

# STATE OF NEW HAMPSHIRE

8<sup>th</sup> Circuit – District Division - Keene

State

v

Graham Colson

## SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

NOW COMES the Defendant, by and through his attorneys, Backus, Meyer and Branch, LLP and respectfully files this Supplemental Memorandum in Support of Motion to Dismiss, stating in support as follows:

1. Testimony was presented at the hearing before the Court by the City Manager that in September of 2011, he was requested by the Chief of Police to authorize the use of No Trespass letters with regard to ordinance violations occurring in Central Square. They had no discussion about the circumstances under which they would be issued or the length of time that the recipient would be barred from the Square. The City Council had no involvement. He acknowledged that Central Square had a unique place in Keene as a place of public gathering and expression. Nevertheless, he stated that he viewed his authority over the Square as being comparable to the authority of any private land owner over his or her property.

2. Officer Jason Short testified that he and other officers had been directed by their supervisor to address disruptive behavior in Central Square by the issuance of No Trespass letters. He testified that he was given no training or guidance on how or when

these letters were to be used. He could also issue citations for ordinance violations. His personal criteria in choosing whether to issue a summons or a no trespass letter, at least in regard to Mr. Colson, was whether he was a repeated violator and his lack of financial means.

3. This testimony further demonstrates the illegality and unconstitutionality of the procedures utilized by the City. The City enforcement scheme fails to delineate between legislative, executive and judicial functions. Instead it places all three under the executive. Unlike the recipient of a Summons, Mr. Colson was never given the opportunity for a judicial adjudication of his alleged ordinance violation in Central Square. His being banned from that location amounted to a restriction on his liberty rights without due process of law in direct violation of the Fourteenth Amendment to the United States Constitution, and Part 1, Article 15 of the New Hampshire Constitution. Second, this administrative enforcement scheme was adopted without any consultation with the legislative body of the City, much less its approval, as required by RSA 31:39-c (I). The enforcement scheme was also statutorily defective by purporting to adjudicate guilt without providing the individual cited with the option of a court determination. RSA 31:39-c (III).

4. The enforcement mechanism is further unconstitutional in providing the executive branch with complete discretion over the scope of the punishment. It is unclear who decided that the period of the "banning" should be for one year, but it was clearly made without any legislative involvement. Further, the penalty of being banned from Central Square is not authorized by the statute governing municipal enforcement of ordinances which provides for "suitable penalties not exceeding \$1,000.00." RSA 31:39 (III).

5. The City claims that a decision in Mr. Colson's favor would leave it powerless to enforce ordinances against repeat offenders in Central Square. However, the issue raised by this Motion is not the enforcement authority of the City, but its obligation to use that enforcement authority in a way that does not violate the law and constitutional rights.

6. The facts leading to Mr. Colson's trespass arrest demonstrate that that arrest, although not the original banning letter, was premised upon his exercising his First Amendment Robin Hood activities. Both of the complaining witnesses were parking enforcement officers whose job duties do not normally encompass enforcing of any other ordinances aside from parking regulations. However, the defendant has consented to this Court deferring a ruling on this issue pending an evidentiary hearing if the other grounds set forth herein for dismissal are not upheld.

Respectfully Submitted,

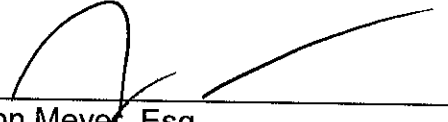
GRAHAM COLSON

By His Attorneys,

BACKUS, MEYER & BRANCH, LLP

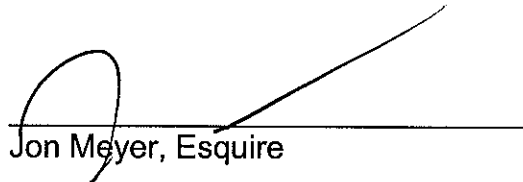
Dated: September 4, 2013

By: \_\_\_\_\_

  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 4 day of September 2013, a copy of the above Supplemental Memorandum in Support of Motion to Dismiss was forwarded by U.S. Postal Service first class mail to Jean M. Kilham, Esquire, attorney for the State.

  
Jon Meyer, Esquire