THE STATE OF NEW HAMPSHIRE
SUPREME COURT

STATE OF NEW HAMPSHIRE
vs.
IAN BERNARD

Case No. 2013-0520

<u>APPELLANT'S MEMORANDUM OF LAW</u>

NOW COMES, the City of Keene, by and through its attorney, Thomas P. Mullins, Esq., and submits this Memorandum of Law pursuant to the Court's Order dated August 30, 2013, and in support thereof, states as follows:

INTRODUCTION

On August 12, 2013, the City of Keene ("City" or "Appellant") filed a Rule 7 Notice of Mandatory Appeal, appealing the 8th Circuit Court – Keene's July 15, 2013 Order granting a Motion to Dismiss filed by Ian Bernard a/k/a Ian Freeman ("Defendant"). This Court's Order dated August 30, 2013, ordered that the City and the New Hampshire Attorney General file memoranda addressing whether RSA 606:10, which establishes the procedures to be followed when appeals are taken by the State in criminal cases, and RSA 606:10, V, which requires prior approval from the Attorney General for such appeal, is applicable in this case.

The case appealed from originated from a Local Ordinance Citation/Summons issued by the City against Defendant for failure to comply with a City ordinance requiring certain fire protection measures. See Local Ordinance Citation/Summons attached hereto as Exhibit A. Said Local Ordinance Citation/Summons was issued after an administrative inspection of the Defendant's property located at 75 Leverett Street, Keene, New Hampshire, which was authorized by an Administrative Inspection Warrant

issued by the 8th Circuit Court – Keene after a finding of probable cause in accordance with RSA 595-B. The administrative inspection revealed that the Defendant's property was a rental use and lacked certain required fire protection measures required by City ordinance which presented significant safety issues. The City issued a Notice of Violation to the Defendant identifying the ordinance violations at the property and the corrective action necessary to remedy those violations, but despite the City's repeated efforts the Defendant failed to take the necessary corrective action. As a result, the City issued the Defendant a Local Ordinance Citation/Summons on a form provided by the 8th Circuit Court - Keene. Notably, said Local Ordinance Citation/Summons issued to the Defendant identified the offense as a violation and assessed a Five Hundred Dollar ($500.00) civil penalty.

ARGUMENT

As stated above, this matter arises from a Local Ordinance Citation/Summons issued by the City to the Defendant for violation of a City ordinance requiring that rental property owners take certain fire protection measures for rental property located within the City of Keene. Although New Hampshire has adopted a State Fire Code pursuant to RSA 153:5 and RSA 541-A, the City is specifically authorized to adopt ordinances dealing with the same subject matter, fire protection and prevention, if such ordinances "are no less restrictive than those adopted by the fire marshal." See RSA 153:5 and RSA 47:22.

Acting pursuant to the authority granted to it under RSA 153:5 and RSA 47:22, the City has adopted an ordinance requiring that all rental properties located in the City be equipped with smoke alarms/carbon monoxide detectors, and that among other

requirements any such alarms/detectors must be interconnected and powered by the building electrical system (i.e. hardwired and not battery operated). See Section 42-95, et seq., of the City Code of Ordinances attached hereto as Exhibit B. In accordance with RSA 47:17 and RSA 31:39, III, the City has made non-compliance with said ordinance a violation level offense, which carries with it a civil penalty of up to Five Hundred Dollars ($500.00) per offense. See Section 42-101 of the City Code of Ordinances. See also Davy v. Dover, 111 N.H. 1 at 4 (1971), in which this Court held that RSA 47:17 authorizes municipalities to adopt ordinances with civil penalties even where the enabling statute did not specifically authorize civil penalties.

Under New Hampshire law, it is well recognized that a violation is not a crime. See RSA 625:9, II (b) and Circuit Court – Criminal – Basic Definitions, attached hereto as Exhibit C, where violation is defined as "[…] an offense which is not 'criminal' in nature. In other words, while it may involve conduct which is illegal and may be charged, it is not classified as a 'crime' and, for that reason, a person who is charged with a violation cannot go to jail if convicted." Further illustrating the distinction between offenses arising from non-compliance with municipal ordinances and other more serious criminal offenses, the legislature enacted RSA 31:39-d, a statute which creates a streamlined process allowing a local municipal official with authority to enforce compliance with the municipal code to issue a Local Ordinance Citation/Summons and attach a civil penalty not to exceed One Thousand Dollars ($1,000.00) for each offense, so long as the offense is classified as a violation.

In this case, although the City ordinance is authorized by RSA 153:5 and RSA 47:22, and is complementary to the State Fire Code, the basis of the offense remains non-

compliance with a City ordinance, not a State statute. As such, it was proper for the Fire Prevention Officer to issue the Defendant a Local Ordinance Citation/Summons and assess a Five Hundred Dollar ($500.00) civil penalty.

RSA 606:10 relates to appeals taken by the State in criminal cases. As previously established, a violation is not a crime. Further, the penalty assessed pursuant to the Local Ordinance Citation/Summons is a civil penalty, not a criminal penalty. As such, RSA 606:10 does not apply in this case, and the City was not required to seek approval from the Attorney General pursuant to RSA 606:10, V, in order to file a mandatory appeal. In the alternative, to the extent that the Court concludes that RSA 606:10, V does apply to this action, the City submits that this is an issue of first impression both before the Court and the Attorney General, and therefore requests that the Court allow the City the opportunity to obtain the approval of the Attorney General under the statute.

CONCLUSION

The underlying cause of action arose from a Local Ordinance Citation/Summons based upon defendant's non-compliance with a lawfully adopted City ordinance. The offense was charged as a violation, by definition not a criminal offense, and the penalty imposed was a civil penalty authorized pursuant RSA 47:17, RSA 31:39, and RSA 31:39-d. On its face RSA 606:10 only applies to criminal appeals taken by the State, which based on the foregoing this is not. As such, the City was not required to seek the approval of the Attorney General in order to file a Rule 7 mandatory appeal under RSA 606:10. The City believes that this type of action is best dealt with by local municipal authorities, that involving the Attorney General's Office is not what the legislature intended when it adopted RSA 606:10 and RSA 31:39-d, and that it would not be an

efficient use of the State's limited resources to require the approval of the Attorney General prior to the appeal by the City.
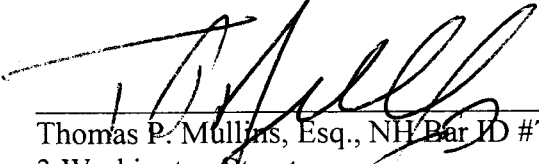
WHEREFORE, Petitioner requests that the Court:

A.   Hold that RSA 606:10, V, does not apply in this case; and

B.   Issue a Notice of Appeal; and

C.   Issue an order requiring the parties to submit briefs on the merits; and

D.   In the alternative, if the Court determines that RSA 606:10, V, does apply in this case, allow the City the opportunity to request written approval from the Attorney General; and

E.   Grant such other relief as may be just and necessary.

Respectfully submitted,
CITY OF KEENE
By Its Attorney

Dated: 9/13/13

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Thomas P. Mullins, Esq., NH Bar ID #7919
3 Washington Street
Keene, NH 03431
(603) 357-9806

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of September 2013, I mailed by First Class Mail a true and correct copy of the within Memorandum of Law to Defendant Ian Bernard a/k/a Ian Freeman, at 63 Emerald Street, #610, Keene, New Hampshire 03431, and to Lisa Wolford, Assistant Attorney General, Office of the Attorney General, 33 Capitol Street, Concord, New Hampshire 03301.

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Thomas P. Mullins, Esq.