

Guide To District Court Enforcement Of Local Ordinances And Codes

**Prepared in 1995 by the New Hampshire Bar Association
Committee on the Enforcement of Local Ordinances and Codes**

**Updated March, 2001 by Municipal & Governmental Law Section members
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INTRODUCTION

While the process for District Court enforcement of traffic regulations and other local ordinances normally enforced by police officers is well-established in New Hampshire, there is much confusion among judges, local enforcement officials, and the public alike, about the proper procedure for District Court enforcement of other types of local ordinances such as zoning and building codes, health officer regulations, housing standards, and the like, which police officers are less likely to handle. The purpose of this booklet is to provide guidance to all parties concerning these less common types of District Court actions. The procedures described here are not meant to be exclusive or exhaustive. Following them will not be a guarantee against procedural legal challenges, nor does the Committee mean to imply that alternative procedures are legally suspect. The goal, rather, is to help tie the statutes together in such a way as to flag the issues and steps which need to be addressed in any such action.

A. District Court Jurisdiction

District Court jurisdiction over local code and ordinance enforcement is contained in RSA 502-A:11-a, (enacted in 1988 and amended in 1991 and 1992) which reads as follows:

“502-A:11-a Local Regulation Enforcement

- I. The district court shall have concurrent jurisdiction, subject to appeal, of the prosecution of any violation of a local ordinance, code, or regulation properly adopted pursuant to enabling statutes to the extent that such violation, by statute or by local ordinance, code or regulation:**

(a) Is characterized as a misdemeanor or violation within the meaning of the criminal code, in which case penalties shall be consistent with RSA 651.

(b) Is punishable by a civil penalty, in which case the penalty imposed shall in no event exceed the limits of the district court’s civil damages concurrent jurisdiction as set forth in RSA 502-A:14, II.

(c) Is enforceable by local authorities through the issuance of a cease and desist order, and district court judgment upon such order, pursuant to RSA 676:17-a.

II. This section shall not be construed to diminish the jurisdiction of the superior court to hear and decide matters in which municipalities seek to enforce local ordinances, codes, or regulations through equitable or other relief.

III. The jurisdiction conferred by this section shall include the procedure for local land use citations and pleas by mail, as provided by RSA 676:17-b, for any offense encompassed by RSA 676:17, and within the limits of paragraph I of this section.”

Thus the only types of local ordinances or codes whose enforcement is *not* within the district court’s jurisdiction are those (if any) characterized as felonies, or those for which the civil penalty sought is higher than the civil jurisdiction limit (\$25,000). Notice that the district court’s jurisdiction is “concurrent”, which means that the mere fact that a type of action *might* have been brought in superior court is *not* a reason for district court jurisdiction to be denied.

B. Choice of Courts

Most local code or land use enforcement actions can be brought in either superior court or district court:

1. TYPE OF RELIEF SOUGHT. The main advantage of the superior court is the judge’s broad powers of equity, including the granting of restraining orders and injunctive relief. The district court has no such power. If the ultimate relief sought is something other than a quasi-criminal penalty, or if the enabling statute is one for which the penalty for a violation is unclear, the superior court might be preferred.

2. FACTUAL COMPLEXITY. The main advantage of the district court is its ready availability, and the likely quicker disposition of a case. Thus factually straightforward violations should be commenced in the district court. On the other hand, the superior court will probably allot more time for a trial. For cases involving complex claims of grandfathered rights, the legality of an ordinance, or other esoteric issues that will involve lengthy proof, the superior court may be more appropriate.

3. USE OF PROSECUTING ATTORNEY. Another advantage of the district court, as set forth below, is that a code enforcement official may, if properly prepared, prosecute a case without the assistance of the municipal attorney. On the other hand, acting as both prosecutor and witness can be disconcerting, especially if there will be testimony of prior acrimonious encounters with the defendant. Such circumstances may tilt the decision in favor of using assistance of counsel and/or choosing the superior court, where there will probably be more time allotted.

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**PART ONE - DISTRICT COURT LAND USE
ENFORCEMENT UNDER RSA 676:17**

The types of regulations enforceable under RSA 676:17 include zoning ordinances, building codes, historic district ordinances, excavation regulations by virtue of RSA 155-E:10, as well as “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 planning, zoning, building code, subdivision, site plan or historic district statutes.

A. Pretrial Procedure.

Step 1 - Who Can Prosecute in District Court? The general rule in New Hampshire is that even private citizens can prosecute a violation of local ordinance. See State v. Merski, 115 N.H. 48 (1975).

A. It is, however, recommended that local enforcement officials who intend to prosecute without an attorney should first, if possible, consult the municipality’s attorney to help you with case preparation. Secondly, be prepared to show the Court that you represent the municipality by having copies of (a) the portion of the local ordinance designating which official is responsible for enforcement, and (b) a copy of your letter of appointment to that position from the local governing body or manager.

B. It is recommended that members of local land use boards should **not**, in their official capacity, prosecute violations in District Court, because such actions could compromise their independence and impartiality as members of quasi-judicial boards.

Step 2 - Inspection and Investigation. In preparation of a case, it is recommended that local officials keep written records of the times of any and all inspections, with detailed observations of the circumstances constituting the violation. If access to the property is denied by the owner or occupant, the building inspector or other enforcement officials may apply to the District Court for an “Administrative Inspection Warrant” under RSA 595-B.

A. RSA 676:17 speaks of a civil penalty of \$275.00 per “each day that such violation is found to continue...”The enforcement official must therefore have proof that the violation did in fact persist for each and every day for which he or she is seeking a penalty. This may take an inspection every day, unless the violation is one for which an inference can be drawn **beyond a reasonable doubt** that the violation continued during days it was not observed (for example, a building which could not possibly have been razed and reconstructed between inspections).

B. Despite several state statutes which, on their face, allow local officials to enter private property, such entry, where permission has been denied, may violate the Fourth Amendment (See v. City of Seattle, 387 U.S. 541 (1967)), except in urgent emergencies, or in the case of a “closely regulated” industry (Marshall v. Barlow’s, Inc, 436 U.S. 307 (1978)). Under RSA 595-B:2, II, “probable cause” exists for purposes of an Administrative Inspection Warrant if the inspection official is conducting a “routine inspection”, and such a lesser standard of “probable cause” is constitutionally permissible (Camera v. Municipal Court of San Francisco, 387 U.S. 532 (1967)); Davy v. Dover, 111 N.H. 1 (1971). Nevertheless it is recommended that if the true reason for the inspection is a belief that a violation exists, the official should meet the same standard as for search warrants, since any lesser standard may be constitutionally suspect. See State v. Turmelle, 132 N.H. 148 (1989) and cases cited.

If the Administrative Inspection Warrant is to be used, the official should recognize that there is no standard form for such a warrant, and that it will have to be “custom-designed” to specify the exact scope of the allowed inspection (RSA 595-B:3). For example, such an inspection must be between 8 a.m. and 6 p.m., and cannot be made by forced entry, unless the issuing justice expressly authorizes it on the warrant (RSA 595-B:5). If such a forced entry (entry when permission is denied) is being requested, it is recommended that the official prepare a separate form requesting authority for such a forced entry, with supporting reasons in addition to those supporting the warrant in general. As an alternative, the criminal search warrant form may be used.

Step 3 - Informal Enforcement This step is up to the discretion of the local official, depending on the seriousness of the violation, and how likely the violator is to respond. It may include telephone calls, personal visits, etc.

The enforcement official should use this process to lay the groundwork for a possible prosecution by: (1) developing a complete, good faith response to any defenses the alleged violator raises, and (2) keeping careful written records of any conversations or correspondence with the alleged violator for use as admissions or proof of facts.

Step 4 - The Formal Notice of Violation. Under RSA 767:17, I(b) the potential for a \$275.00 per day civil penalty begins to accrue “after the day on which the violator receives written notice from the municipality that he is in violation...” This notice is therefore the first step of formal enforcement, and should be sent by registered mail, so that the prosecuting official can prove in court that it was received. If this type of service does not work, personal delivery may have to be made, and proved.

A. It is recommended that in order to avoid confusion, the term “Cease and Desist Order” should not be used on this Notice of Violation, unless the procedure under RSA 676:17-a is intended to be used (see Part Two, *infra*). However the use of this term does not constitute a legal defect.

B. In cases where the Notice of Violation constitutes a “decision of the administrative officer” which can be appealed to the Board of Adjustment under RSA 676:5, or constitutes a decision which may be appealed to the Building Code Board of Appeals under RSA 674:34, it is recommended that the Notice of Violation should apprise the alleged violator of such right to appeal, and of the procedure and amount of time, under local rules, within which he or she can make such an appeal. The omission of such information does not constitute a defect in the Notice (at least not under RSA 676:17 - but see infra for use of the Local Land Use Citation system). Nevertheless the fact that a defendant has been given such information may later help to demonstrate the wilfulness of the violation.

C. In any event, if such an administrative appeal is not made within the time provided by local rules adopted by the zoning board of adjustment or building code board of appeals under RSA 676:17, it cannot be made later (for example after the complaint is filed with the Court). See Daniel v. B & J Realty, 134 N.H. 174 (1991).

D. Note that RSA 676:17 also provides for a \$275.00 per day fine for each day that the violation continues “after the conviction date.” However it is recommended that this provision not be relied upon, at least initially, because at best it would require two trials (one for the original conviction, another to prove that the violation continued after that).

E. It is recommended that if the property is in the possession and control of a tenant, the action should usually be taken against the tenant, but a copy of the Notice of Violation and all other notices should be served on the owner as well. Why? See Trial Step 3 below.

Step 5 - Drafting of Complaint The standard District Court Complaint form for misdemeanors may be used, with additional attached sheets if necessary. (See Part Two infra for use of the Local Land Use Citation, which may be used if the prosecuting official wishes to charge the offense initially as a violation rather than a misdemeanor.) However, the use of standard forms for RSA 502-A:11-a prosecutions is not mandated by rule, and the municipality may wish to develop its own form. In any event, the complaint must contain:

- (i) The name and address of the defendant;
- (ii) A recitation of the state statute violated (RSA 676:17) and a recitation of the local ordinance or code section, decision, or condition alleged to be violated;
- (iii) A statement of the facts constituting the violation;
- (iv) A statement of the date(s) and time(s) for which the prosecuting official can prove *beyond a reasonable doubt* that the violation continued subsequent to the serving of the Notice of Violation;
- (v) The words “Against the peace and dignity of the state”; and
- (vi) The signature under oath of the person who has personal knowledge of the facts constituting the violation, attested by a Justice of the Peace.

A. It is recommended that, in the absence of unusual circumstances or repeated prior violations, land use complaints should be charged as Class B rather than Class A misdemeanors, and that the penalty sought should be the civil penalty provided for in RSA 676:17, I(b), rather than a fine or imprisonment. Note that since 676:17 specifies a violation under that section as a misdemeanor, without any designation of classification, it would, unless specified otherwise on the complaint, be classified under RSA 625:9 (Amended 1993) as a Class A misdemeanor. Thus the Defendant's right of appeal de novo to the Superior Court or right to a jury trial in one of the district courts served by a regional jury trial court, will only be foreclosed if the offense is reduced to a Class B misdemeanor or to a violation. (See RSA 502-A:12, amended 1993).

B. It is further recommended that the complaint should *not* state that the violation "continues to the present," because this might present problems of proof. Instead the complaint should specify only those dates for which the prosecuting official believes he or she can prove beyond a reasonable doubt that the violation continued.

Step 6 - File Complaint and Obtain Arraignment Date from Clerk of Court. Prosecuting officials unfamiliar with a particular District Court should contact its Clerk to ascertain how this is done.

Step 7 - Service of Complaint and Summons upon Defendant It is recommended that this step be entrusted to peace officers or constables because of their familiarity with serving process and proof of service, and because the defendant is more likely to treat the complaint seriously. However it is not clear that service by a peace officer is a legal necessity. (Compare RSA 592-A:8, which requires an *arrest* warrant to be directed to a sheriff, deputy, constable or police officer, with RSA 592-A:14 "Summons to Defendant", which contains no similar limitation. RSA 594:14 "Summons Instead of Arrest" does not apply here, since that statute pertains only to situations equivalent to a warrantless arrest.)

Step 8 - Arraignment The Defendant appears in court and enters a plea to the charges contained in the complaint.

A. In most cases of building code or zoning violations, where the goal is compliance rather than punishment, the prosecuting official may wish to consider whether to reduce the charge from a misdemeanor to a violation at this time, if the defendant has responded to the complaint by appearing in court. See RSA 676:17, V. An exception might be considered if the violation is especially serious, or the violator has been convicted of similar offenses before.

B. If the Defendant does not appear, and proper service of the complaint and summons is proven, the prosecuting official may wish to consider asking the Court to issue a bench warrant for the Defendant's arrest. See District Court Rule 2.11.

C. If the Defendant has brought the property into compliance prior to the arraignment, the prosecuting official may wish to consider withdrawing the complaint by entering a “Nolle Prosequi,” but is not required to do so, since the past violation remains subject to prosecution. The decision whether or not to enter a “Nolle Prosequi” rests in the sole discretion of the prosecuting official. See McNamara, “Criminal Practice & Procedure” (Butterworth N.H. Practice, Vol. 1) Section 494.

B. Trial.

Step 1 - Proving the Legal Effectiveness of the Ordinance, Code, Specification, Requirement or Condition. This is one step which makes local ordinance violations more complex than violations of state law. It is recommended that municipalities routinely provide, and District Court judges obtain, certified, most recently updated copies of the ordinances and codes in effect in the municipalities served by the Court. Although the Court may take judicial notice of these ordinances (See Rule 201(b), NH Rule of Evidence), it is nonetheless recommended that the prosecuting official always be prepared to prove the proper adoption of the ordinance or code section involved.

A. It is recommended that a defense based on a claim that the ordinance was not validly enacted should be treated as an affirmative defense which must be raised by written notice at least 5 days in advance of trial. See District Court Rule 2.8(B).

B. Note that RSA 31:126-129 contains a conclusive presumption of procedural validity which goes into effect 5 years after the enactment of “municipal legislation” (as defined). However, this curative statute may be unreliable if the defect was a constitutional one. See Calawa v. Litchfield, 112 N.H. 263 (1972).

C. If the violation involves a specification, requirement or condition imposed by a local land use board, rather than an ordinance provision, the burden of proving that the requirement was in fact imposed may require testimony from planning board or zoning board of adjustment members, or from the person who has custody of such boards’ records. If, however, the requirement was noted on a Mylar plan or written decision which is recorded at the Registry of Deeds, certified copies should be admissible under the “public records” exception to the hearsay rule (Rule 803(8), NH Rules of Evidence).

Step 2 - Proving the Violation. Although RSA 676:17 uses the term “civil penalty” to describe the \$275.00 per day penalty, it is suggested that this terminology is used only to distinguish it from the standard amounts for fines provided in the Criminal Code. (Compare RSA 502-A:11-a, paragraph I(a) with paragraph I(b).) It is recommended that all parties treat such violations as quasi-criminal in nature rather than civil, and that it should be assumed that the burden of proof required to be met is proof **BEYOND A REASONABLE DOUBT**.

The facts constituting the violation will normally be proved by personal observations of the inspecting official. Code officers or other designated enforcement officials who are also prosecuting the case should be permitted to testify as to their own observations, just as normally occurs with police officers who prosecute cases.

Step 3 - Proving the Defendant's Responsibility for that Violation. Chapter 676 does not, by itself, contain any presumption that a person is guilty of any and all land use violation occurring on his or her property. And unlike more usual criminal prosecutions, land use violation cases do not normally include direct observations of the actions of the Defendant. Prosecuting officials should therefore make sure that their case includes proof of (a) the ownership and/or (b) possession and control over the property where the violation exists. Of course these facts may be established by admissions and/or circumstantial evidence.

A. Where ownership is in doubt or is not admitted to, the prosecuting official may need to use information from the community's tax map, supplemented by an update at the registry of deeds.

B. However, the establishment of an RSA 676:17 violation does not necessarily require proof of ownership. On the contrary, proof that the Defendant had possession and exercised control over the property, even though merely as a tenant or lessee, may be more effective at showing the mental element of the offense than proof of ownership.

C. It is also suggested that if the local ordinance makes it a violation to “permit” property to be used in violation of the ordinance, or similar language, this would preclude an owner from defending on the ground that she or he ceded control to a tenant by means of a lease which contained no prohibition on illegal uses.

D. Furthermore, if the prosecuting official can prove that the actual owner was given written notice of the violation and an adequate time to compel the tenant to conform to the law (Pretrial Step 4, above), his/her failure to do so should establish the mental element of the offense.

Step 4 - Proof of Informal Efforts to Obtain Compliance, Including Service of the Notice of Violation. As indicated above, this type of testimony is highly relevant to prove the mental element of the offense, as well as establishing the service of a written Notice of Violation, which, absent a prior conviction, is an element of the offense under RSA 676:17.

Step 5 - Defenses Raised by Defendant, and Prosecuting Official's Responses to Them.

A. 'GRANDFATHERING' ISSUES. It is recommended that constitutional defenses such as a claim that the alleged violation is a nonconforming use or vested right should be treated as an "affirmative defense" which should be raised in advance under District Court Rule 2.8(b). At any rate, if the prosecuting official is surprised by such a defense and asks for a continuance in order to respond, the Court should normally grant it.

It is suggested that if there is *no* evidence of any vested right, it is not the burden of the prosecuting official, as part of the *prima facie* case, to disprove such a possibility. However if the Defendant produces enough evidence to raise a *reasonable doubt* about whether a vested right might prevent the regulation from being fully effective as to the property, the burden will be on the prosecuting official to overcome that doubt.

B. EVIDENCE OF OTHER VIOLATIONS IN THE COMMUNITY. Evidence of other violations in the community is not normally relevant to the issue of the Defendant's own guilt. See City of Concord v. Tompkins, 124 N.H. 463 (1984); Weare v. Stone, 114 N.H. 80 (1974). It only becomes relevant if the Defendant is able to show such consistent nonenforcement as to raise an inference of discrimination, or where the municipality has so far affirmatively ratified a pattern of nonenforcement that it becomes an "administrative gloss." See Alexander v. Town of Hampstead, 129 N.H. 278 (1987); Tessier v. Town of Hudson, 135 N.H. 168 (1991). Therefore it is recommended that this issue should also be treated as an "affirmative defense." Evidence of the existence of other violations should not be admitted as relevant unless the Defendant first makes an offer of proof on one of these latter theories.

C. MOTION TO STAY TRIAL PENDING ADMINISTRATIVE APPEAL TO THE ZONING BOARD OR BUILDING CODE APPEALS BOARD.

(1) The preferable way for the prosecuting official to deal with this possibility is to include notice of the opportunity for such an appeal in the original Notice of Violation. (Such notice is *required* if the Citation system under RSA 676:17-b is used; see below.) If the local time period for such an appeal has run, such an appeal cannot now be entertained (see Daniel v. B&J Realty, 134 N.H. 174 (1991)). However, if the appeals period has not run, such a motion is within the discretion of the Court.

(2) It is suggested that an application for a **variance**, submitted by the Defendant subsequent to service of the Complaint, should not be grounds for delaying trial, since the later granting of a variance does not justify the existence of a violation **prior to** that variance request.

D. ‘FACIAL ATTACK’ ON THE VALIDITY OF ORDINANCE OR RESTRICTION. A ‘facial attack’ (constitutional challenge to the substance of the ordinance itself) need not require exhaustion of administrative remedies, and therefore can be raised even where the Defendant has not made any local administrative appeal. See Blue Jay Realty Trust v. City of Franklin, 132 N.H. 502 (1989); Delude v. Town of Amherst, 137 N.H. 361 (1993). Preferably such issues should be treated as “affirmative defenses” and raised in advance under District Court Rule 2.8(b). Since such questions are well within the province of the District Court to decide, the raising of such a defense does **not** necessitate any transfer to the Superior Court. The District Court may, however, entertain a motion for an interlocutory appeal to the Supreme Court on the issue.

Step 6 - Conviction and Sentencing.

A. The prosecuting official should submit an oral recommendation for a penalty at the close of the evidence. Although it is unclear under RSA 676:17 whether a “fine” and “civil penalty” could legally both be imposed for the same offense, it is recommended that, absent unusual circumstances, the prosecutor should request only the “civil penalty.” Because of its cumulative nature, the imposition of the “civil penalty” is more likely to achieve ordinance compliance. Note that 676:17, V says that any inconsistent local penalty provisions are superseded.

B. If the defendant is found guilty, the parties may wish to request, and the Court may wish to consider, suspending some portion of the sentence on condition of compliance with the ordinance. In some cases, depending on economics and the motivations of the defendant, such a conditional suspension may have the same persuasive effect as an injunction.

Step 7 - Requests for Attorney’s Fees and Costs. RSA 676:17, II reads as follows: “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 may 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.” (emphasis added)

A. There is no question that this paragraph **does** apply to actions brought by municipalities in District Court. Thus prosecuting officials should be given an opportunity to request attorney’s fees and costs.

B. The statutory language of RSA 676:17,II, is permissive, not mandatory, and the award of attorney's fees and costs under this statute is at the court's discretion. Town of Swanzey v. Liebeler, 140 N.H. 760, 764 (N.H. 1996). However, a court may be more likely to award fees and costs when the violator has "unnecessarily prolonged an action by "oppressive, vexatious, arbitrary, capricious or bad faith conduct" as "compensation for those who are forced to litigate against an opponent whose position is patently unreasonable". Id.

C. There is no **statutory** provision for the award of attorney's fees **against** a municipality if the municipality **loses** a case under RSA 676:17 (contrast RSA 676:17-a, VII concerning frivolous cease and desist orders). Thus, any such award must rest upon the common-law doctrine that a citizen should not be compelled to bear the financial burden of protecting a clearly defined and established property right from unconstitutional abuses of power (see Dugas v. Town of Conway, 125 N.H. 175 (1984).)

Step 8 - Subsequent Orders or Actions.

A. RSA 676:17, I(b) says that the violator is subject to a civil penalty not to exceed \$275/day "**for each day that such violation is found to continue after the conviction date...**" Such language implies that the Court retains jurisdiction over continuing violations for as long as they remain uncorrected (i.e. each day does **not** constitute a **separate** violation) and that therefore no new complaint need be initiated if the violation continues. It is recommended that the prosecuting official should file a "Motion To Impose Civil Penalties" with the Court, and served on the defendant, or upon his/her attorney, if any. Such a motion should contain, in addition to the types of factual information contained in the original complaint: (i) a recitation of the fact of the prior conviction, and the date of that conviction; and (ii) a recitation of the date(s) and time(s) for which the prosecuting official can prove **beyond a reasonable doubt** that the violation continued subsequent to that conviction date. As an alternative, the prosecuting official may file a new complaint which recites a prior conviction rather than the serving of a Notice of Violation.

B. If in fact such a motion or second complaint deals with the same identical violation as the former conviction, the doctrine of **res judicata** prevents the defendant from raising any new substantive defenses (e.g. ordinance validity or "vested rights" issues) which were adjudicated or which the defendant failed to raise in the original action. Neither can such defenses be raised in any collateral forum such as in an action for injunction or declaratory judgment in Superior Court. See State v. Lemire, 125 N.H. 461 (1984); University of N.H. v. April, 115 N.H. 576 (1975); Town of Nottingham v. Lee Homes, Inc., 118 N.H. 438 (1978).

C. However, if the ground for imposing additional penalties is based on **new** facts (for example an illegal sign was removed but was allegedly replaced by another), then even though the ordinance provision involved may be the same, a new complaint should be initiated, and treated by the Court as a new and separate action.

PART TWO – OTHER TYPES OF MUNICIPAL ENFORCEMENT IN DISTRICT COURT

The following discussion covers other statutory types of local code and ordinance enforcement which, under RSA 502-A:11-a, are within the jurisdiction of the District Court. Unlike Part One of this booklet, not every step in each enforcement action will be detailed here, but only those aspects which differ significantly from the type of RSA 676:17 action considered under Part One, or from the more “generic” enforcement of state statutory law violations in District Court; thus anyone interested in the following types of action should read Part One first.

1. Locally-enacted “Bylaws.” Scattered throughout the statutes are enabling acts which authorize towns and cities to adopt local legislation. The most commonly cited are RSA 31:39 (Town Bylaws) and RSA 47:17 (City Bylaws and Ordinances). Additional enabling laws include solid waste regulations (RSA 149-M:13), sewage bylaws (RSA 149-I:6), local police regulations (RSA 105:6-8), and local fire regulations (RSA 154:18). All such local legislation is clearly enforceable in the District Court pursuant to RSA 502-A:11-a, as set forth in the beginning of this booklet.

A. ENFORCEMENT STEPS. No special enforcement procedures are given for these types of local legislation. Thus typical District Court procedures should be used, in accordance with District Court rules, and as described in Part One, including:

- (i) Drafting of the complaint;
- (ii) Filing the complaint with the Court and obtaining an arraignment date;
- (iii) Service of the summons and complaint upon the defendant;
- (iv) Arraignment;
- (v) Trial; and
- (vi) Findings and sentencing.

Any substantive defense raised, including constitutional questions, are well within the province of the District Court to decide, as long as the underlying offense is within the Court’s 502-A:11-a jurisdiction.

B. THE COMPLAINT. The elements of the complaint are set forth in Pretrial Step 5 above. Although standard complaint forms for violations and misdemeanors may be used, the juxtaposition of RSA 502-A:11-a against 502-A:11 & 14 suggests that a local ordinance enforcement is a separate type of District Court action from *either* a criminal or civil action, and the municipality may wish to develop its own form, or draft the complaint in narrative form, similar to a civil complaint. However it is recommended that all parties treat the municipality’s burden as being the same as in a criminal case - proof *beyond a reasonable doubt* - and that the criminal rules be followed with respect to such complaints.

C. PROCEDURAL VALIDITY. Just as with land use regulations, the prosecuting official should be prepared to prove the validity and adoption of the local legislation (See Trial Step 1 in Part One above). Some officials and even attorneys get stuck over whether a piece of local legislation is properly characterized as a “bylaw”, “ordinance” or “regulation.” But no legal significance rests in these words. Instead the pivotal issue is whether the local legislation was enacted in accordance with statute, with action by the proper local body, using the proper procedure. Notice that RSA 31:126-129 contains a presumption of procedural validity which becomes effective 5 years after the enactment. Furthermore, the N.H. Supreme Court has followed a rule of “substantial compliance” and upheld technically faulty procedures unless the defendant can establish that the asserted defects in all likelihood affected the outcome; see City of Keene v. Gerry's Cash Market, 113 N.H. 165 (1973) Town of Nottingham v. Harvey, 120 N.H. 889 (N.H. 1980). Also see RSA 31:131 (Enacted 1991) which states that the forms of questions in enabling acts shall be deemed advisory only.

D. MAXIMUM PENALTIES. For some of types of local legislation, penalties are set by the statute itself. For example RSA 154:18 says that breach of local fire regulations constitutes a violation. RSA 105:8 states that violation of local police regulations is a misdemeanor. Such penalty provisions tie these statutes into the sentencing provisions of RSA Ch. 651. Other statutes have more explicit penalty provisions. For example violation of sewage system bylaws is subject to a civil penalty of up to \$10,000 per day; RSA 149-I:6, II.

Still other statutes appear to set parameters within which the municipality may enact its own penalty provisions. For example RSA 31:39 and 47:17 permit towns and cities to set fines at amounts up to \$1000.00 per offense. There is little doubt, however, that the amount of a fine prescribed in local legislation is a *maximum*, not a mandatory minimum, and that the Court has full discretion to vary the sentence depending on the circumstances; see State v. Burroughs, 113 N.H. 21 (1973). Municipalities may wish to consider this fact when the penalty is set in the ordinance. A local penalty provision which states that penalties shall be “as the Court may prescribe, up to the statutory maximum”, or something similar, should not be considered defective merely because it does not specify an exact amount.

E. WHEN NO PENALTY IS SET FORTH. Unfortunately there are some enabling acts containing *no* penalty language at all. For example RSA 31:102-a permits municipalities to regulate hawkers and vendors, but no penalty for violating such regulations is stated. RSA 48-A:14 sets forth “minimum housing standards”, but provides no penalty. Even RSA 41:11, the standard source of authority for selectmen to regulate “highways, sidewalks and commons”, contains no penalty language, and while the penalties for traffic regulations are set by RSA 265, it is unclear what penalty, if any, applies to one who violates selectmen’s regulations of “commons.” The law is unclear, and a municipality may want to avoid the problem by seeking injunctions from the Superior Court in these areas (although that may be unrealistic for simple one-time violations of town common regulations).

Another approach, however, would be to argue that the municipality has implied authority to enact its own penalties, using RSA 31:39 or 47:17. In State v. Fletcher, 5 N.H. 257 (1830) it was said that whenever the legislature has enacted a statute defining an offense, but without a penalty provision, an offender may be sentenced to pay a fine. And it has been held in other jurisdictions that a statute enabling the enactment of local regulation *impliedly* also authorized the enactment of penalties (see 5 McQuillen, "Municipal Corporations" § 17.04). If this argument is valid, the municipality could either enact a specific dollar amount penalty, or could leave the penalty to the discretion of the Court, as set forth above.

A still further alternative argument is that such offenses constitute "violations." RSA 625:9 proclaims that it governs the classification of "**every offense**", and paragraph V says that a "violation" includes not merely offenses explicitly so designated, but also "**any offense defined outside of this code for which there is no other penalty provided other than a fine or fine and forfeiture or other civil penalty.**" (emphasis added) It can be argued that such language, on its face, appears to include defined offenses for which *no* explicit penalty is provided. By this reasoning the penalties for these offenses are those provided for violations as set forth in RSA 651, namely a fine of not more than \$1,000 for each offense (RSA 651:2, IV(b), amended 1991).

2. Local Land Use Citations - RSA 676:17-b. The Local Land Use Citation was enacted by the Legislature in 1991 as an alternative method of enforcing land use violations through a sort of "traffic ticket" system, where the defendant has the option of entering a plea and paying a fine by mail, similar to minor traffic violations. A form for the Citation has been developed by the N.H. Supreme Court (see Appendix), which contains all of the elements required by the statute, and should be used. In practice, the procedure is *not* as simple as issuing a traffic ticket, and the prosecuting official should recognize that, unless there is an actual expectation that the defendant may pay the "civil penalty" by mail, without contesting it, the use of a Citation offers little advantage over a complaint under RSA 676:17 (Part One of this booklet). The notable features of the Citation are as follows:

A. NOTICE OF VIOLATION. No Land Use Citation can be served unless the defendant has first been issued a written Notice of Violation (similar to the one discussed in Part One). The notice *must* set forth the period within which any "administrative decision" (i.e. construction, interpretation or application of a regulation) must be appealed to the zoning board of adjustment or building code board of appeals, under the rules of the respective board, in no case less than 7 days.

[The term "administrative decision" is defined in RSA 676:5.
The "rules of the respective board" refers to rules adopted by
each local board pursuant to RSA 676:1.]

B. EFFECT OF LOCAL APPEAL. If such an “administrative” appeal is taken to the local board, no Citation can be issued at all until after the appeal is resolved. If this delay would “cause imminent peril to life or property” the enforcement official may seek a restraining order from the land use board or the superior court. RSA 676:6. [On the other hand, if the violation involves “imminent peril,” it probably shouldn’t be enforced through a Local Land Use Citation in the first place.]

C. MAXIMUM CHARGE. Use of the Citation system requires that the prosecuting official reduce the charge from the misdemeanor specified under RSA 676:17 to a violation. Furthermore, the sole penalty which can be sought is the \$275/day “civil penalty”, and the maximum which can be charged in one Citation is 5 days’ violation (i.e. maximum \$1375.00). See RSA 676:17-b, II(h).

D. SUCCESSIVE CITATIONS. The 5-days’ (\$1375.00) maximum penalty limitation does not, however, prevent the prosecuting official from issuing further Citations for additional amounts, if a violation continues. There is no need to give any additional Notice of Violation or opportunity for administrative appeal; see RSA 676:17-b, VII.

E. FINALITY. However the statute states that “**A plea of guilty or nolo contendere to the prior citation shall not affect the rights of the defendant with respect to a subsequent citation.**” This means that the doctrine of *res judicata* does *not* apply to preclude the defendant from raising substantive defenses to a subsequent Citation (for example constitutional issues), even if such defenses were not raised previously. (Presumably this is to prevent landowners from losing substantive rights merely by choosing to forego the “bother” of going to court.) Therefore if part of the municipality’s goal is to settle the issue of an anticipated substantive defense, the Citation system is not recommended, and a prosecution under RSA 676:17 should be used instead.

F. SERVICE OF PROCESS. Both RSA 676:17-b, VIII and the form developed by the Supreme Court, state that the Local Land Use Citation itself constitutes a summons as well as a complaint. Thus no additional summons is necessary. The introductory paragraph of RSA 676:17-b also states that the local building inspector or other prosecuting official “**may issue and serve upon the defendant...a local land use citation.**” Furthermore this is not a summons which is being served in lieu of arrest (hence RSA 594:14 does not apply). Therefore a building inspector or other official may serve the citation, and service by a police officer or constable is not legally required. On the other hand, the Citation must be sworn to before a Justice of the Peace prior to issuance. Thus a building official cannot simply whip out a Citation upon first observing the violation.

G. PLEA BY MAIL. The instructions on the reverse side of the Local Land Use Citation (see Appendix) instruct the defendant how to enter a plea of guilty or nolo contendere and pay the “civil penalty” by mail. If the defendant chooses to plead not guilty, the Citation must be mailed to the Court and a subsequent court date will be issued through the mail.

H. DEFAULT? RSA 676:17-b, IV, while unclear, appears to indicate that the “civil penalty” may be imposed without trial if the defendant defaults. However such an interpretation raises constitutional questions in the context of a “penalty” which is in fact a criminal fine. Therefore it is instead recommended, if the Citation is not responded to, that the Court should consider the issuance of a bench warrant, authorized by RSA 676:17-b, V, but should **not** attempt to deny a “defaulting” defendant the opportunity to plead not guilty and request a trial.

3. “Cease and Desist Orders” - RSA 676:17-a. As stated in Part One (above), the document which most municipalities have historically called a “Cease and Desist Order” is referred to in RSA 676:17 as a “written notice of violation” and does **not** conform to the complex requirements of RSA 676:17-a. What this statute now calls a “Cease and Desist Order” is a complex alternative procedure for enforcing land use violations, the goal of which is for the District Court to authorize the municipality to enter upon the property and correct the violation at the municipality’s expense, with the municipality’s costs becoming a lien on the property, enforceable through the procedures used to collect real estate taxes. It is recommended that **unless** the prosecuting official anticipates that the municipality may actually front the money to take such action (for example because of a clear health or safety hazard), RSA 676:17-a should **not** be used, and, to avoid confusion, the written notice of violation should **not** be referred to as a “Cease and Desist Order.” The notable features of the RSA 676:17-a Cease and Desist Order are as follows:

A. THE ORDER. In addition to the information required for a complaint under RSA 676:17, the Cease and Desist Order must contain:

- (i) A statement of what corrective action is required to be taken, and a reasonable time within which it must be taken; and
- (ii) A statement that, unless such corrective action is taken or an answer filed within 20 days, a motion for summary enforcement of the order shall be made to the District Court,
- (iii) A statement that if such enforcement 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.

B. SERVICE OF PROCESS. This is one of the steps which makes RSA 676:17-a more complex than other types of land use enforcement. Service must be the same as is ***“provided for service of a summons in a civil action in district court”*** RSA 676:17-a, II. Such language appears to require service by sheriff or constable. Furthermore, such service must be made upon ***“the record owner of the property or his 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...”*** The statute authorizes a sheriff, deputy sheriff, local police officer, or constable to make personal service. If the owner is unknown or cannot be found, service may be made by posting the order on the subject property and by 4 weeks’ publication in a newspaper of general circulation in the municipality. Whew!

Clearly such service requires a lot of research on the part of the prosecuting official, and gives the defendant ample opportunities to question proper service. On the other hand, this procedure may be useful in a case where the local enforcement official believes that a landlord or mortgagee will persuade a violator to comply.

C. ADMINISTRATIVE APPEALS? Unlike the Local Land Use Citation (see above), the Cease and Desist statute does not require notice of the opportunity for local administrative appeals. However, in order to avoid the possibility that such an appeal will delay compliance, it is recommended that the enforcement official should issue an initial administrative decision (e.g. written Notice of Violation) first, and the Cease and Desist Order should not be served until the period under local board rules for appealing that administrative decision has elapsed. If the violation is so serious that this delay may cause irreparable harm, the prosecuting official should consider seeking an injunction from the Superior Court rather than using RSA 676:17-a.

D. FAILURE TO OBEY ORDER. Once the Cease and Desist Order is properly served, then even if no further action is taken under RSA 676:17-a, paragraph III thereof states that the failure to obey the Order constitutes a violation of RSA Title LXIV ***in addition to*** the underlying ordinance or code violation, one which could be enforced through a RSA 676:17 complaint. In other words, a later complaint under RSA 676:17 could request a \$550/day civil penalty - \$275/day for the underlying code violation, and \$275/day for failure to comply with a properly issued Cease and Desist Order. However, it is suggested that any valid defenses to the underlying violation would also constitute valid defenses to the failure to comply with the Cease and Desist Order.

E. ENFORCEMENT OF ORDER - ANSWER AND TRIAL. The procedure for filing a Cease and Desist Order with the Court is similar to the procedure concerning hazardous buildings, enacted in 1967 (RSA 155-B), in that the statute does not require the Cease and Desist Order to be filed with the Court until such time as enforcement is sought. Nevertheless, since the statute allows the defendant to file an answer in Court within 20 days of service, it is highly recommended that the prosecuting official should file the Order with the Court immediately after service on the defendant. Otherwise the Court may receive an answer to an action which has not yet been filed. There is no disadvantage to the filing of the Order with the Court; if the Order is voluntarily complied with, the action can be withdrawn.

At any rate, if the municipality does intend to proceed under RSA 676:17-a to enforce the Cease and Desist Order, the enforcement official **must** file the Order, along with proof of service, with the District Court, and then file a motion to enforce the Order, at least 5 days after the Order was filed. If an answer has been filed by the defendant within 20 days of service, trial is held in accordance with District Court Rules (see Part One of this booklet), after which the Court must either annul and set aside the Order, or affirm it and set a new compliance deadline. If no answer is filed, the Court may **“upon presentation of such evidence as it may require, affirm or modify the order and enter judgment accordingly...”** In either case, the judgment is mailed by the Court to all persons upon whom the original Order was served. See RSA 676:17-a, VI and VII.

F. MUNICIPAL CORRECTIVE ACTION AND COSTS. Once a judgment affirming the Order is issued, the municipality has the legal authority to enter onto the property and perform the corrective action. (The Court could **not**, for example, affirm the validity of the Order, but **deny** the municipality’s opportunity to correct the violation.) The decision whether or not to take such action is made by the “local governing body” (selectmen or city council), which need not return to the District Court at this point. The municipality must keep careful account of its expenses and costs, **“including but not limited to filing fees, service fees, publication fees, the expenses of searching the registry of deeds to identify mortgages, witness and expert fees, attorneys fees and traveling expenses.”** Unlike RSA 676:17, this statute says that the Court **“SHALL examine, correct if necessary, and allow the expense account”** (emphasis added), suggesting that the District Court has no discretion. See Town of Hudson v. Baker, 133 N.H. 750 (1990). Thus the Court’s discretion must be exercised, if at all, at the time judgment is issued. Once the expense account is “allowed” by the Court, the governing body is authorized to commit it to the Tax Collector, who has all the same remedies as for real estate taxes. See RSA 676:17-a, IX. It is suggested that some explanation will be necessary for most tax collectors, because they will not usually be familiar with this type of remedy.

G. FRIVOLOUS CEASE AND DESIST ORDERS. Counterbalancing the mandatory costs and fees if the municipality wins is the provision for the defendant to ask the municipality to pay costs and fees if it loses. The Court may grant such fees and costs to the defendant ***“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-ground in fact...”*** RSA 676:17-a, VII. This language is similar to that in Rule 11 of the Rules of Civil Procedure. Clearly, municipal officials should not issue a “Cease and Desist Order” if they have any doubts about the violation.

4. Town Health Regulations - RSA 147:1. Under RSA 147:1, the town health officer (who is appointed by the Director of the State Division of Public Health, see RSA 128:1) has broad authority to enact “regulations for the prevention and removal of nuisances, and such other regulations relating to the public health as in their judgment the health and safety of the people require...” [In cities, this authority is given to the city council as part of its power to enact bylaws, RSA 47:17, XIV (see section above on local by-laws).]

A. WHO CAN ENFORCE? The health officer may enforce health regulations in District Court to the same extent that a building inspector, zoning or code administrator may enforce land use regulations. (See Pretrial Step 1 in Part One of this booklet.)

B. ENACTMENT PROCEDURE. RSA 147:1, I states that local health regulations take effect as soon as they are approved by the selectmen, recorded with the town clerk, and either published in a newspaper or posted in two public places in the town. No town meeting vote is required. However it is recommended that some reasonable notice and an opportunity for the public to be heard should be given prior to enactment, although such a hearing is not required by statute, and it is not clear whether it is a constitutional necessity for these types of regulations; see Calawa v. Litchfield, 112 N.H. 263 (1972). At any rate, the enactment process need not be lengthy, and can in fact be initiated in response to ***already-existing*** health-threatening situations, since no-one can claim a vested “grandfathered” property right to maintain a use which constitutes a health nuisance or otherwise injures the rights of others (see RSA 674:39; L. Grossman & Sons, Inc. v. Town of Gilford, 118 N.H. 480 at 483 (1978); Smith v. Town of Wolfeboro, 136 N.H. 337 at 345 (1992)), as long as the regulations also comport with substantive due process and equal protection (see Town of Chesterfield v. Brooks, 126 N.H. 64 (1985); Asselin v. Town of Conway, 137 N.H. 368 (1993)).

C. PROSECUTION PROCEDURE. Under RSA 147:1, III persons “wilfully violating” such regulations shall be guilty of a violation. No special procedure is called for. Thus the prosecuting official can use the form and procedures normally utilized in the District Court for violations of state law, with the following cautions:

(i) As with land use violations, the prosecuting official should be prepared to prove the proper adoption of the regulations. (See Trial Step 1 in Part One of this booklet.)

(ii) In order to prove that the violation is “wilful” with respect to violations of which the person or landowner may not necessarily be aware (for example the temperature in a restaurant dishwasher), it is recommended that, just as in the case of land use violations, a written notice of violation and a reasonable opportunity to correct the violation should be given in advance of filing the complaint, and should be proved as part of the State’s case in court. (See Trial Step 3 in Part One).

5. Orders of the Health Officer - RSA 147:3 through 17-a. Chapter 147 confers upon health officers the full police power of the State with respect to nuisances and other threats to public health, including the power to enter onto property (147:3), to issue orders (147:4, 11, 17, 17-a) to order the evacuation of a building (147:16-a) and to remove or destroy such nuisances (147:4, 13, 17), even without notice in the case of an emergency (147:6). Such powers can be exercised even if the municipality has not adopted health regulations on a particular subject (above). However, most of Chapter 147 is ancient in origin, and it is recommended that the health officer seek the help of the municipal attorney in developing procedures which contain adequate safeguards for constitutional due process. In 1991 the Legislature enacted RSA 147:7-a and 7-b, which provide for District Court enforcement of Health Officer orders, and are similar to the procedure for land use Cease and Desist Orders (RSA 676:17-a, above). However these statutes also raise due process questions, and should be used carefully.

A. WARRANTS. For secured premises (defined in RSA 635:2), when an owner or occupant has denied the health officer permission to enter, RSA 147:3 requires obtaining an Administrative Inspection Warrant under RSA 595-B prior to searching for health violations (see Pretrial Step 2 in Part One of this booklet). In fact, when permission for entry has been sought and denied, such a warrant is constitutionally required (Camera v. Municipal Court of San Francisco, 387 U.S. 532 (1967)); Davy v. Dover, 111 N.H. 1 (1971), except in the case of an urgent emergency (similar to the need to stop the spread of a fire, or protect citizens from an at-large murder suspect; Thompson v. Louisiana, 469 U.S. 17 (1984).) [From a practical standpoint, health officers can ignore this “emergency” exception for warrants, because it won’t apply anyway except in situations where one’s sense of urgent moral duty to protect others exceeds concerns with legal liability.]

B. ISSUANCE OF ORDER. In order for the municipality to retain the ability to later recoup its nuisance abatement costs, RSA 147:6-a requires orders of the health officer to contain the following:

(a) A description of the nuisance or other danger to the public health, including the date of any inspection.

(b) A statement of what corrective action is required, and a reasonable time, in light of the seriousness of the nuisance or other danger to health, within which that action must be taken.

(c) A statement that failure to take the corrective action within that time 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."

Copies of the order must be sent, by registered mail, to the owner or person who pays taxes on the property, and to any tenant or other person known to exercise control over the premises. As with land use violations, if service cannot be made in this manner, personal service may have to be made, and later proved. (See Pretrial Step 4 in Part One).

C. PENALTIES. Violations of health officer orders are punishable to the same degree as violations of enacted regulations, even where the order is *not* based on existing regulations. Thus, in cases which do not involve any extreme urgency, health officer orders can be enforced through normal District Court complaint procedures, as in the case of health regulations (above.) RSA 147:11 says that if any person continues a nuisance after an order from the health officers, or neglects to comply with such an order, (s)he shall be guilty of a violation for each day of such continuance or neglect. Violating an order to cleanse premises under RSA 147:17, however, constitutes a misdemeanor instead of a violation.

D. "ADEQUATE" SANITARY FACILITIES. One frequent subject of health officer orders is the statute requiring all occupied buildings to have adequate toilet and lavatory facilities (RSA 147:8, 9, 10). Failure to comply constitutes a violation *"for each day of neglect or refusal..."* However RSA 147:8 does not specify what kinds of facilities are "adequate." Clearly a sewage system already in failure is not "adequate," and a repair may be ordered. But except in such cases of demonstrable system failure, it is recommended that the municipality not seek penalties under these statutes unless it first enacts regulations on what constitutes "adequate" sanitary facilities. A municipality may wish to adopt regulations promulgated by the Department of Environmental Services, Water Supply and Pollution Control Division. However more stringent local regulations are not preempted if otherwise reasonable; see RSA 485-A:32, I.

E. ABATEMENT BY HEALTH OFFICER. Both RSA 147:4 and 7-b, on their face, imply that if the owner or occupant does not comply with the order within the time specified, the health officer can act summarily to abate the nuisance without further process. However it is suggested:

- (i) that any additional entry onto property, without permission, may well violate Fourth Amendment rights unless an additional warrant is sought under RSA 595-B (see above); and further
- (ii) that if there is no emergency, and the abatement action entails destruction of property, or potential of damage to property, such action could violate due process rights.

Therefore, it is recommended that, unless there is such urgency or imminent peril that the delay inherent in resort to judicial remedies would be unreasonable or defeat the public health objective sought to be achieved (see McQuillen, "Municipal Corporations", § 24.71), or unless the health officer has unambiguous permission from the owner to take the corrective action, the municipality should instead first seek either an injunctive order in Superior Court allowing such abatement by the municipality, or a hearing in District Court on a complaint under RSA 147:8, 11 or 17 for failure to comply with the order (paragraph C above).

F. COLLECTION OF ABATEMENT COSTS. If the health officer's original order complied with RSA 147:7-a, and in circumstances where summary abatement was proper (a) because of imminent peril, or (b) because the health officer had the owner's permission, or (c) because the municipality was acting pursuant to a Superior Court injunction, the municipality's abatement costs can be converted to a tax lien utilizing the District Court procedure in RSA 147:7-b, which requires the issuance of an "Order for Abatement Costs Pursuant to RSA 147:7-b." Although RSA 147:7-b, IV appears to suggest that if no objection is filed the health officer can simply forward the Order for Abatement Costs to the selectmen, to be committed to the tax collector, it is highly recommended that the health officer file a motion to affirm the Order with the District Court pursuant to 147:7-b, V, regardless of whether any objection was filed. Further proceedings are then similar to those under the Cease and Desist Order statute (Section 3 above).

G. ANTICIPATORY MOTION FOR ABATEMENT COSTS? In the absence of any emergency justifying summary abatement of the health nuisance without a judicial hearing, it is recommended that the procedure in RSA 147:7-b *not* be used, at least by itself, because it does not provide for a hearing until after the municipality's action has already been taken. This could well be unconstitutionally inadequate; see City of Claremont v. Truell, 126 N.H. 30 (1985). Instead the health officer or other prosecuting official may wish to consider filing a complaint for violating health officer orders under RSA 147:8, 11 or 17, *in combination with* an anticipatory 147:7-b Order for Abatement Costs, which would contain only an *estimate* of the cost of corrective action. The municipality would then, by motion, request the District Court to affirm the abatement cost order, pursuant to 147:7-b, V, at the time of trial on the underlying complaint, but *before* the municipality takes the corrective action. A later motion to allow the municipality's expense account, as in the case of Cease and Desist Orders, would then be made after the corrective action is taken. In any event, 147:7-b in its present form is less than satisfactory, and the alternative of seeking injunctive relief from the Superior Court will reduce the risk of procedural entanglements.

H. ORDERING BUILDING VACATED. In 1998 the legislature enacted RSA 147:16-a which provides a procedure for ordering a building to be vacated. This section authorizes health officers operating under RSA 147:4 & II, building inspectors operating under 674:52-a, or a fire chief acting under RSA 154:21-a to order a building's occupants to vacate a building. The statute does not apply to a residence owned and occupied by the owner and his or her immediate family unless the condition of such premises constitutes a clear and imminent danger to the life, or health of persons other than the occupants.

1. ***Issuance of Order and Posting of Notice.*** The officer informs the owner and occupants of the building or the order to vacate as soon as, and by such means as are possible. If the order is not effective immediately, a reasonable time to comply is provided depending on the seriousness and immediacy of the danger involved. The officer then posts a prominent notice at each entrance to the premises providing a brief description of the dangerous condition, informing all persons that the premises has been ordered vacated, of the officer making the order and the effective date and time of the order. The statute provides a sample notice:

“DANGER. THIS BUILDING (or other premises) IS UNSAFE BECAUSE OF THE FOLLOWING DANGEROUS CONDITIONS: (brief description) EFFECTIVE (date and time).. OCCUPANCY IS PROHIBITED BY ORDER OF THE TOWN (City) OF _____, UNDER AUTHORITY OF RSA 147:16-a. DETAILS OF THIS VIOLATION ARE ON FILE AT _____. ANYONE ENTERING THIS BUILDING (premises) WITHOUT PERMISSION OF THE (officer’s title), OR ANYONE REMOVING THIS NOTICE SHALL BE GUILTY OF A MISDEMEANOR. PERSONS AGGRIEVED BY THIS ORDER MAY REQUEST A HEARING IN THE _____ DISTRICT COURT, AND MAY ASK THE COURT TO DIRECT THE RESPONSIBLE PARTY TO REMOVE OR ABATE THE DANGEROUS CONDITION.”

2. ***Mailing/Service and Filing of Order.*** The officer causes written notice of the order to be sent by registered mail to the owner of the property, if known, and to known lessees or others know to exercise control over the premises within 24 hours of the issuance of the order to vacate. No such mailing is necessary where, due to immediate removal or abatement of the source of danger, the order has been countermanded. Alternatively, the officer may cause the written notice to be served personally by a peace officer. The notice must contain the address and description of the premises, a statement of the particulars of the danger to life, health, or safety, a statement of the date and time that the order becomes or became effective, and a statement of the right to a hearing in district court to contest the order or to have the court consider whether to direct the responsible party to remove or abate the source of danger. The officer then forwards a copy of the order to the local law enforcement agency having jurisdiction to enforce the order, and files a copy of the order along with a service list of names and addresses of people to whom the notice was sent, in the district court for the district in which the property is located. The municipality pays any filing fee due.
3. ***Appeal of Order.*** The statute provides that “any person specially aggrieved” by the order may file a written request with the clerk of the district court for the district in which the property is located for a hearing to contest the order or have the court consider whether to direct the responsible party to remove or abate the source of danger. The hearing must be held no later than 7 days after the request is received by the clerk. The clerk sends a hearing notice to the aggrieved person, the municipality and any other person whose name appears on the service list.

The hearing shall concern whether the order to vacate is justified and whether the court should order the responsible party to remove or abate the source of danger. Other issues including any challenge to outstanding ordinance or code violations, cease and desist orders, or repair orders, can only be contested under the statutes appertaining to them. After receiving evidence, the court either affirms, modifies or sets aside the order to vacate and issues any other appropriate order consistent with the statute, and enters judgment accordingly. Failure to comply with an order under this section shall be adherence to the statute does not constitute a defense to the misdemeanor charge unless that deficiency amounts to the failure of notice to the defendant. The court may order the municipality to pay the aggrieved person's attorneys fees if it finds that the order to vacate is frivolous, commenced in bad faith, or was not based on reasonable information or belief.

4. Fire Chief Enforcement of State Fire Code - RSA 153:14. Under RSA 153:14, I, the State Fire Marshal has the authority to adopt a state fire code. Under paragraph II of the same statute, a local fire chief is given concurrent authority with the Fire Marshal to enforce the code by requesting Administrative Inspection Warrants to inspect all buildings and premises except for single family dwellings and multi-unit dwellings containing 2 units for fire safety (see Pretrial Step 2 in Part I of this booklet), and to issue written orders *“whenever any of the said officers shall find a condition that such officer deems hazardous to life or property..”*

A. APPLICABLE CODES. It is recommended that any such order be based upon an adopted standard, from either the State Fire Code, a local fire regulation adopted under RSA 154:18, or a building code enacted pursuant to 674:51-52. Under RSA 153:24, violators of the state fire code are guilty of a violation for each offense.

B. SERVICE OF ORDER. Under RSA 153:14, III, the Order must be served by a peace officer upon the owner, with attested copies to any tenant or occupant. The order should contain a description of the remedial action required, and a time within which it must be completed.

C. LIMITED APPEALS. The person upon whom the order is served has 14 days to petition the Superior Court to review the order (RSA 153:14, II). Arguably, if such a petition is not filed within that time, the substance of the order cannot later be challenged as a defense to an enforcement action. It is, however, recommended that the fire chief's written order should explicitly advise the owner of this appeals petition deadline.

D. ORDERING BUILDING VACATED Under RSA 154:21-a, the fire chief or chief's designee have the authority to order occupants to vacate a building, structure or other premises if, based on reasonable information and belief, they determine that the condition of such premises constitutes a clear and imminent danger to the live and safety of occupants or other persons and that protection of life and safety requires vacating the premises. The authority granted by this statute does not apply to a residence occupied by the owner and his or her

family, unless the conditions constitute a clear an imminent danger to the life and health of persons other than the owner and occupants. Such an order is subject to the procedures outlined in RSA 147:16-a (see § 5H above).

- 5. *State Building Code for Public Buildings (RSA 155-A) and State Energy Code (RSA 155-D).*** RSA 155-A:1, I requires all “public buildings” to comply with the BOCA National Building Code, and 155-D:3 also requires them to comply with the State Energy Code. Prior to 1990 the term “public buildings” referred primarily only to buildings constructed by governmental entities; now however it includes “*any building space where the general public is allowed entry as a normal part of the operation and use of the building.*” (see RSA 155-D:2, III, and cross-reference in RSA 155-A:1, I). These codes are administered through local permitting systems (see RSA 155-A:2 and 155-D:5 and 6).

Violation of the state energy code constitutes a misdemeanor and can also be enforced by injunction (RSA 155-D: 5 and 6). On the other hand RSA 155-A, the “public building” code, contains no penalty provision at all. Hence, unless an offense impliedly constitutes a violation (see discussion under paragraph E of Section 1, above), the only way to enforce it is to deny *local* building permits for buildings not in compliance.

- 6. *Hazardous and Dilapidated Buildings - RSA 155-B.*** Since 1967, towns and cities have had the authority, under the supervision of the District Court, to order the repair or destruction of buildings which “because of inadequate maintenance, dilapidation, physical damage, unsanitary condition or abandonment, constitutes a fire hazard or a hazard to public safety or health.” The same procedure can also be used to address excavations for building purposes that have been left open for more than 6 months, or where an excavation or basement is not filled to grade or otherwise protected after the building is demolished or removed (RSA 155-B:13). In either case the procedure is similar to the Cease and Desist Order statute (above). It begins with an order from the municipal governing body to the owner of the building, and ends with the municipality’s expenses in carrying out the order becoming a tax lien against the property.

A. PREPARATION. The prosecuting official, as a first step, should do a search at the Registry of Deeds, because any order must be served upon the owner of record, or his agent, the occupying tenant if there is one, and all lienholders of record. The official should then request the governing body (Board of Selectmen/ City Council) to issue an order directing the owner to correct the hazardous condition or raze or remove the building. There is *no* requirement that the owner be given notice before the order is issued.

B. THE ORDER. In order to comport with due process, it is recommended that the order contain a prominent statement informing the owner of the procedure, similar to the following: ***“If you fail to fully comply with this order within __ days, or to serve an answer within 20 days, as provided in RSA 155-B:6, a Motion for Summary Enforcement of this order, pursuant to RSA 155-B:7 will be made to the _____ District Court. The Court may authorize the Town of _____ to carry out the corrective action specified in this order, and if it does, the Town’s costs shall constitute a lien against the property, enforceable in the same manner as real estate taxes, including possible loss of the property if not paid.”***

C. SERVICE OF PROCESS. Just as with RSA 676:17-a, the Order must be served, in the manner process is served in a civil suit, upon the owner or agent, and tenants and lien holders of record. If the owner cannot be found, the order may be served by posting it and by 4 weeks’ publication (RSA 155-B:4). Also see paragraphs E and F of Section 3, above, for discussion of filing with the District Court and enforcement of the order. The only difference is that with RSA 155-B, a notice must also be filed with the Registry of Deeds at the time the motion to enforce the order is filed with the District Court (see RSA 155-B:5).

D. MOTION FOR ENFORCEMENT If the owner does not file an answer, the municipality may move the Court to enforce the order (RSA 155-B:7). The municipality must still present its evidence to the Court, and the Court will either affirm or modify the order, enter judgment, and fix the time after which the municipality may proceed with enforcement of the order (RSA 155-B:7). On the other hand, if the owner wants to contest the order, an answer must be filed with the Court within 20 days of the date of service (RSA 155-B:6). At that point the case will be tried following the court rules for civil procedure. If the Court sustains the order, the Court enters judgment and fixes a time after which the building is either destroyed or repaired (RSA 155-B:8).

E. ENFORCEMENT BY MUNICIPALITY If the owner does not comply with the order, the governing body can order the building to be razed or repaired in accordance with the judgment, and its costs become a lien against the real estate, collectable through the tax collection procedure under RSA Ch. 80. The municipality should keep an accurate account of all expenses incurred (including any money received from the sale of salvage, etc.). Notice that once the Court affirms the order, the statute says that the Court ***“SHALL examine, correct if necessary, and allow the expense account”*** (emphasis added), implying that the District Court has no discretion. See Town of Hudson v. Baker, 133 N.H. 750 (1990). Thus the Court’s discretion must be exercised, if at all, at the time judgment is issued. Any appeal to the Superior Court must be filed within 15 days of that judgment (RSA 155-B: 15).

7. *Protection of Highways from Damage - RSA 236:9-24 and 236:38-9.*

One further type of municipal enforcement action seldom brought to court is that of protecting the integrity of public highways. Under RSA 236:9, no one is to “*excavate or disturb the shoulders, ditches, embankments or the surface improved for travel...*” of any highway without permission from the unit of government with responsibility for that highway, for local highways permission must come from the selectmen or highway agent, or in the case of a city, from the mayor and aldermen or street commissioners. RSA 236:13 requires permission before constructing driveway connections (often called “curb cuts”) and in the case of local highways, regulatory authority is given to the planning board. People violating these statutes are guilty of a violation (RSA 231:14). Thus, the proper way to enforce these statutes is through the District Court’s normal procedures for violation complaints. Additional statutes make it a violation to erect or maintain encroachments on highways (RSA 236:15 and 16), and to obstruct highways with water (236:19). Willful damage of a highway constitutes a misdemeanor (RSA 236:38). Almost all of these statutes contain provisions making the defendant liable for repairing or restoring the highway.

INSTRUCTIONS FOR USING CEASE AND DESIST FORMS AND LAND USE CITATION FORMS UNDER NH RSA 676:17-a & 17-b

1. Cease & Desist Forms

676:17-a

A. Prior to issuing the Cease & Desist Order, under RSA 676:17-a (not to be confused with the Building Inspector's issuance of a normal Cease & Desist Order) a title search in the Registry of Deeds must be done from the date that the owner acquired the property forward. This is necessary because it is a precondition to enforcing the Cease & Desist Order that not only the owner but any tenants and any person who has a recorded interest in the property, such as a mortgagee or a lease holder who holds under a recorded lease, be notified of the violation. The Notice must be in writing and be served in the same manner as is necessary to start a Civil Lawsuit (see "D" below). For these reasons, municipalities often do not issue the formal Cease & Desist Order because of the work involved.

B. Once the use of the Cease & Desist Order has been determined to be the form to be used, it must be filled out carefully, setting forth in Paragraph A the exact Article or Section of the Ordinance that is alleged to be violated or how the building permit or site plan approval or subdivision approval is being violated or not being complied with.

C. The Cease & Desist Order ("C & D") must contain a provision that specifically informs the land owner and others holding an interest in the land what action must be done to cure the violation and a reasonable amount of time to accomplish that. The reasonable amount of time may vary, but it is suggested that a 7-day minimum time limit be given. Obviously, if the violation consists of a health hazard or some type of hazard, there are other abatement provisions available to the municipality to protect the life, health, and safety of the Town.

1. If you are counting and using the minimum, the seven days notice period should not include the day that the sheriff serves notice nor should it could the day by which the work is to be done. So that, in effect, you are really providing at least nine (9) days.

2. If the violation consists of something that is reasonably going to take more time to correct the situation, then again unless it is a health and safety issue in which you deal with it under a different authority, you should provide and allow the land owner the reasonable amount of time to do so.

3. As an example, if the violation is the fact that an unused building has burned down, the ruins are there, and they could be dangerous, you should probably allow at least 30 days notice to the owner to have the ruins removed.

4. The landowner has twenty (20) days from the date of service of the C & D in which to contest the C & D by filing a written objection in the local District Court. (Do not confuse the 20-day period in which the Defendant has the right to file an answer in Court with the date that they have for correction. The 20 days is fixed to a statutory allowance

of time in which the person may contest to the Court after he or she or it has been served.)

5. Filing a “Motion for Summary Enforcement. The time limit that you give the landowner to take corrective action is the time that you must wait before you file a “Motion for Summary Enforcement” of the C & D. Please remember that if you give someone seven (7) days to take correction action and they do not, then at the expiration of that (9 days) you may file in the local District Court a “Motion for Summary Enforcement,” but of course the Court will not act on that until the expiration of the 20 days to determine whether or not the Defendant is going to contest it.

6. Please note that if the owner of the property is unknown or cannot be found, service of the C & D can be made by publishing the C & D for four (4) consecutive weeks in a newspaper in general circulation in the community. Obviously, if this is the situation, the time for corrective action should be fixed after the date of the last publication. Five (5) days after the date of last publication is the suggested date, which means pretty much a month before you file your Motion for Summary Enforcement. Please note that if you serve by publication for four (4) weeks (plus posting a copy of the C & D on the property itself), the 20 days does not start to run until seven (7) days after the last day of publication, which means that the individual really has 48 days in which to answer the Petition, and you cannot file a Motion for Summary Enforcement until at least five (5) days after the last date of publication, which date constitutes the “date of service.” When the owner’s name and address is known and he and any mortgagee and/or leasee are in-state, you can file the “Motion for Summary Enforcement” with the Court at the expiration of five (5) days after you have filed with the Court proof of service on the Defendant in any event.

- a. Thus, in a normal situation, let’s say
 - (i) give the Defendant seven (7) days to cure the violation.
 - (ii) You serve him on the 1st of the month.
 - (iii) If it is not cured by the 9th of the month, you file a copy of the C & D , filling out the time and date of service, with the local District Court.
 - (iv) On the 15th of the month (nine plus five) you could then file a Motion for Summary Enforcement

- b. By publication
 - (i) You would file a copy of the C & D as “served” by publication on the Defendant not earlier than the 29th day following posting and first publication and then
 - (ii) You could file your Motion for Summary Enforcement not earlier than the 35th day (Please notice that I always allow an extra day. Too many time lawyers as well as Building Inspectors have had to start the process all over because they miscounted. If you allow an extra day or two, it is usually much more efficient)

D. Motion for Summary Enforcements – A Note about Service of Process

- 1. The forms provide for Notices to Mortgagees, etc. by certified mail return receipt

requested. The statute provides that Service on Mortgagees, etc. is to be the same as Service of Summons in a civil action at a District Court. Unfortunately, this means that a Deputy Sheriff in the county where the mortgagee's office is located, assuming the mortgagee has an office in New Hampshire, must serve the copy of the Cease & Desist Order. If it is an out-of-state mortgagee doing business in New Hampshire, this is a somewhat complicated procedure; and if you find yourself in this situation, the Town Counsel should be the one that takes over at this point to set up and to ensure that Service is proper. If the mortgagee is an out-of-state company, then depending on whether or not it is registered to do business in New Hampshire, in which case its Resident Agent must be served by a Deputy Sheriff in that county or if it is an out-of-state mortgagee, which is not registered to do business in the State of New Hampshire, service must be made via the Merrimack County Sheriff's Office on the Secretary of State. If either of these situations occur, it is strongly suggested that you have Town Counsel or City Counsel handle the matter, since there are certain rules with regard to Certification of Service, etc. As you probably realize (but at least one lawyer did not) service is not valid if made by a New Hampshire sheriff who goes over the border into Vermont or Maine or Massachusetts and leaves a copy with the out-of-state mortgagee. Again, this is one of the reasons that the C & D procedure under 17-a is seldom used by municipalities, but it is available.

2. If the Defendant, Mortgagee, or Tenant fails to file an answer in 20 days from the date of "Service" upon them (Please keep in mind the publication problem, if service is made by publication) you may then file a Certification of Service with the Court, and five (5) days thereafter the municipality (you) may file a Motion for Summary Enforcement. A copy of the form for Motion of Summary Enforcement is included for your use, but you are cautioned that it would be a good idea to let Town Counsel look it over. Please remember that if you go this way, you must keep an accurate record of all costs and expenses incurred. The Court will give the Defendant an additional period of time to correct before you can undertake action on behalf of the Town and collect the costs of such from the Defendant. Failing (again) corrective action by the Defendant, you will then have a period of time in which to complete the work and to come back to Court to have the Court approve the amount of the costs and expenses you have legitimately incurred. Once such costs have been approved, it becomes a lien on the property for 18 months during which time the Town can take appropriate action to add it to the real estate taxes and in which case it can then be collected as if it were real estate taxes.

2. Land Use Citation Forms

676:17-b

A. There are three (3) forms included for Land Use Citation. The first one (Form 17-b) which must be delivered or mailed (certified mail return receipt requested) at least twelve (12) days prior to issuing the Citation, a "Notice of Violation," must be sent first. Carefully fill out the second page with regard to whether or not the Defendant has a right to obtaining a Variance, Special Exception, or Administrative Appeal from the ZBA or approval from the Planning Board, if jurisdiction lies there. If the individual files with the ZBA or Planning Board as appropriate (a reasonable time must be given to file with the appropriate Board), then no further action should be taken unless a negative decision comes out of that Board. Assuming there is no Appeal permitted through the Planning Board or through the Zoning Board of Adjustment, then you can proceed to issue a Land Use Citation, which, as you

know, includes a Summons. There are two (2) forms that I have provided, 17-b-1 and 17-b-2. Form 17-b-1 is for use when there is a violation of the Town Ordinance and Form 17-b-2, which is very similar, is for when the violation is alleged to be a violation of an Approved Site Plan or Subdivision Plan. Unlike the C & D, the Land Use Citation needs only to be served upon the Defendant, or the person in charge of the land at the time, i.e. general contractor performing work. In order to avoid questions of service, however, it is strongly recommended that in addition to serving who you think is the general contractor, the copy also be posted on site and a copy sent by certified mail return receipt requested to the actual land owner. Again, if the landowner is out of state, I strongly advise that you let Town Counsel take over this part of the proceeding. Note that if the Defendant is in state, the service may be made by either a Deputy Sheriff, a municipal Police Officer of that town, or a Constable. Please note that you need to fill out (i) exactly the Section of the Ordinance or the provision or condition of the Plan that is being violated and (ii) when the Defendant was served notice of the violation and furthermore (iii) when a subsequent inspection revealed that the violation had not been abated and was still continuing.

B. Once the local Land Use Citation has been served on the Defendant, at least five (5) days (I suggest 7) after the violation has been seen to continue, the local Land Use Citation and Proof of Service (i.e. the Completed Service Section on the form has been filled out and signed), together with a copy of the original Notice of Violation and Proof of Date of Mailing Service should be filed with the local District Court.

C. Before serving the Land Use Citation and in addition to filling out the dates and times and describing type of activity that constitutes the violation, be sure to call the Court and obtain a date by which the Defendant must file an answer. This is important, because many District Courts have only certain days that they are open and will hear Summonses. If you are in a district which has a full-time District Court, one call to the Clerk will establish what days of the week, which may be any day depending on the Court's procedure, that you may fill in for the return date.

D. Please note that there are arrangements in the Land Use Citation for the Defendant to pay a specified fine (remember the minimum is \$275 and the maximum is \$1,375), which does not relieve him of abating the violation but should cause him/her to comply.

E. If the matter does go to Court and a hearing, of course, it is best that you have Town Counsel handle the matter, and in preparation for such at the very least you should have photographs taken on the date on which the original Notice of Violation was issued and again on the dates on which you visited the site to ensure that the violation had not been corrected pursuant to the original Notice. Photographs and your statement that you were there, that you took the photographs, that they are accurate representations of what you observed at the site and pointing out different items on the photographs, such as license plates or something that cannot be seen and the dates of the visit, will go a long way toward proving your case.

Form 17-a

**CEASE AND DESIST ORDER
MUNICIPALITY OF _____, NEW HAMPSHIRE**

TO: _____
(Record Owner of Land)

TO: _____
(Occupying Tenant or Other Entity in Possession)

(Address)

(Address)

(Town, State, Zip)

(Town, State, Zip)

Date:

Pursuant to the provisions of New Hampshire RSA 676:17-a, you are hereby notified of the following:

5. a violation of the _____ Ordinance, Article ___, Section ___, and/or the following condition(s) as set forth in a permit/site plan/subdivision plan/variance/building permit approved or issued to you as of _____, 20__, has occurred, or continues to exist at the property located at Tax Map ___, Lot No. ___, _____ Street/Road, in the Municipality of _____, New Hampshire, and which is owned by you, or in which you have a legal interest, or over which you are exercising possessory control.
6. An inspection of the property was made by the _____ Code Enforcement Officer, on the ___ day of _____, 20__. The violation consists of the following:
(List specific facts constituting the violation)
7. You are hereby notified to take the following corrective action on or before the ___ Day of _____, 20__:
8. A Motion for Summary Enforcement of this Cease and Desist Order will be filed in the _____ District Court, located at _____ Street, P.O. Box ___, _____, New Hampshire, _____ unless corrective action is taken in accordance with Paragraph (c) above, or unless you file with said Court an answer, specifically denying the facts set forth in Paragraph (b) above within twenty (20) days of the date set forth in Paragraph (c) above.

Form 17-a-2

STATE OF NEW HAMPSHIRE

COUNTY OF _____

_____ DISTRICT COURT

MOTION FOR SUMMARY ENFORCEMENT
UNDER NH RSA 676:17-a

MUNICIPALITY OF _____ (“Municipality”)

vs.

_____ (“Defendant”)

COMES NOW the Municipality of _____ and moves for Summary Enforcement of the “Cease and Desist Order”, a copy of which is attached hereto, and in support of this Motion says:

1. That a copy of said Order was served on the Defendant and on each other person having an interest in the Premises, known as Tax Map __, Block __, Lot __, _____, New Hampshire, as defined and required under RS 676:17-a II;

2. That service of said Order was accomplished in accordance with the provisions of RSA 676:17-a, and a copy of said Order with such service certified thereon was filed with the Honorable Court more than five (5) days prior to the filing of this Motion;

3. That the violation as alleged in said Order has not, as of this date, been abated or corrected as required; and

4. That more than twenty (20) days has expired since the aforesaid date of service and neither the Defendant nor any tenant nor mortgagee has filed with this Court an answer, denying the facts set forth in the aforesaid Order.

WHEREFORE, the Municipality moves that the Court enter the following order:

A. That the Defendant is enjoined to begin the corrective actions set forth in the attached Cease and Desist Order;

B. That if said corrective action is not commenced on or before _____ and completed on or before _____, the Municipality is authorized to undertake such corrective actions, the cost of which together with all other expenses as set forth in NH RSA 676:17-a IX to be a lien against the real estate on which the violation has occurred, which lien shall continue for eighteen (18) months from the date upon which this Court approves the expenses and costs incurred by the Municipality in completing the aforesaid corrective action; and

C. The Municipality shall have from thirty (30) days after the last date set forth in "B" above and continuing until ___ days thereafter in which to complete the corrective action and return an accurate account of all costs and expenses so incurred to this Court for approval in accordance with NH RSA 676:17-A IX.

Date: _____

Respectfully submitted,

MUNICIPALITY OF

By
Its Code Enforcement Officer

Form 17-b

For Land Use Citations Only

NOTE WELL: This form must be sent first and at least seven (7) days (12 days is suggested) prior to sending/serving a "Land Use Citation."

**SENT CERTIFIED MAIL, RETURN RECEIPT REQUESTED
OR
TO BE HANDED TO LOT OWNER/OCCUPANT AND TO VIOLATOR
(IF DIFFERENT FROM OWNER)**

(Name of Owner or Occupier of premises
where violation is occurring)

WRITTEN NOTICE OF VIOLATION

(To be delivered/mailed 12 days prior
to issuing a local Land Use Citation)

Dear _____:

Pursuant to NH RSA 676:17-b, you are hereby notified the following violation of the (municipality) Land Use Regulations is occurring on the premises known as _____, New Hampshire (Tax Map __, Block __, Lot __);

1. A violation of Article __, Section __, sub-paragraph __ of the

(municipality) Zoning Ordinance

(municipality) Subdivision Control Regulations

(municipality) Site Plan Review Regulations

OR

1-A. A violation of the approved subdivision/site plan, approved on _____, 20_, (and recorded at the _____ County Registry of Deeds as Plan Number _____.

2. Acts or actions constituting the violation consist of the following: (Be sure to include date(s) violation(s) was/were observed.)

(continued on Attachment "2" following)

3. The following provision **(DOES) (DOES NOT)** apply to this notice:

You may appeal this decision to the _____ (municipality)

Zoning Board of Adjustment;

Board of Building Appeals;

provided such appeal is filed within ten (10) days of the date this letter is deposited in the U.S. mail, postage prepaid or hand-delivered to you; **OR,**

File for subdivision/site plan approval to the _____ (municipality) Planning Board, provided you file plans for such within thirty (30) days.

(Municipality)

Code Enforcement Officer

PROOF OF SERVICE*

I, _____, Code Enforcement Officer for _____ (municipality), New Hampshire, do hereby certify I caused a copy of this notice to be handed to _____ at ____ a.m./p.m. on _____, 20_, and/or by mailing a copy, certified mail return receipt requested, to the following addressees:

Owner _____
(Name) (Address)

Tenant/Agent/
Contractor on
Premises _____
(Name) (Address)

_____ (Municipality)
Code Enforcement Officer

*Complete this section on a duplicate signed copy after service and keep in file or forward to Town Counsel for further action.

Form 17-b-1

[for use when activity violates Zoning Ordinance]

To The Honorable District Court of
_____, _____ County, New Hampshire

**Local Land Use Citation, Municipality of
Pursuant to New Hampshire RSA 676:17-b
And the Municipality of _____ Ordinance
Article __, Section**

(1) and (2). Upon oath given, the undersigned gives information and complaint against _____ of _____ (“Defendant”), saying that on or about _____, 20__, and continuing thereafter, Defendant did willfully and unlawfully violate the Ordinances of the Municipality of _____, to wit: Article __, Section __ of the _____ Ordinance, in that the said Defendant did cause, permit, and allow the following conditions or actions to exist or occur at _____ Street/Road, in said (Being Tax Map __, Block __, Lot No. __ as shown on the 20__ Tax Assessor’s Maps):

(3)

[Briefly set forth all pertinent facts which establish the alleged violation. There should be one complaint for each alleged violation.]

(4) Such violation occurred at _____,
in _____ (municipality) _____ County, New Hampshire.

(5) That the Defendant received written notice of the aforesaid violation on _____, 20__, by (certified mail, return receipt requested) (in hand service).

(6) That upon personal subsequent inspection by the undersigned, _____, on _____, 20__, at or about __ a.m./p.m., the aforesaid violation was observed to (still exist) (be continuing).

You are hereby further notified that:

(7) The maximum amount of the penalty which may be assessed against you is \$275.00 per day for each day of violation, up to a maximum of \$1,375.00 hereunder.

SUMMONS

You are hereby ordered to appear before the _____ District Court at or before the following date: _____, 20_.

You may answer this Citation by mail delivered to _____, Clerk, District Court, _____, _____, New Hampshire, _____, on or before a.m./p.m., _____, 20_. (**Code Enforcement Officer contact Clerk of Court for this date**), or by personal appearance on that date.

Contrary to the provisions of State Law pursuant to New Hampshire RSA 676:17, and being against the peace and dignity of the State of New Hampshire

WARNING

YOUR FAILURE TO RESPOND TO THIS CITATION ON OR BEFORE THE ABOVE DATE MAY RESULT IN YOUR ARREST.

DEFENDANT’S PLEA INSTRUCTIONS

To: _____ (Defendant)

- [] a)If you wish to have a trial and to contest this violation, check this box, which will constitute a plea of “NOT GUILTY” to this Local Land Use Citation to the above _____ District Court Clerk and a copy to the _____ Code Enforcement Officer at the below address box, which will constitute a plea of “GUILTY,” and mail a copy of this Local Land Use Citation to the above _____ District Court Clerk and a copy to the _____ Code Enforcement Officer at the below address. By pleading GUILTY and paying the civil penalty, you are also agreeing to cure this violation NOT LATER THAN _____, 20_.

CITY/TOWN OF

By Its Code Enforcement Officer

Signature

Address

City, State, Zip Code

STATE OF NEW HAMPSHIRE

_____, SS.

Sworn and subscribed to before me this ___ day of _____, 20_,
by _____ in his/her capacity as _____ on the
City/Town of _____.

Justice of the Peace/Notary Public

PROOF OF SERVICE

I, _____, _____ (title) of _____, New Hampshire, do hereby
certify that I caused a copy of the above Local Land Use Citation to be handed
to _____ at ___ a.m./p.m. on _____, 20_.

Signature

(Authority) must be
Deputy Sheriff,
Police Officer of Municipality,
or Constable

YOUR ATTENTION IS ALSO DIRECTED TO THE FACT THAT ANY VIOLATION OF THE TOWN'S ORDINANCES IS ENFORCEABLE PURSUANT TO THE PROVISION SOF NEW HAMPSHIRE RSA 676:17 (IN ADDITION TO THE STATUTE REFERRED TO ABOVE) AND SAID STATUTE ALSO PROVIDES, IN PART, THAT A VIOLATION IS PUNISHABLE BY A CIVIL FINE OF NOT MORE THAN \$275.00 FOR EACH DAY THAT SUCH VIOLATION IS FOUND BY A COURT TO CONTINUE, UP TO A MAXIMUM OF \$1,375.00 FOR EACH CITATION, AND THAT THE MUNICIPALITY MAY RECOVER ALL OF 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 AND THAT FOR THE PURPOSE OF THAT STATUTE, RECOVERABLE COSTS INCLUDE ALL OUT-OF-POCKET EXPENSES ACTUALLY INCURRED, INCLUDING, BUT NOT LIMITED TO, INSPECTION FEES, EXPERT FEES, AND INVESTIGATORY EXPENSES.

YOU ARE INFORMED THAT YOUR FAILURE TO COMPLY WITH THE WITHIN ORDER WILL RESULT IN THE TOWN TAKING ALL APPROPRIATE ACTION TO ENFORCE THE FOREGOING, AND THAT, UPON YOUR CONVICTION, A CRIMINAL PENALTY OF UP TO \$1,000.00 MAY BE ASSESSED BY THE COURT.

Form 17-b-2

[for use when activity violates Approved Site Plan/Subdivision Plan or Site Plan/Subdivision Regulations]

To The Honorable District Court of
_____, _____ County, New Hampshire

**Local Land Use Citation, Municipality of
Pursuant to New Hampshire RSA 676:17-b
And the Municipality of
Site Plan/Subdivision Plan Regulations and/or
Approved Site Plan/Subdivision Plan**

(1). Upon oath given, the undersigned gives information and complaint against _____ of _____ (“Defendant”), saying that on or about _____, 20__, and continuing thereafter, Defendant did willfully and unlawfully violate the conditions/requirements/provisions of approval of a certain Site/Subdivision Plan approved on _____, 20__, by the _____ Planning Board, and shown as “_____,” recorded at the Rockingham County Registry of Deeds as Plan No. _____, in that the said Defendant did cause, permit, and allow the following actions or conditions to occur or exist at _____ Street/Road, in said _____, New Hampshire (being Tax Map ____, Block ____, Lot No. ____, as shown on the 20_ _____ Tax Assessor’s Map) in violation of

(2) (a) Section __ of the _____ Site Plan/Subdivision Regulations; and/or

(b) The following condition(s) as shown/set forth on said approved Site Plan/Subdivision Plan:

(3)

[Briefly specify all pertinent facts which establish the violation(s).]

(4) Such violation occurred at _____,
in _____ (municipality) _____ County, New Hampshire.

(5) That the Defendant received written notice of the aforesaid violation on _____, 20__, by (certified mail, return receipt requested) (in hand service).

(6) That upon personal subsequent inspection by the undersigned, _____, on _____, 20_, at or about ___ a.m./p.m., the aforesaid violation was observed to (still exist) (be continuing).

You are hereby further notified that:

(7) The maximum amount of the penalty which may be assessed against you is \$275.00 per day for each day of violation, up to a maximum of \$1,375.00 hereunder.

SUMMONS

You are hereby ordered to appear before the _____ District Court at or before the following date: _____, 20_.

You may answer this Citation by mail delivered to _____, Clerk, _____ District Court, _____, _____, New Hampshire, _____, on or before ___ a.m./p.m., _____, 20_. (**Code Enforcement Officer contact Clerk of Court for this date**), or by personal appearance on that date.

Contrary to the provisions of State Law pursuant to New Hampshire RSA 676:17, and being against the peace and dignity of the State of New Hampshire

WARNING

YOUR FAILURE TO RESPOND TO THIS CITATION ON OR BEFORE THE ABOVE DATE MAY RESULT IN YOUR ARREST.

DEFENDANT'S PLEA INSTRUCTIONS

To: _____ (Defendant)

- [] a) If you wish to have a trial and to contest this violation, check this box, which will constitute a plea of "NOT GUILTY" to this Local Land Use Citation to the above _____ District Court Clerk and a copy to the _____ Code Enforcement Officer at the below address.
- [] b) If you wish not to contest this violation and pay a fixed civil penalty of \$_____, check this box, which will constitute a plea of "GUILTY," and mail a copy of this Local Land Use Citation to the above _____ District Court Clerk and a copy to the _____ Code

Enforcement Officer at the below address. By pleading GUILTY and paying the civil penalty, you are also agreeing to cure this violation NOT LATER THAN _____, 20_.

CITY/TOWN OF

By Its Code Enforcement Officer

Signature

Address

City, State, Zip Code

STATE OF NEW HAMPSHIRE

_____, SS.

Sworn and subscribed to before me this ___ day of _____, 20_, by _____ in his/her capacity as _____ on the City/Town of _____.

Justice of the Peace/Notary Public

PROOF OF SERVICE

I, _____, _____ (title) of _____, New Hampshire, do hereby certify that I caused a copy of the above Local Land Use Citation to be handed to at ___ a.m./p.m. on _____, 20_.

Signature

(Authority) must be
Deputy Sheriff,
Police Officer of Municipality,
or Constable

YOUR ATTENTION IS ALSO DIRECTED TO THE FACT THAT ANY VIOLATION OF THE TOWN'S ORDINANCES IS ENFORCEABLE PURSUANT TO THE PROVISION SOF NEW HAMPSHIRE RSA 676:17 (IN ADDITION TO THE STATUTE REFERRED TO ABOVE) AND SAID STATUTE ALSO PROVIDES, IN PART, THAT A VIOLATION IS PUNISHABLE BY A CIVIL FINE OF NOT MORE THAN \$275.00 FOR EACH DAY THAT SUCH VIOLATION IS FOUND BY A COURT TO CONTINUE, UP TO A MAXIMUM OF \$1,375.00 FOR EACH CITATION, AND THAT THE MUNICIPALITY MAY RECOVER ALL OF 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 AND THAT FOR THE PURPOSE OF THAT STATUTE, RECOVERABLE COSTS INCLUDE ALL OUT-OF-POCKET EXPENSES ACTUALLY INCURRED, INCLUDING, BUT NOT LIMITED TO, INSPECTION FEES, EXPERT FEES, AND INVESTIGATORY EXPENSES.

YOU ARE INFORMED THAT YOUR FAILURE TO COMPLY WITH THE WITHIN ORDER WILL RESULT IN THE TOWN TAKING ALL APPROPRIATE ACTION TO ENFORCE THE FOREGOING, AND THAT, UPON YOUR CONVICTION, A CRIMINAL PENALTY OF UP TO \$1,000.00 MAY BE ASSESSED BY THE COURT.