

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2013-0520

The State Of New Hampshire

v.

Ian Bernard

**STATE'S MEMORANDUM ADDRESSING THE APPLICABILITY  
OF RSA 606:10 TO THE CITY OF KEENE'S APPEAL**

The State of New Hampshire, by and through the New Hampshire Department of Justice, submits this memorandum of law on the issue of whether the city of Keene's appeal in the above-cited matter should have been brought under RSA 606:10 as an appeal in a criminal case. This memorandum concludes that the ordinance-enforcement action at issue in this appeal was not a criminal case, and thus that RSA 606:10 is not applicable to the appellate procedure utilized by the City.

In support, the following is stated:

**PROCEDURAL HISTORY**

1. On June 13, 2012, the 8th Circuit Court – Keene District Division (*Burke, J.*) granted the city of Keene's request for an administrative inspection warrant under RSA chapter 595-B. App. 1;<sup>1</sup> RSA 595-B:2 (2001). The warrant

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<sup>1</sup> Citations to the record are as follows: "App." refers to the appendix filed with this motion; and "NOA" refers to the City of Keene's notice of appeal.

authorized the City to enter Ian Bernard's property to determine whether Mr. Bernard had violated either the City's zoning ordinance or the New Hampshire Fire Code, or both. App. 1.

2. In early January 2013, the City served Mr. Bernard with a "Local Ordinance Citation/Summons," which alleged that he had violated *Keene, N.H., Ordinances 42-95 (2011)* by not having the required smoke and carbon monoxide detectors installed in his residence. App. 2.

3. Mr. Bernard sought to suppress evidence obtained by the City as a result of its execution of the administrative inspections warrant. App. 3-4. The circuit court (*Runyon, J.*) granted the motion. *Id.* The City filed notice of a Rule 7 mandatory appeal in which it indicated that it would challenge this and a subsequent order issued by the trial court dismissing the City's ordinance-violation citation. NOA 5-7.

### ARGUMENT

4. This Court has requested memorandums of law addressing whether the City's appeal should have been brought as a criminal appeal under RSA 606:10 (2001). That statute, entitled "Appeals by the State," provides, in relevant part:

II. An appeal may be taken by the state *in criminal cases* on questions of law from the district ... courts ... to the supreme court from:

(a) An order of the court prior to trial which suppresses any evidence including, but not limited to, physical or identification evidence or evidence of a confession or admission;

(b) An order prior to trial which prevents the state from obtaining evidence;

(c) A pretrial dismissal of an indictment, information or complaint; or

(d) Any other order of the court prior to trial if, either because of the nature of the order in question or because of the particular circumstances of the case, there is a reasonable likelihood that such order will cause either serious impairment to or termination of the prosecution of any case.

....

V. No appeal may be taken pursuant to this section unless the attorney general approves such appeal ....

RSA 606:10 (emphasis added); *see also* RSA 21-M:8, II(b) (2012) (directing that the duties of the criminal bureau of the New Hampshire Department of Justice “shall include” “[r]epresenting the state in all criminal appeals to the New Hampshire supreme court or federal courts”).

5. The question, then, is whether the City’s ordinance enforcement action in the district division was a “criminal case.” The resolution of this question depends on whether the enforcement of the City’s smoke detector ordinance is a criminal or civil process. For four reasons, this Court should find that it is civil.

6. First, the language of the statutes authorizing Keene’s enforcement of its fire code makes evidence that the legislature intended enforcement proceedings to be civil. This Court’s analysis in *State v. Fitzgerald*, 137 N.H. 23 (1993), is instructive. In *Fitzgerald*, this Court addressed the question of whether, for double jeopardy purposes, a red light violation under RSA 265:10 was a criminal offense. *Id.*

at 26. To answer that question, this Court “look[ed] to the express or implied intent of the legislature in establishing the penalty” for the offense. *Id.*

7. *Fitzgerald* found particularly compelling that the “statutory mechanisms created for [traffic violation] enforcement and adjudication” permitted pleas by mail: “If adjudications of these traffic violations were criminal proceedings, this default provision would have serious constitutional implications.” *Id.* at 27. The Court thus concluded “that the legislature intended the traffic violations adjudicable under this mail-in procedure to be civil in nature.” *Id.*

8. The same is true of the statutory framework that authorizes Keene’s enforcement of its fire code. Keene has adopted a “Fire Prevention and Protection Code.” *See Keene, N.H., Ordinances* ch. 42. Mr. Bernard was alleged to have violated section 42-95 of the code, which provides that “[s]moke and carbon monoxide detectors shall be installed on every floor level outside bedrooms, including basements, in all bedrooms, and on every level in each common stairway for apartments.”

9. The adoption of this ordinance is authorized under RSA 47:22 and RSA 153:14. *See* RSA 47:22 (2012) (“The ... governmental body of any city[] is hereby empowered and authorized in the passing and adopting of ordinances, [and] establishing codes ... relating to ... fire protection ....”); RSA 153:14, I (Supp. 2012) (“Any city, town, village district and precinct may adopt the rules and regulations of the state fire marshal by reference thereto, as a part of its local laws and ordinances.”).

10. Under RSA 47:17, XVI (2012), a municipality may “establish a procedure for the issuance of warnings and citations for the violation of ... fire ... and housing codes and ordinances.” The City’s fire chief may be charged with the enforcement of the City’s fire code. *See* RSA 154:2, II(a) (Supp. 2012) (“The fire chief shall have the authority to enforce any local or state laws or rules pertaining to ... fire safety measures including the state fire code enacted pursuant to RSA 153:5.”).

11. A municipality is also authorized by statute to enforce compliance with its ordinances. This may be done by defining a system that does not rely on the circuit court, pursuant to RSA 31:39-c:

Notwithstanding any other provision of law, a town may use the following provisions in the enforcement of its ordinances and regulations:

Any town may establish ... a system for the administrative enforcement of violations of any municipal code, ordinance, bylaw, or regulation and for the collection of penalties, to be used prior to the service of a formal summons and complaint. Such a system may be administered by a police department or other municipal agency. *The system may include opportunities for persons who do not wish to contest violations to pay such penalties by mail.* The system may also provide for a schedule of enhanced penalties the longer such penalties remain unpaid; provided, however, that the penalty for any separate offense shall in no case exceed the maximum penalty for a violation as set forth in RSA 31:39, III.

RSA 31:39-c, I (Supp. 2012) (emphasis added).

12. Or, enforcement may be accomplished by the municipality through the circuit court, under RSA 31:39-d:

[A] local official with authority to prosecute an offense under any municipal code, ordinance, bylaw, or regulation, if such offense is classified as a violation under applicable law, may issue and serve upon the defendant, in addition to a summons to appear in the district court, a local ordinance citation as set forth in this section. *The defendant receiving such a citation may plead guilty or nolo contendere by mail by entering that plea as provided herein.* If such a plea is accepted by the district court and the prescribed fine is paid with the plea by mail, the defendant shall not be required to appear personally or by counsel; otherwise the defendant shall appear as directed by the court.

RSA 31:39-d (Supp. 2012) (entitled "Local Ordinance Citations; Pleas by Mail").

13. Thus, under these statutes, the resolution of enforcement actions may in some cases circumvent the circuit court entirely, or may be disposed of by mail. The language of these statutes makes evident that, as in *Fitzgerald*, the legislature's intent in creating this statutory mechanism for enforcement was to establish a civil rather than criminal proceeding.

14. Second, other statutory provisions also make evident the legislature's intent to make the enforcement of local fire ordinances a civil process. For example, RSA 31:39-d refers to the penalties prescribed for ordinance violation as "civil" penalties. *See* RSA 31:39-d, III ("Defendants who are issued a summons and local ordinance citation and who wish to plead guilty or nolo contendere shall enter their plea on the summons and return it with payment of the civil penalty ...."); RSA 31:39-d, IV ("Civil penalties collected by the district court under this section shall be remitted to the municipality issuing the citation.").

15. Third, the district division rules, perhaps reflecting this statutory scheme, set apart a section entitled "Town Ordinance Violation Rules." *See Dist.*

*Div. R. 6.1-6.7.* These rules also refer to ordinance-violation penalties as “civil.” *See Dist. Div. R. 6.4.*

16. Fourth, the penalty scheme within Keene’s smoke detector ordinance is a uniquely civil scheme. It provides for additional fines in the event of ongoing noncompliance: “A person who fails to comply with the notice described above shall be guilty of a violation and subject to a fine of up to \$500.00. Each day that a violation continues shall constitute a separate violation punishable as such.” This penalty structure appears designed to compel prompt remedial action, a hallmark of civil, rather than criminal, sanctions. *See, e.g., State v. Guay*, 164 N.H. 696, 701 (2013) (noting that civil administrative penalties are those intended to provoke compliance); *cf. Town of Nottingham v. Cedar Waters, Inc.*, 118 N.H. 282, 285 (1978) (“In civil contempt, the punishment is remedial, coercive, and for the benefit of the complainant. Civil contempt proceedings may result [penalties levied] until the contemnor complies with the court order.”).

17. The fact that some language in the above-cited statutes may seem suited to criminal proceedings does not mean that the code enforcement at issue here is criminal in nature. *See, e.g., RSA 31:19-d* (referring to the authority to “prosecute an offense”). The executive-branch power to enforce the law “includes criminal as well as civil process.” *Opinion of the Justices (Requiring Att’y Gen. to Join Lawsuit)*, 162 N.H. 160, 169 (2011) (citation omitted) (discussing the authority of the governor); *see also 38 Endicott St. N., LLC v. State Fire Marshall*, 163 N.H. 656, 662

(2011) (in the context of the Right-to-Know Law, the phrase “for law enforcement purposes” “includes both civil and criminal matters”). In addition, “the applicability of characteristically criminal procedure does not prevent a proceeding from being civil in substance.” *Fitzgerald*, 137 N.H. at 27.

18. Finally, to the extent that *State v. Stearns*, 31 N.H. 106 (1855), suggests a different result, this Court should overrule that case or find it inapposite. In *Stearns*, the question before this Court was whether the defendant could collect litigation costs as a result of the dismissal of a complaint against him. *Stearns*, 31 N.H. at 107-08. The complaint, which had been brought by the city of Portsmouth, alleged that the defendant had breached a city ordinance by running a bowling alley without a license. *Stearns*, 31 N.H. at 107.

19. This Court determined that the question of whether the defendant could collect costs turned on whether the breach-of-ordinance proceeding was civil or criminal. *Id.* at 107. By statute, fines collected by the court in such a proceeding were payable to the city. *Id.* at 108. Because these penalties were therefore “applied to the public use” rather than “designed as a remedy for a private loss or injury,” this Court found that the case against the defendant was a criminal prosecution. *Id.* at 110-11. The *Stearns* defendant was therefore not entitled to recoup his costs. *Id.* at 111.

20. Here, as in *Stearns*, penalties collected in ordinance-enforcement actions are remitted to the municipality. See RSA 31:39-c, IV. Unlike in *Stearns*,



however, the statute authorizing the collection of fines in this case explicitly refers to these as "civil penalties." *Id.* In addition, as discussed above, the Keene ordinance penalties are intended to coerce compliance with the ordinance. *Stearns* is therefore inapposite.

21. Thus, for the reasons cited above, this Court should conclude that the legislature intended ordinance-enforcement proceedings to be civil in nature.

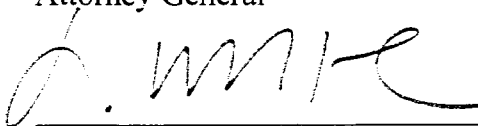
**CONCLUSION**

22. Because the enforcement action against Mr. Bernard was not a criminal matter, the City of Keene was not required to follow the prescriptions of RSA 606:10.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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