumbersome and non-user friendly, and there has been no state funding for the purchase of software for local fire departments.

3.2 Compliance Issues (Continued)

Observation No. 5: Fire Chiefs Need To Comply With Reporting Requirements (Continued)

For the first time ever, the division has been successful in obtaining state funding to provide fire incident reporting software and technical support to all local fire departments. A new, Windows®-based, user-friendly reporting system has been distributed to fire departments free of charge. In addition, funding has been provided for the development and publication of an annual fire incident data report. The software is being implemented in coordination with the statewide E-911 computer assisted dispatching system. Long-term, it is our goal to provide for electronic uploading of reports, which eliminates the need to amend the ten-day reporting statute.

The Division has increased its formal efforts in informing fire chiefs of their statutory obligation to report fires, and the potential consequences of not complying.

The Division will provide the names of fire departments in compliance and not in compliance with RSA 153:11 when it produces its annual report. Expected date of implementation: with publication of calendar year fire incident data report for 2001 (spring of 2002).

Observation No. 6

Electrical Inspectors' Performance Evaluations Need To Be Completed

Performance evaluations on the electrical inspectors are not completed. The State Fire Marshal stated he has not completed a performance evaluation on the electrical inspectors since he has been Fire Marshal. Furthermore, the deputy fire marshal assigned to supervising the electrical inspectors stated he has never completed an evaluation of the electrical inspectors. RSA 21-I:42, XIII, requires annual written evaluations to be completed by an employee's immediate supervisor.

RSA 319-C:5, I, states any person employed as an electrical inspector shall be "under the administration and supervisory direction of the state fire marshal." Even though the State Fire Marshal has stated there is some confusion regarding who is responsible for the performance evaluations of the electrical inspectors, he has assigned a deputy fire marshal to supervise the electrical inspectors. Additionally, in August of 1997 the State Fire Marshal signed as the supervisor for the electrical inspectors on their supplemental job description.

The completion of performance evaluations provides employees and employers with a management tool that can help to identify employee strengths and weaknesses as well as help to prevent future disputes. More specifically, it allows for the formal documentation of employee performance as well as a means to provide recommendations on how to improve work performance if it is falling below expectations. In addition, the performance evaluations are used to document satisfactory work performance when determining processing a classified employee's annual salary increment. The administrative assistant for the Electricians' Board completes the paperwork for annual salary increments even though there are no performance evaluations.

3.2 Compliance Issues (Continued)

Observation No. 6: Electrical Inspectors' Performance Evaluations Need To Be Completed (Continued)

Recommendation:

The State Fire Marshal should comply with State law and provide performance evaluations for electrical inspectors. The division should coordinate with the Electricians' Board the completion of performance evaluations and the approval of annual salary increments.

Auditee Response:

We concur. Performance evaluations have been completed.

**STATE OF NEW HAMPSHIRE
DIVISION OF FIRE SAFETY**

OTHER ISSUES AND CONCERNS

In this section we present issues and concerns we encountered during our audit that were not developed into formal observations yet we consider noteworthy. The Division of Fire Safety (the division), the Electricians' Board (the board), and the Legislature may consider these issues and concerns deserving of further study or action.

Inconsistent Fire Code Enforcement

According to the State Fire Marshal, the State Fire Code (the Code) is not consistently followed throughout the State. While the division has the authority to inspect all buildings (excluding single and multi-unit dwellings) in the State, it is not mandated to do so. According to the Attorney General, local fire chiefs are not required to enforce the Code. RSA 153:4-a authorizes the State Fire Marshal to supervise and enforce all fire safety laws. RSA 153:14 establishes the enforcement mechanism by authorizing the State Fire Marshal, his authorized officers, or fire chiefs to inspect these buildings upon complaint or when deemed necessary. Some communities may enforce the Code, while others choose not to inspect buildings. Ultimately, it is the responsibility of the property owner to be in compliance with the Code. As a result, there is increased risk that some buildings may not be as safe as State law requires, thereby endangering the public.

State law appears to support unequal government oversight of fire safety standards. The need for plan review or inspection of buildings is primarily determined by local authorities. Given the importance of local control, this may be the intent of the Legislature. On the other hand, the intent may include greater assurance that the public is protected through a more inclusive government review or inspection process. The Legislature may wish to review and amend State law to ensure statewide enforcement of the Code.

No Statutory Authority For Division To Accept Local Variances

State law does not require a builder/owner to seek or receive approval for a Code variance from the State Fire Marshal. However, RSA 153:14, II, gives the State Fire Marshal the authority to inspect any existing building (except single family and multi-unit dwellings containing two units) and require compliance to the Code. Potentially, a builder/owner can receive a variance from the local authority, but may be held to the Code by the division after the building is finished. Locally-granted variances do not exempt builders from enforcement of the Code by the State Fire Marshal, even when the local code is the same as the State Fire Code. However, the State Fire Marshal has said it is his policy "not to interfere with a local variance process unless it is apparent that there is a pattern of total disregard for the code, or unless a situation has been created that creates a serious or imminent life safety risk."

According to the State Fire Marshal, a more likely problem concerns existing buildings or buildings being renovated:

4. Other Issues And Concerns (Continued)

[T]here is a greater potential for a builder/owner to obtain a variance at the local level that is not consistent with the intent or requirements of the State Fire Code. Frequently, there is no design professional² involved in the project. Code officials can be reluctant to require a property owner to spend money to correct a code violation (or may be under political pressure to be lenient). Or the variance granted might be a total waiver of a code requirement, rather than an alternative design that provides an “equivalent level of safety” to that which is required by the code.

According to the Attorney General’s opinion, “State law allows a two-tier system of regulation and enforcement in which regulations on the same subject may be different at State and local levels.” The State Fire Marshal does not have the authority to directly overrule a variance issued by a local jurisdiction, however, he can enforce the Code, which may in fact overrule a locally-granted variance.

Builders/owners are not required to get two separate waivers from the local and State governments. However, it appears that it may be advisable for builders/owners to get two separate variances to be absolutely sure they are in compliance with the Code. The State Fire Marshal disagrees that a builder/owner needs to get a variance from both levels of government:

If a local community has established a formal variance process, the fire chief will most likely be involved in the review. We are confident that there is sufficient formal and informal communication between fire chiefs, building inspectors and the State Fire Marshal’s office concerning these issues that the appropriate steps will be taken in the granting of a variance or exception, provided of course that the variance granting authority acts within the scope of its authority and does not totally disregard code requirements or the intent of the code. The key word is a “formal” variance process; not just a verbal OK from a local inspector. If there were no formal process³ established in a community, then a variance or exception from the State Fire Marshal’s office would be required.

We note that the State Fire Marshal’s policy of accepting locally granted variances is not based on State law or administrative rule. It is just the current State Fire Marshal’s practice and therefore is subject to change. The Legislature may wish to review and amend how State law treats locally-granted variances in relationship to the State Fire Marshal’s authority.

² According to the State Fire Marshal, a NH licensed design professional (engineer or architect) must design any building not used as a single-family dwelling, and is over 4,000 square feet area, or uses steel or concrete for structural support. They have a professional and ethical responsibility to follow both State and local codes. “The design professional also has an obligation to understand the process for simultaneously satisfying the local officials and the State Fire Code.”

³ According to the State Fire Marshal, “A formal process must include some type of public record of the variance that has been granted, preferably based on a public action by a local building code board of appeals or a zoning board of adjustment acting as the building code board of appeals.”

4. Other Issues And Concerns (Continued)

Electricians' Board

We gathered information on the board while gaining an understanding of the responsibilities of the division.

Pursuant to RSA 319-C:4, IV, the board is administratively attached to the Department of Safety (the department) as specified under RSA 21-G:10. The board's electrical inspectors are under the administration and supervisory direction of the State Fire Marshal according to RSA 319-C:5, I. However, the administrative staff is only responsible to the board.

We question if this is the most efficient and effective arrangement. We noted the following areas of concern:

- The administrative staff are responsible to the board and the electrical inspectors are responsible to the division, resulting in divided management oversight of activities.
- There is no policy and procedure manual.
- Checks are not restrictively endorsed.
- Revenue is not deposited timely.
- Revenue in excess of what is statutorily allowed to run board operations has been collected, as shown in Table 4.

Table 4

Excess Revenue From Electricians' Board Fees				
Fiscal Year	Prior Year Expenditure	125% of Prior Year Expenditure¹	Actual Unrestricted Revenue	Excess Revenue²
1998	\$235,268	\$294,085	\$407,177	\$113,092
1999	\$244,325	\$305,406	\$398,410	\$93,004
2000	\$249,387	\$311,734	\$381,720	\$69,986
2001	\$287,332	\$359,165	\$450,710	\$91,545

Notes: ¹ Pursuant to RSA 319-C:6-b.
² Excess Revenue = Actual Unrestricted Revenue - 125% Of Prior Year Expenditure.
Source: LBA analysis of Statement of Appropriation and Integrated Financial System data.

While State law allows the board to exercise its powers, duties, functions, and responsibilities independently of the department, it allows the department to "provide budgeting, recordkeeping and related administrative and clerical assistance" to the board. However, such an arrangement would have to be mutually agreed to in writing and the board would have to pay the department on a cost allocation basis for such services. The recent creation of the Chief Electrical Inspector position could improve the overall management of board activities if the position is given such management oversight responsibilities of all board activities.

Based on a cursory review of the board, we suggest the board and the department study the benefits of transferring the administrative function to the Division of Fire Safety in order to provide a single source of oversight and control over the day-to-day operations.

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**STATE OF NEW HAMPSHIRE
DIVISION OF FIRE SAFETY**

CONCLUSION

Concerns that the Division of Fire Safety (the division) may have exceeded its statutory authority in enforcing the State Fire Code (the Code) are not supported by the Attorney General's opinion issued in response to this audit. While the opinion does not rule out the possibility that some portion of the current or future version of the Code could be determined to be an unfunded mandate to a municipality, no such example could be provided.

As part of our audit, we reviewed the overall operations and management of the division. Fire Investigators received praise from many sources for their work determining the causes of fires and related law enforcement activities. However, we found a substantial percentage of fire investigation and building inspection reports were missing or lacking documentation. This deficiency is troublesome as the reports represent the product of the division's work. In addition, we found the following deficiencies:

- The State Fire Marshal does not regularly inspect State buildings as required by statute.
- There is an inconsistency between the Code and State law related to sprinkler systems in rooms with certain electrical equipment.
- The functions of collecting fees and maintaining the program data are not properly segregated in the Modular Building Program.
- Not all fire chiefs are reporting fires as required by statute.
- The State Fire Marshal has not conducted performance evaluations for electrical inspectors under his authority.

As a result of our review of the division's statutory responsibilities, the Attorney General's opinion, and answers from the State Fire Marshal, we have identified two issues for Legislative consideration: the inconsistent Statewide enforcement of the Code and the issue of locally granted variances. In addition, we suggest the Electricians' Board and the Department of Safety consider having the department take over the responsibility for providing administrative support to the board by transferring current staff to the division. Day-to-day management oversight could then become the responsibility of the newly created Chief Electrical Inspector and ultimately the State Fire Marshal.

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**APPENDIX A
DIVISION RESPONSE**



State of New Hampshire Department of Safety

Richard M. Flynn, Commissioner

Division of Fire Safety

Office of the State Fire Marshal

Donald P. Bliss, State Fire Marshal

10 Hazen Drive, Concord, N.H. 03305, (603) 271-3294, FAX (603) 271-1091



November 1, 2001

Ms. Catherine A. Provencher, CPA
Director of Audits
Office of the Legislative Budget Assistant
State House Rm. 102
Concord NH 03301

Dear Ms. Provencher:

Enclosed please find the Department's response to the Division of Fire Safety Performance Audit. It was a pleasure working with you and the staff of the Audit Division.

On behalf of Commissioner Richard M. Flynn, I would like to thank the LBA Audit Division for its comments and recommendations. The staff has spent a great deal of time and effort critically analyzing the operation and performance of the State Fire Marshal's Office. The information contained in the report has been of valuable assistance, as evidenced by the steps that we have taken to implement the recommendations that were brought forward by your staff.

It has been extremely helpful to have an independent review of the procedures and activities of the Division of Fire Safety as we continue to strive to reduce deaths, injuries, and property loss due to fires throughout the State. In fact, our ability to more effectively deploy our limited resources has been enhanced as a result of your agency's efforts, and we look forward to working with the General Court to further improve our delivery of services to local communities.

Once again, we would like to thank you for the insight you have provided to the Division of Fire Safety.

Sincerely,

Donald P. Bliss, Director
State Fire Marshal

TDD Access: Relay NH 1-800-735-2964
ARSON HOT LINE 1-800-400-3526

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**PERFORMANCE AUDITS
ISSUED BY
OFFICE OF LEGISLATIVE BUDGET ASSISTANT**

<u>TITLE OF REPORT</u>	<u>DATE</u>
Department of Education – Construction and Renovation Programs	September 2001
Department of Health and Human Services Division for Children, Youth and Families Foster Family Care	September 2001
Department of Education – Bureau of Vocational Rehabilitation And Service Delivery	August 2001
Department of Transportation – Bureau of Turnpikes Performance-Based Budgeting	April 2001
Judicial Branch – Family Division Pilot Program	January 2000
Year 2000 Computing Crisis – Special Report – Update	July 1999
Special Education – Catastrophic Aid Program	July 1999
Year 2000 Computing Crisis – Special Report	March 1999
Juvenile Justice Organization	November 1998
Marine Patrol Bureau Staffing	March 1998
Health Services Planning and Review Board	January 1998
Economic Development Programs	October 1997
Job Opportunities and Basic Skills Training Program	May 1997
Child Support Services	December 1995
Multiple DWI Offender Program	December 1995
Managed Care Programs for Workers’ Compensation	November 1995
State Liquor Commission	July 1994
Property and Casualty Loss Control Program	November 1993
Child Settlement Program	March 1993

**PERFORMANCE AUDITS
ISSUED BY
OFFICE OF LEGISLATIVE BUDGET ASSISTANT (Continued)**

<u>TITLE OF REPORT</u>	<u>DATE</u>
Workers' Compensation Program for State Employees	January 1993
Prison Expansion	April 1992
Developmental Services System	April 1991
Department of Administrative Services, Division of Plant and Property Management State Procurement and Property Management Services	June 1990
Mental Health Services System	January 1990
Hazardous Waste Management Program	June 1989
Review of the Indigent Defense Program	January 1989
Review of the Allocation of Highway Fund Resources To Support Agencies and Programs	March 1988
Review of the Public Employees Deferred Compensation Plan	December 1987
Management Review of the Policies and Procedures Of the Division of Plant and Property Management	June 1984
Review of the Management and Use of State Owned Passenger Vehicles and Privately Owned Vehicles Used at State Expense	August 1984

Copies of the above reports may be received by request from:

State of New Hampshire
Office of Legislative Budget Assistant
107 North Main Street, Room 102
Concord, New Hampshire 03301-4906
(603) 271-2785

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