

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2009-0544

CITY OF PORTSMOUTH

v.

JAMES BOYLE, TRUSTEE, 150 GREENLEAF AVENUE REALTY TRUST

CITY OF PORTSMOUTH'S BRIEF

Suzanne M. Woodland, Esq.
Assistant City Attorney
NH Bar #: 9410

Susan W. Chamberlin, Esq.
NH Bar #: 5517

City of Portsmouth
1 Junkins Avenue
Portsmouth, NH 03801
603-610-7240

TABLE OF CONTENTS

I.	QUESTIONS PRESENTED FOR REVIEW	1
II.	STATUTES AND ORDINANCES	2
III.	STATEMENT OF FACTS	7
IV.	SUMMARY OF ARGUMENT	8
V.	ARGUMENT	9
1.	Standard of Review	9
2.	A municipal enforcement action under RSA 676 is not a civil action for purposes of Superior Court Rule 87.	10
a.	<i>Whether a municipality is enforcing its zoning subdivision regulations or acting in a private capacity controls the assessment of costs.</i>	10
b.	<i>The legislature enacted a comprehensive legislative scheme to protect municipalities acting in their enforcement capacity.</i>	12
c.	<i>The statutory scheme set forth at RSA 676 et seq and Rule 87 may coexist under an interpretation that recognizes a municipality's multiple roles.</i>	14
d.	<i>Assessment of costs and fees under Rule 87 must not be used to discourage municipalities from undertaking good faith enforcement actions.</i>	15
3.	A municipality is immune from an award of costs in a good faith enforcement action.	16
4.	The Superior Court's award of costs was an unsustainable act of discretion where the costs arose from a good faith municipal enforcement action.	17
VI.	CONCLUSION AND REQUEST FOR ORAL ARGUMENT	19
VII.	CERTIFICATION	20

TABLE OF AUTHORITIES

Cases:

<u>Adams v. Bradshaw</u> , 135 N.H. 716 (1991)	18
<u>Amabello v. Colonial Motors</u> , 120 N.H. 524, 525 – 526, 418 A.2d 1279, 1281 (1980).....	18
<u>Arcidi v. Town of Rye</u> , 150 N.H. 694, 704 (2004)	10
<u>Associated Press v. State</u> , 153 N.H. 120 (2005)	15
<u>Atwood v. Owens</u> , 142 N.H. 396, 398 (1997)	17
<u>Carignan v. N.H. Int'l Speedway</u> , 151 N.H. 409, 419 (2004).....	9
<u>Cutter v. Farmington</u> , 126 N.H. 836 (1985).....	18
<u>Dover v. Kimball</u> , 136 NH 441 (1992)	17
<u>Dumont v. Wolfboro</u> , 137 NH 1 (1993).....	17
<u>Glaude & Fogg</u> , 151 NH 273, 275 (2004)	10
<u>Grenier v. Barclay Square Commercial Condo Ass'n</u> , 150 N.H. 111 (2003) 116... 15, 16, 17	
<u>Medico v. Almasy</u> , 108 N.H. 324, 325, 234 A.2d 527, 528 (1967)	18
<u>New Hampshire Donuts, Inc. v. George Skipitaris</u> , 129 N.H. 774 (1987).....	14
<u>Portsmouth Country Club v. Town of Greenland</u> , 152 N.H. 617 (2005).....	9, 10
<u>Radziewicz v. Town of Hudson</u> (October 20, 2009.).....	9
<u>Sanborn Regional Sch. Dist. v. Budget Comm. Of the Sanborn Regional Sch. Dist.</u> , 150 N.H. 241, 242 (2003).....	16
<u>Smith v. Wolfboro</u> , 136 NH 337 (1992).....	17
<u>State v. Lambert</u> , 147 N.H. 295 (2001).....	10, 18
<u>Tarbell Administrator, Inc. v. Concord</u> , 956 A.2d 322 (NH 2008).....	15
<u>Town of Windham v. Lawrence Savings Bank</u> , 146 N.H. 517 (2001)	11
<u>Van Der Stok v. Van Noorhees</u> , 151 N.H. 679.....	10
<u>White v. Francoeur</u> , 138 N.H. 307 (1994).....	10, 11

Statutes:

NH RSA 80	13
NHRSA 356-B:15, II.....	15
NH RSA 525	18
NH RSA 674:16 (I).....	2, 11
NH RSA 676	1, 7,8, 10, 12, 14, 15, 16, 17, 18, 19
NH RSA 676:15	2, 7, 8, 9, 11, 12, 14, 19
NH RSA 676:17	3, 7, 8, 9, 10, 11, 12, 13, 15, 17, 19
NH RSA 676:17-a	4, 17
NH RSA 676:18	12
NH RSA 677:15 (V)	17

Other Authorities:

Portsmouth Zoning Ordinance Chapter 10 Article VI.....	7
Superior Court Rule 87	1,2, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

I. QUESTIONS PRESENTED FOR REVIEW

1. Did the Superior Court err as a matter of law by awarding costs pursuant to Superior Court Rule 87 against the City of Portsmouth in a case arising from a zoning enforcement action commenced and conducted in good faith?
 - 1a. Is a municipal enforcement action under RSA 676 a civil action for purposes of Superior Court Rule 87?
 - 1b. Is a municipality immune from an award of costs when it has acted in good faith in an enforcement action?

2. Was the Superior Court's award of costs a sustainable act of discretion when the costs arose from a good faith municipal enforcement action and a portion of those costs were not directly related to the experts' appearance before the Superior Court?

II. STATUTES AND ORDINANCES

Superior Court Rule 87. Taxation of Costs

- (a) Costs. Costs shall be allowed as of course to the prevailing party as provided by these rules, unless the Court otherwise directs.
- (b) Taxation of Costs. Upon written request, the clerk shall tax costs in any case, which shall include the fees of the clerk and fees for service of process which are documented in the court file.
Any party claiming other allowable costs shall file a motion to allow costs together with an itemized, verified bill of all costs requested, to be ruled upon by the Court. Any party aggrieved by the Court's order concerning costs may appeal therefrom within 30 days from the date of notice of such order, regardless of whether an appeal concerning the underlying judgment is sought.
- (c) Allowable Costs. The following costs shall be allowed to the prevailing party: Fees of the clerk, fees for service of process, witness fees, expense of view, cost of transcripts, and such other costs as may be provided by law. The court, in its discretion, may allow the stenographic cost of an original transcript of a deposition, plus one copy, including the cost of videotaping, and may allow other costs including, but not limited to, actual costs of expert witnesses, if the costs were reasonably necessary to the litigation.

NH RSA 674:16 (I) Grant of Power.

- I. For the purpose of promoting the health, safety, or the general welfare of the community, the local legislative body of any city, town, or county in which there are located unincorporated towns or unorganized places is authorized to adopt or amend a zoning ordinance under the ordinance enactment procedures of RSA 675:2-5. The zoning ordinance shall be designed to regulate and restrict:
 - (a) The height, number of stories and size of buildings and other structures;
 - (b) Lot sizes, the percentage of a lot that may be occupied, and the size of yards, courts and other open spaces;
 - (c) The density of population in the municipality; and
 - (d) The location and use of buildings, structures and land used for business, industrial, residential, or other purposes.

(remainder of the statute intentionally omitted)

NH RSA 676:15 - Injunctive Relief

In case any building or structure or part thereof is or is proposed to be erected, constructed, altered, or reconstructed, or any land is or is proposed to be used in violation of this title or of any local ordinance, code, or regulation adopted under this title, or of any provision or specification of an application, plat, or plan approved by, or any requirement or condition of a permit or decision issued by, any local administrator or land use board acting under the authority of this title, the building inspector or other official with authority to

enforce the provisions of this title or any local ordinance, code, or regulation adopted under this title, or the owner of any adjacent or neighboring property who would be specially damaged by such violation may, in addition to other remedies provided by law, institute injunction, mandamus, abatement, or any other appropriate action or proceeding to prevent, enjoin, abate, or remove such unlawful erection, construction, alteration, or reconstruction.

NH RSA 676:17 Fines and Penalties; Second Offense

- I. Any person who violates any of the provisions of this title, or any local ordinance, code, or regulation adopted under this title, or any provision or specification of any application, plat, or plan approved by, or any requirement or condition of a permit or decision issued by, any local administrator or land use board acting under the authority of this title shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person; and shall be subject to a civil penalty of \$275 for the first offense and \$550 for subsequent offenses for each day that such violation is found to continue after the conviction date or after the date on which the violator receives written notice from the municipality that the violator is in violation, whichever is earlier.
- II. In any legal action brought by a municipality to enforce, by way of injunctive relief as provided by RSA 676:15 or otherwise, any local ordinance, code or regulation adopted under this title, or to enforce any planning board, zoning board of adjustment or building code board of appeals decision made pursuant to this title, or to seek the payment of any fine levied under paragraph I, the municipality shall recover its costs and reasonable attorney's fees actually expended in pursuing the legal action if it is found to be a prevailing party in the action. For the purposes of this paragraph, recoverable costs shall include all out-of-pocket expenses actually incurred, including but not limited to, inspection fees, expert fees and investigatory expenses.
- III. If any violation of a local ordinance, code or regulation, or any violation of a planning board, zoning board of adjustment or building code board of appeals decision, results in the expenditure of public funds by a municipality which are not reimbursed under paragraph II, the court in its discretion may order, as an additional civil penalty, that a violator make restitution to the municipality for such funds so expended.
- IV. The superior court may, upon a petition filed by a municipality and after notice and a preliminary hearing as in the case of prejudgment attachments under RSA 511-A, require an alleged violator to post a bond with the court to secure payment of any penalty or remedy or the performance of any injunctive relief which may be ordered or both. At the hearing, the burden shall be on the municipality to show that there is a strong likelihood that it will prevail on the merits, that the penalties or remedies sought are

reasonably likely to be awarded by the court in an amount consistent with the bond sought, and that the bond represents the amount of the projected expense of compliance with the injunctive relief sought.

- V. The building inspector or other local official with the authority to enforce the provisions of this title or any local ordinance, code, or regulation adopted under this title may commence an action under paragraph I either in the district court pursuant to RSA 502-A:11-a, or in the superior court. The prosecuting official in the official's discretion may, prior to or at the time of arraignment, charge the offense as a violation, and in such cases the penalties to be imposed by the court shall be limited to those provided for a violation under RSA 651:2 and the civil penalty provided in subparagraph I(b) of this section. The provisions of this section shall supersede any inconsistent local penalty provision.

NH RSA 676:17-a Cease and Desist Orders. – The building inspector, code enforcement officer, zoning administrator or other official designated as an enforcement authority by ordinance or resolution of the local legislative body may issue a cease and desist order against any violation of this title, any local ordinance, code or regulation adopted under this title, or any provision or specification of an application, plat, or plan approved by, or any requirement or condition of a permit or decision issued by, any local administrator or land use board acting under the authority of this title, subject to the following:

- I. The order shall state, in writing:
 - (a) The precise regulation, provision, specification or condition which is being violated.
 - (b) The facts constituting the violation, including the date of any inspection from which these facts were ascertained.
 - (c) The corrective action required, including a reasonable time within which such action shall be taken.
 - (d) A statement that a motion for summary enforcement of the order shall be made to the court of the district in which the property is situated unless such corrective action is taken within the time provided, or unless an answer is filed within 20 days, as provided in paragraph V.
 - (e) A statement that failure to either take the corrective action, or to file an answer, may result in corrective action being taken by the municipality, and that if this occurs the municipality's costs shall constitute a lien against the real estate, enforceable in the same manner as real estate taxes, including possible loss of the property if not paid.
- II. The order shall be served upon the record owner of the property or the record owner's agent, and upon the person to whom taxes are assessed for the property, if other than the owner, and upon any occupying tenant of the property, and upon any other person known by the enforcing officer to exercise control over the premises in violation, and upon all persons holding mortgages upon such property as recorded in the office of the register of deeds, in the same manner provided for service of a summons in a civil

- action in district court. Personal service may be made by a sheriff, deputy sheriff, local police officer, or constable. If the owner is unknown or cannot be found, the order shall be served by posting it upon the property and by 4 weeks' publication in a newspaper in general circulation in the municipality.
- III. Upon service of the order, the owner or the owner's agent, occupying tenant or the tenant's agent, or any other person who is engaged in development, construction, excavation, or other changes of the land or buildings on the land shall cease immediately such activities, if so provided in the order, until such time as judgment is rendered under paragraphs VI or VII. Failure to cease such activity shall constitute a separate violation of this title in addition to the violation cited in the order, unless such order is annulled as provided in paragraph VII.
 - IV. A copy of the order with proof of service shall be filed with clerk of the district court of the district in which the property is located not fewer than 5 days prior to the filing of a motion to enforce under paragraph VI.
 - V. Within 20 days after the date of service, any person upon whom the order is served may serve an answer in the manner provided for the service of an answer in a civil action, specifically denying such facts in the order as are in dispute.
 - VI. If no answer is served, the enforcement official may move the court for the enforcement of the order. If such a motion is made the court may, upon the presentation of such evidence as it may require, affirm or modify the order and enter judgment accordingly, fixing a time after which the governing body may proceed with the enforcement of the order. The clerk of the court shall mail a copy of the judgment to all persons upon whom the original order was served.
 - VII. If an answer is filed and served as provided in paragraph V, further proceedings in the action shall be governed by the rules of the district court. If the order is sustained following trial, the court shall enter judgment and shall fix a time within which the corrective action shall be taken, in compliance with the order as originally filed, or as modified by the court. If the order is not sustained, it shall be annulled and set aside. If it appears to the court that the order was frivolous, was commenced in bad faith, or was not based upon information and belief formed after reasonable inquiry or was not well-grounded in fact, then the court shall order the defendant's costs and reasonable attorney's fees to be paid by the municipality. The clerk of the court shall mail a copy of the judgment to the persons upon whom the original order was served.
 - VIII. If a judgment is not complied with in the time prescribed, the local governing body may cause the corrective action to be taken as set forth in the judgment. The cost to the municipality of taking such corrective action together with its other expenses as provided in paragraph IX, shall be a lien against the real estate on which the violation occurred, which shall continue for 18 months from the date upon which the expense account is allowed by the court, as provided in paragraph IX.

- IX. The municipality shall keep an accurate account of the expenses incurred in carrying out the order and of all other expenses in connection with its enforcement, including but not limited to filing fees, service fees, publication fees, the expense of searching the registry of deeds to identify mortgages, witness and expert fees, attorney's fees and traveling expenses. The court shall examine, correct if necessary, and allow the expense account. The municipal governing body, by majority vote, may commit the expense account to the collector of taxes, in which case the mayor, as defined by RSA 672:9, shall direct the expense account, together with a warrant under the mayor's hand and seal, to the municipal tax collector, requiring the tax collector to collect the same from the person to whom real estate taxes are assessed for the premises upon which such corrective action was taken, and to pay the amount so collected to the municipal treasurer. Within 30 days after the receipt of such warrant, the collector shall send a bill as provided in RSA 76:11. Interest as provided in RSA 76:13 shall be charged on any amount not paid within 30 days after the bill is mailed. The collector shall have the same rights and remedies as in the collection of taxes, as provided in RSA 80.
- X. A party aggrieved by the judgment of the district court may appeal, within 15 days after the rendering of such judgment, to the superior court.
- XI. The remedy provided in this section is supplementary to other enforcement remedies provided by this chapter or local ordinance. At the discretion of the local enforcement official, an action to enforce a cease and desist order under this section may be joined with an action under RSA 676:17, I, and the cease and desist order shall constitute the written notice under RSA 676:17, I(b).

III. STATEMENT OF FACTS

On January 26, 2006, the City of Portsmouth ("City") commenced a zoning enforcement action against 150 Greenleaf Avenue Realty Trust, James Boyle, Trustee ("Defendant"). Appendix at 1 (Original Petition). As set forth in the Original Petition as well as a subsequently filed Amended Petition, the City was exercising its authority under RSA 676:15 and 676:17 to enforce Portsmouth Zoning Ordinance Chapter 10 Article VI pertaining to wetlands protection. Appendix at 1 and 5. The City alleged that the Defendant had unlawfully clearcut trees within a wetlands buffer zone and sought injunctive relief and penalties as remedies for the environmental damage.

A bench trial took place on May 2, 2007. On August 9, 2007, the Superior Court (Lewis, J.) dismissed the Amended Petition, finding that the City had not met its burden of showing that Defendant's clear cutting activity violated the City's zoning ordinance. Appendix at 10. The City appealed to this Court; this Court affirming on July 2, 2008 the Superior Court's August 9, 2007 decision (Supreme Court Docket No. 2007-0722.)

Invoking Superior Court Rule 87, Defendant filed a Request for Taxation of Costs on November 10, 2008, to which the City timely objected.¹ Appendix at 17 and 23 (exhibits to the pleadings omitted). On January 21, 2009, the Superior Court ordered Defendant to submit details regarding his costs, and Defendant complied. Appendix at 27 and 29 (exhibits to the pleadings omitted). On March 12, 2009, the City objected to Defendant's claim for \$28,052.34 in costs stating that at most \$9,090 were costs directly related to the experts' appearance before the Superior Court. Appendix at 35.

¹ Defendant also filed a Request for Attorneys' Fees, to which the City objected. The Superior Court dealt with both motions in its subsequent orders.

The Superior Court held a hearing on the pending motions on April 14, 2009. On June 30, 2009 the Superior Court (Lewis, J.) held that Superior Court Rule 87 applied to the City's enforcement action and that Defendant was allowed certain costs including his deposition transcription charges and his expert witness costs. The June 30, 2009 Superior Court Order (hereinafter the "Order") which is the subject of this appeal is set forth in the Appendix at 39. In the same Order, the Superior Court denied Defendant's request for attorneys' fees, rejecting Defendant's argument that the City proceeded in this action in bad faith. Id. at 50. The Court also rejected Defendant's argument that he was seeking "judicial assistance to secure a clearly defined right". Id. The City appeals the Superior Court's assessment of costs.

IV. SUMMARY OF ARGUMENT

The nature of the City's action controls whether or not the Superior Court may award costs against the City. The City undertook a zoning enforcement action under RSA 676:15 and RSA 676:17. The City was not engaged in a civil action as a private entity for purposes of Superior Court Rule 87.

The comprehensive municipal zoning statutory scheme and the prior decisions of this Court do not support an award of costs under Superior Court Rule 87 when the City is acting in its enforcement capacity. The plain language of the statutory scheme set forth at RSA 676 et seq is to allow municipal cost recovery for zoning enforcement actions, and to assess costs against a municipality only upon a finding of bad faith. Legislative action in 2004 strengthened municipal enforcement power by protecting the municipality from excessive financial exposure due to zoning enforcement actions. To allow cost

assessment by Superior Court rule allows the judiciary to take away under Rule 87 what the legislature granted under RSA 676:17.

Alternatively, if this Court finds that Superior Court Rule 87 applies to a municipality acting in its zoning enforcement capacity, then the Superior Court's award of costs to Defendant should be overturned as an unsustainable act of discretion where the City was acting in good faith and the legislature has expressed its intent to protect and enhance municipal zoning enforcement capabilities.

V. ARGUMENT

1. Standard of Review

This case concerns the interpretation of multiple statutes and a Superior Court Rule: RSA 676:17, which among other provisions directs the Court to assess costs and fees to a prevailing municipality in a zoning ordinance enforcement action; RSA 676:15 which expressly allows a municipality to seek injunctive relief in addition to other remedies and; Superior Court Rule 87, which allows costs to the prevailing party, unless the Court otherwise directs. The interpretation of a statute is a question of law which the Supreme Court reviews de novo. Radziewiez v. Town of Hudson (October 20, 2009.) The Supreme Court is "the final arbiter of legislative intent as expressed in the words of the statute considered as a whole. We first examine the language of the statute and ascribe the plain and ordinary meanings to the words used". Portsmouth Country Club v. Town of Greenland, 152 N.H. 617 (2005) citing Carignan v. N.H. Int'l Speedway, 151 N.H. 409, 419 (2004) (citation omitted). Statutes are not interpreted in isolation, but in the context of the

overall statutory scheme. Portsmouth, *supra* citing In the Matter of Glaude & Fogg, 151 NH 273, 275 (2004).

If, after completing its de novo review of the Superior Court's interpretation of the statutes at issue, this Court determines that Superior Court Rule 87 applies to the City's enforcement action, then the review of the Superior Court's award of costs is under "an unsustainable exercise of discretion standard, giving deference to the trial court's decision." Van Der Stok v. Van Noorhees, 151 N.H. 679 citing Arcidi v. Town of Rye, 150 N.H. 694, 704 (2004); State v. Lambert, 147 N.H. 295 (2001) (the defendant must demonstrate that the Court's ruling was clearly untenable or unreasonable to the prejudice of his case).

2. *A municipal enforcement action under RSA 676 is not a civil action for purposes of Superior Court Rule 87.*

a. *Whether a municipality is enforcing its zoning subdivision regulations or acting in a private capacity controls the assessment of costs.*

This Court has previously concluded in White v. Francoeur, 138 N.H. 307 (1994) that the nature of a municipality's action is a determining factor when assessing costs. Consequently, the Superior Court erred in awarding the Defendant costs in this action in which the City was proceeding under its enforcement authority set forth in RSA 676 et seq. and not as a private party. The award must be overturned.

In White, two private parties, White and Francoeur, and a municipality were in dispute over the metes and bounds of a subdivision plot. Id. Accepting White's and the town's arguments, the trial court assessed costs pursuant to RSA 676:17 (II) against Francoeur. Id. at 309. On appeal, Francoeur argued that the substance of the municipality's case was a title action not an enforcement action. Id. at 312. This Court

reversed the trial court award of costs finding that the action was primarily a title action and therefore the municipality was not entitled to costs under RSA 676:17 (II). To explain the basis of its decision to deny fees and costs to the town, this Court highlighted the uniqueness of a legal action brought to enforce land use regulations, adding emphasis to the word “enforce” in its citation to RSA 676:17 (II), Id. at 311. As the Court pointed out, when a municipality is undertaking a zoning enforcement action, it acts with the purpose of “promoting the health, safety and general welfare of the community.” Id. at 312, citing NH RSA 674:16 (I).

The White decision holds that the determination as to whether a municipality is enforcing its land use regulations or acting in a private capacity such as a landowner, controls the assessment of costs under RSA 676:17. The Court overturned the trial court’s decision finding that the trial court abused its discretion by awarding costs under RSA 676:17 (II) where the successful action was private in nature and not an enforcement action.² This Court in Town of Windham v. Lawrence Savings Bank, 146 N.H. 517 (2001) continued to recognize that a municipality acts in multiple roles, and that its enforcement role is determinative in the assessment of costs.

The triggering event for the City’s initiation of this litigation was to seek the Defendant’s compliance with the City’s municipal zoning ordinances. The Defendant clear cut portions of his property which the City in good-faith believed were within the City’s inland wetland protection buffer zone. It brought suit seeking remedies under RSA 676:15 and 676:17. Appendix at 1 and 5. Granted, the White decision and the Town of Windham decision involved a prevailing municipality seeking to take advantage of the cost and fees

² While denying the municipality fees and costs under RSA 676:17, the White court concluded that the municipality could avail itself of Superior Court Rule 87; this finding resting on the determination that the town was acting in a private capacity, not an enforcement capacity. Id. at 313.

provisions of RSA 676:17, but the cases establish that a municipality serves a unique enforcement role in the field of zoning. That unique municipal role is recognizable in the overall statutory scheme of RSA 676 et seq. An award of costs under Rule 87 against the municipality defeats that statutory scheme.

b. The legislature enacted a comprehensive legislative scheme to protect municipalities acting in their enforcement capacity.

The comprehensive municipal zoning statutory scheme supports the City's interpretation that Superior Court Rule 87 cannot be used to shift costs to the municipality. RSA 676 is one statute among many addressing New Hampshire's land use planning and zoning laws. See P. Loughlin, Vol. 15 "Land Use Planning and Zoning". RSA 676 is entitled "Administrative and Enforcement Procedures" with Sections 676:15 through 676:18 addressing penalties and remedies. The statute provides several mechanisms through which a municipality may recover its costs for zoning enforcement actions; strengthening municipal enforcement power by protecting the municipality from excessive financial exposure due to zoning enforcement actions. Specifically, RSA 676:17 (II) states, "In any legal action brought by a municipality to enforce by way of injunctive relief as provided by RSA 676:15 or otherwise any local ordinance, code or regulation adopted under this title... the municipality shall recover its costs and reasonable attorney's fees ... if it is found to be the prevailing party in the action." RSA 676:17 (III) states "If any violation ... results in the expenditure of public funds by a municipality which are not reimbursed under paragraph II the Court in its discretion may order, as additional civil penalty, a violator make restitution to the municipality for such funds so expended". RSA 676:17 (IV) authorizes the Superior Court to "require an alleged violator to post a bond with

the Court to secure payment of any penalty or remedy...” RSA 676:17 (IX) gives the municipality the same collection authority for expenses as provided in the collection of taxes pursuant to RSA 80. The plain language of the statutory scheme is to allow municipal cost recovery for zoning enforcement action. The Superior Court’s application of Superior Court Rule 87 to this action strips away the intent of the statutory scheme to avoid municipal loss for zoning enforcement actions.

The legislature went to great lengths to protect the municipality from incurring costs in zoning enforcement actions in RSA 676:17. It expressly provided for the municipality to recover costs of the type that are awarded under Rule 87. Yet the legislature did not expressly give defendants the benefit of cost shifting when the municipality does not prevail. This Court should not presume to give the Defendant in this case his costs under Rule 87 when the legislature did not elect to do so.

Rep. James E. Trombley testified relative to amendments to RSA 676:17 for the Municipal and County Government committee as follows:

“The purpose of this bill is to strengthen and clarify the statutes in regard to zoning ordinances. Municipalities experience difficulty in enforcing certain zoning ordinances because the penalty is not enough of a deterrent to ensure compliance. HB 713 doubles the daily fine for a second offense at the same location, from \$275 to \$550. It also clarifies the statute which states that a person who violates an ordinance is guilty of a misdemeanor” and “shall be subject to a civil penalty”. Some judges were interpreting the present law as “or”. Also, the word “may” is changed to “shall” to mandate that municipalities will be able to collect attorneys’ fees in pursuing ordinances cases. The district courts were consulted and approved of these changes.”

Appendix at 52. These legislative changes occurred in 2004, after the 2002-2003 general amendments to Superior Court Rule 87, which expanded and clarified the taxation of costs in civil proceedings. Appendix at 57 - 62.

The importance of strong municipal zoning enforcement mechanisms cannot be understated. In discussing the vital role of the enforcement powers of RSA 676:15

Loughlin explains:

“...a municipality is under an obligation to maintain and enforce those valid regulations which have been enacted by the legislative body. If those regulations are being violated, the violator should be enjoined. Irreparable harm is allegedly being done to the fabric of an ordinance each day that a violation continues. Municipalities need not, and often could not, show the specific type of damage which may be necessary in order to show the irreparable type of harm that a private party might have to demonstrate in order to obtain an injunction. Very often, traditional damages are impossible for a municipality to demonstrate in a concrete manner. For example, the construction of an apartment in a single family district, or the operation of a small business in a residential district may not constitute an easily demonstrated type of irreparable harm. However, the statute specifically authorizes the municipality to institute injunctive relief to “prevent” such activity. As was pointed out in the footnote to the Standard Zoning Enabling Act, it is important that “the authorities shall be able to stop promptly such unlawful activity.” See, New Hampshire Donuts, Inc. v. George Skipitaris, 129 N.H. 774 (1987).

P. Loughlin, Vol. 15 Land Use Planning & Zoning § 7.08

Recognizing the importance of zoning enforcement, the legislature took the above cited steps to create a viable enforcement process, which should not be undermined by improper application of Superior Court Rule 87.

- c. ***The statutory scheme set forth at RSA 676 et seq and Rule 87 may coexist under an interpretation that recognizes a municipality's multiple roles.***

The Court has interpreted the interplay of statutes and rules in other analogous contexts. In Associated Press v. State, 153 N.H. 120 (2005) the Court analyzed a state statute and a Court rule to determine whether the statute intruded upon the Court's power "to control its own proceedings" regarding the confidentiality of certain Court records. The Court determined that the coexistence of the statute and the rule do not create a conflict, finding that "the statute does not supplant the rule and the two continue to exist without contradiction". Id. at 144. Where RSA 676:17 addresses municipalities engaged in their enforcement of zoning ordinances and Rule 87 addresses the allocation of costs in private civil actions between parties, the two may coexist under an interpretation that recognizes a municipality's varying status as litigant. To find otherwise is contrary to the plain language of the zoning enforcement statutes, allowing the judiciary to take away under Rule 87 what the legislature granted under RSA 676 et seq. See, Tarbell Administrator, Inc. v. Concord, 956 A.2d 322 (NH 2008) ("subjecting the City to potential liability for a negligence claim in response to this decision would be tantamount to judicial interference with legislative or executive decision-making").

d. Assessment of costs and fees under Rule 87 must not be used to discourage municipalities from undertaking good faith enforcement actions

This Court has interpreted other statutes which assess costs and fees in conjunction with Superior Court Rule 87. The Court made a statutory interpretation regarding the award of costs and attorneys' fees under RSA 356-B:15, II. Grenier v. Barclay Square Commercial Condo Ass'n, 150 N.H. 111 (2003) 116. Although the plain language of the statute states "the unit owners association shall be entitled to all costs and attorneys fees incurred in any proceeding under RSA 356-B:15, I", the Court held that to

award costs and fees to the association would be absurd because it would discourage unit owners “from bringing claims to protect their rights since they would be responsible for the association’s attorneys fee regardless of whether they win or lose”. *Id.* at 116. Similarly, RSA 676 et seq. authorizes the prevailing municipality to recover costs and fees. It does not go on to penalize the municipality for bringing a good faith enforcement action by imposing costs and fees on the municipality if it does not prevail. Rule 87 should not be used to impose such a punishment in its place. To do so would discourage municipalities from bringing good faith enforcement actions. See Sanborn Regional Sch. Dist. v. Budget Comm. Of the Sanborn Regional Sch. Dist., 150 N.H. 241, 242 (2003) (“When interpreting two statutes which deal with a similar subject matter, we construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statute” (quotations, citation and ellipsis omitted).)

3. *A municipality is immune from an award of costs in a good faith enforcement action.*

Occasionally, a municipality will lose an enforcement action, even when undertaken in good faith, as was the case here. This does not mean that all of the legislatively enacted enforcement protections for municipalities disappear. If costs under Rule 87 are allowed against municipalities acting in good faith in their enforcement capacity, the costs of an individual business owner regarding his argument with the municipality’s good faith interpretation of a zoning ordinance will shift to the community at large, the very entity the zoning ordinances are designed to protect. This result is contrary to the plain language and legislative history of RSA 676.

Of note is that while RSA 676:17 (II) does not expressly address the question of cost recovery if a municipality is unsuccessful in the enforcement action, RSA 676:17-a (VII) relative to cease and desist orders does. RSA 676:17-a (VII) authorizes cost assessment against a municipality if the action was commenced in bad faith. RSA 676:17-a (VII) states:

If it appears to the court that the order was frivolous, was commenced in bad faith, or was not based upon information and belief formed after reasonable inquiry or was not well grounded in fact, then the court shall order the defendants costs and reasonable attorney's fees to be paid by the municipality.

The common sense rationale behind a "bad faith" requirement is that the municipality has lost the action because the action was without merit, not that there was merely disagreement between litigants concerning a zoning ordinance. Smith v. Wolfboro, 136 NH 337 (1992). See Dumont v. Wolfboro, 137 NH 1 (1993) (trial court denial of costs under RSA 677:15 (V) upheld where there was no finding of bad faith). Dover v. Kimball, 136 NH 441 (1992) (Neither attorneys' fees nor damages are allowed against a municipality without a finding of bad faith). After the legislature went to such lengths to provide protections for municipalities against financial exposure under RSA 676 et seq, it would be an absurd result to use Superior Court Rule 87 to impose financial exposure onto municipalities undertaking zoning enforcement actions. Grenier, supra, 150 N.H. at 116 citing Atwood v. Owens, 142 N.H. 396, 398 (1997) (Court does not assume that the legislature would enact statutory language that would lead to an absurd result).

4. ***The Superior Court's award of costs was an unsustainable act of discretion where the costs arose from a good faith municipal enforcement action.***

If this Court finds that Superior Court Rule 87 applies to a municipality acting in its zoning enforcement capacity, then the Superior Court's award of costs to Defendant should be overturned as an unsustainable act of discretion where the City was acting in good faith and the legislature has expressed its intent to protect and enhance municipal zoning enforcement capabilities. Regarding the award of costs under the RSA 676 predecessor statute RSA 525, the Court held in Cutter v. Farmington, 126 N.H. 836 (1985) as follows:

"The award of costs lies within the sound discretion of the trial court, Amabello v. Colonial Motors, 120 N.H. 524, 525 – 526, 418 A.2d 1279, 1281 (1980), although certain costs generally are awarded to the prevailing party under RSA chapter 525. Nevertheless, the proper exercise of such discretion is not limitless. Medico v. Almasy, 108 N.H. 324, 325, 234 A.2d 527, 528 (1967) (prevailing party's entitlement to costs is prima facie only and not absolute)."

The trial court is not required to grant the prevailing party its costs, if to do so is unjust.

See State v. Lambert, 147 NH 295 (2001).

Here, the Superior Court's award of costs is unsustainable as the Superior Court made an express finding that the City acted in good faith. Order at 11, Appendix at 50. The Superior Court denied attorneys' fees to the Defendant as prevailing litigant finding neither bad faith, nor a patently unreasonable position by the City or a clearly defined right by Defendant. *Id.*, citing Adams v. Bradshaw, 135 N.H. 716 (1991) (As a general rule each party pays its own attorneys fees.) The same reasoning applies to costs when a municipality acts in good faith to enforce its lawfully enacted zoning ordinances. The Superior Court's award of costs to the Defendant is an unsustainable act of discretion, contrary to the comprehensive legislative regulatory scheme of zoning law enforcement and should not be upheld in the absence of bad faith.

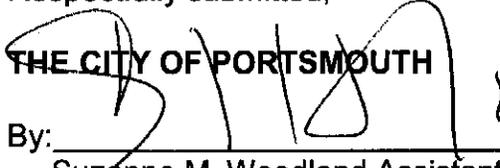
VI. CONCLUSION AND REQUEST FOR ORAL ARGUMENT

The Superior Court erroneously applied Superior Court Rule 87 to assess costs against the City of Portsmouth, which was engaged in a lawful exercise of its zoning enforcement authority under RSA 676:15 and 17. Where the City acts in a dual capacity, sometimes in an enforcement capacity and other times in a private capacity, Superior Court Rule 87 applies only when the City is acting in a private capacity. Through the enactment and amendment of RSA 676 et seq and related zoning enforcement statutes, the legislature sought to encourage municipalities to actively enforce their zoning regulations by providing to them financial protection.

Alternatively, should the Court determine the Superior Court may assess costs against the City under Rule 87 when acting in its enforcement capacity pursuant to RSA 676:15 and 17, then this Court should overturn the award of costs as an unsustainable exercise of discretion when the City acted in good faith. To assess costs against a municipality acting in good faith contravenes the plain language and the intent of the legislative zoning enforcement statutory scheme which is to encourage and financially protect municipalities undertaking zoning enforcement action.

The City requests oral argument.

Respectfully submitted,


THE CITY OF PORTSMOUTH

By: _____

Suzanne M. Woodland Assistant City Attorney
NH Bar #: 9410
City of Portsmouth
1 Junkins Avenue
Portsmouth, NH 03801
610-7240

Dated: 11-23-09

VII. CERTIFICATION

I, Suzanne M. Woodland, hereby certify that two copies of Appellant's Brief were forwarded, via first class mail postage prepaid, on this 23 day of November 2009 to the following parties appearing of record:

Name of Party:

Bernard W. Pelech, Esq.
Counsel for the Plaintiff

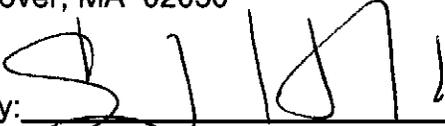
Address:

Wholey & Pelech
55 Congress Street – Suite B
Box 395
Portsmouth, NH 03802
(603) 436-6121

John Kuzinevich, Esq.

4 Sanger Circle
Dover, MA 02030

Dated: 11-23-09

By: 

Suzanne M. Woodland Assistant City Attorney