

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

No. 2012-0745

Town of Campton

v.

Beebe River Village District

RULE 7 APPEAL FROM FINAL DECISION OF GRAFTON COUNTY SUPERIOR COURT

BRIEF OF THE INTERVENOR/DEFENDANT-APPELLANT JFF/SWF, LLC

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QUESTIONS PRESENTED

1. Did the Court err in determining it had subject matter jurisdiction of the dissolution of the Beebe River Village District by ordering the dissolution of the Beebe River Village District without a vote by the BRVD voters pursuant to RSA 52:21?
Preserved: State v. Demesmin, 159 N.H. 595, 597, 992 A.2d 569 (2010) - Subject matter jurisdiction may be raised on appeal by the court sua sponte. Further, it is axiomatic that a party can challenge subject matter jurisdiction at any time. (SEE: In re: Michelle G., 52 Conn.App. 187, 727 A.2d 226, 228 (1999); Thompson v. County of Franklin, 15 F.3d 245, 248 (2d Cir. 1994); cf. Conway v. Water Resources Board, 89 N.H. 346, 348-49, 199 A. 83, 87 (1938)).

2. Did the Court commit an unsustainable exercise of discretion in denying JFF/SWF, LLC's Motion to Intervene?
*Preserved: Motion to Intervene by JFF/SWF, LLC – 7/7/12.
Objection by Town of Campton to JFF/SWF, LLC's Motion to Intervene*

3. Did the Court commit an unsustainable exercise of discretion in denying JFF/SWF, LLC's Motion to Intervene in that other similarly situated parties like Timothy Harvey, Trudy Cote, and Robert Oakes were allowed to appear as parties without objection from the Town of Campton and thus the Court and Town of Campton should have been estopped from arguing against JFF/SWF, LLC from Intervening in the action?
*Preserved: Motion to Intervene by JFF/SWF, LLC – 7/7/12
Objection by Town of Campton to Motion to Intervene by JFF/SWF, LLC*

TITLE III TOWNS, CITIES, VILLAGE DISTRICTS, AND UNINCORPORATED PLACES

CHAPTER 52 VILLAGE DISTRICTS

Section 52:16

52:16 Taxation, Procedure. –

I. Whenever the district votes to raise money by taxation or otherwise for any of its purposes, the clerk shall, within 20 days thereafter, deliver a certified copy of such vote to the selectmen of each town which contains any part of the district and to the commissioner of revenue administration. Whether or not the district is situated wholly within one town, the selectmen of each town shall assess the tax on that part of the district lying within their own town and commit it to the collector of taxes from their own town. The collectors shall then collect the tax as required by law. The selectmen may make such assessments in the manner provided under RSA 76:4.

II. In the case of districts with annual budgets of less than \$200,000, the town treasurer shall distribute the amount of taxes collected and held in trust by the town under paragraph I to the district treasurer no later than December 31 of each calendar year, unless otherwise agreed to in writing by the town and district treasurers. In the case of districts with annual budgets of \$200,000 or more, the town treasurer shall distribute the amount of taxes collected and held in trust by the town under paragraph I by distributing to the district treasurer all taxes collected in any given calendar month by the end of the next following month, unless otherwise agreed to in writing by the town and district treasurers. The town treasurer, furthermore, shall turn over to the district treasurer all interest earned on district tax revenues held in trust by the town and all interest collected by the town on the account of any delinquent district taxpayers' district taxes in the same manner as the tax revenues are distributed.

Source. 1849, 852:7. CS 116:7. GS 97:4. 1874, 11:1. GL 107:4. PS 53:11. PL 57:15. RL 70:15. RSA 52:16. 1975, 138:1. 1977, 11:1. 1991, 90:1. 1992, 274:1. 2010, 262:8, eff. Sept. 4, 2010.

TITLE III

TOWNS, CITIES, VILLAGE DISTRICTS, AND UNINCORPORATED PLACES

CHAPTER 52

VILLAGE DISTRICTS

Section 52:21

52:21 Dissolution. – Any village district and any district now in existence having the rights and powers of a village district, may, at an annual meeting, by a 2/3 vote of its legal voters, terminate its existence and dispose of its corporate property. Upon the dissolution of any such district, the property, real and personal, which is contained within the former boundaries of the dissolved district shall continue to be subject to taxation and betterment assessments for the purpose of paying any unpaid bonds, notes, bills or other obligations incurred while the district was in existence, in the same manner as if the said district had not been dissolved. The selectmen of the town or towns in which the district was situated shall assess the taxes and betterment assessments in the same manner as if the district had not been dissolved and shall have the duty, authority, and power to pay such bonds, notes, bills or other obligations after the moneys received from such taxes and assessments. Provided, however, that in no case shall the total of any such taxes or assessment exceed the balance necessary to pay said bonds, notes, bills or other obligations after the net income derived from the property disposed of has been applied for the payment of the same.

Source. GL 107:8. PS 53:15. PL 57:20. RSA 52:21. 1967, 169:1, eff. June 9, 1967.

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RULES OF THE SUPERIOR COURT OF THE STATE OF NEW HAMPSHIRE

NEW PARTIES

139. Any person shown to be interested may become a party to any proceeding in equity on his petition briefly setting forth his relation to the cause; or, upon petition of any party, such person may be made a party by order of court notifying him to appear therein. If the person so notified shall neglect to appear, the bill shall be taken pro confesso as against him. No such decree pro confesso shall be set aside, except by agreement, or by order of the court upon such terms as justice may require.

U.S. CONSTITUTION - AMENDMENT XIV

SECTION 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

SECTION 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

New Hampshire Constitution

Article 1. [Equality of Men; Origin and Object of Government.] All men are born equally free and independent; therefore, all government of right originates from the people, is founded in consent, and instituted for the general good.

[Art.] 37. [Separation of Powers.] In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

The Beebe River Village Precinct, also known as the Beebe River Village District (hereinafter “BRVD”), was formed on March 19, 1997. BRVD was formed for the purposes of (1) supplying water for domestic and fire purposes, which may include the protection of water systems; (2) lighting and sprinkling of streets; (3) construction, operation and maintenance of sewage and waste treatment plants; and, (4) the layout, acceptance, construction and maintenance of roads. (*Beebe River Village District Organization Meeting, Report of the District Clerk – 3/19/1997*).

Pursuant to RSA 52:16, the Town of Campton is responsible for the collection of taxes authorized by BRVD and for mailing tax bills and distributing tax revenue to the BRVD. BRVD is small in size, and consists of approximately 47 lots and 37 voters. According to the Town of Campton, approximately 12 people attend the BRVD annual meetings (*Town of Campton’s Petition for Dissolution of Village District – 4/10/2012*). In fact, only nine (9) votes were made to create the BRVD. (*Objection to Entry of Final Judgment by Sally Moulton – 8/7/12*). The Town of Campton complains that they have had difficulty attracting commissioners of the BRVD. (*Town’s Petition- p.3*). In 2011, eleven people attended the annual meeting. (*Town’s Petition – p. 3*). No one volunteered or was nominated for the empty commissioner seats. (*Town’s Petition – p. 3*). An article was placed on the warrant to consider the dissolution of BRVD, but no vote was held as there was alleged confusion by BRVD over the requirement of RSA 52:21, in that it required 2/3 of the legal voters to vote to dissolve the district. (*Town’s Petition – p. 3*). No further attempt was made to conduct the vote pursuant to RSA 52:21.

The Town of Campton sought to dissolve the BRVD, and specifically requested as part of their petition that the Town should not be responsible for taking any action or responsibility over BRVD's assets, which include the roads. (*Town's Proposed Final Order- P.2*).

JFF/SWF, LLC (hereinafter "JFF") filed a Motion to Intervene on or about July 7, 2012. (*JFF's Motion to Intervene - 7/7/12*). JFF is a limited liability corporation in good standing in New Hampshire. (*JFF/SWF, LLC's Articles of Incorporation – 10/5/2005*). They own the property located at 72 Beebe River Road. JFF is owned by Stanley and Joel Freeman. Stanley and Joel Freeman are also the incorporators of the business known as EMM America, Inc., which is a corporation in good standing in New Hampshire. (*EMM, Inc. Articles of Incorporation – 9/21/2001*). EMM America, Inc. exports, imports and distributes products out of the 72 Beebe River Road location. The BRVD has maintained the roadways used by the business since 1997. Beebe River Road is the only way to access the property owned by JFF/SWF, LLC and its tenant, EMM America, Inc. Anything that impacts the operation and maintenance of Beebe River Road will impact the potential use and value of the real estate owned by JFF. If the dissolution is allowed, JFF's property value will decrease and the use of the property will become untenable for a distributorship.

In addition, Timothy Harvey, Trudy Cote and Robert Oakes were individuals who were allowed to participate in the Trial Court's process. Trudy Cote and Robert Oaks were allowed to become parties to the suit despite the fact they were not residents of the Beebe River Village District and were not registered voters. (*Notice of Decision of Grafton Superior Court – 8/29/12*). These parties were allowed to participate because they had filed Appearances with the Court prior to their filing Motions to Intervene that were not objected to and not rejected by the Court *sua sponte*. The Court deemed Ms. Cote's and Mr. Oaks' Motions to Intervene as "moot" as

they were already parties to the action. The Town of Campton did not object to either Ms. Cote or Mr. Oaks filing appearances, nor did they object to their filing of Motions to Intervene. JFF/SWF, LLC, was identically situated to Robert Oakes and Trudy Cote in that they were property owners in Beebe River Village District, but were not deemed “residents” and were also not registered voters. All three of Harvey, Cote and Oakes were allowed to participate in the underlying case below, including filing Objections to the Motion for Entry of Final Judgment filed by the Town. This allowed those parties to protect their property rights through the trial court process. At no time was JFF allowed to participate in the underlying matter, as their Motion to Intervene was denied without any reasoning being provided by the Court for its decision.

BRVD was ultimately dissolved on August 29, 2012, by order of Hon. Judge Bornstein of the Grafton County Superior Court. (*Grafton Sup. Ct. Final Order – 8/28/2012*). No hearing was held in this matter. Furthermore, no vote was held by BRVD or its voters pursuant to RSA 52:21, which states to dissolve a village district, a vote must be held by which a 2/3 majority is required in favor of dissolution.

JFF has appealed the denial of their Motion to Intervene, and raised the issue of lack of subject matter jurisdiction by the lower Court.

SUMMARY OF ARGUMENTS

JFF first notes that the New Hampshire legislature put together a comprehensive regulatory scheme in RSA 52 that governs the establishment, procedure, and dissolution of village districts in New Hampshire. The Order from the Grafton Superior Court dissolving the BRVD without a vote pursuant to RSA 52:21 is a violation of the principles of separation of powers as the Grafton County Superior Court did not have subject matter jurisdiction to dissolve the BRVD. Further, the Order dissolving the BRVD has deprived JFF of property without due process of law, as their Motion to Intervene was improperly denied. Finally, the Town of Campton should have been estopped from objection to JFF's Motion to Intervene, because they had allowed other similarly situated individuals to intervene without any objection previously.

ARGUMENT

I. The Order by the Grafton Superior Court dissolving the BRVD was a violation of the principles of separation of powers principles, in violation of RSA 52:21, and thus the Superior Court did not have subject matter jurisdiction over the dissolution.

Part I, Article 37 of the New Hampshire State Constitution provides: “In the government of this state, the three essential powers thereof, to wit, the legislative, executive and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.” Part I, Article 37 is a “provision of interrelation”. *Ferretti v. Jackson*, 88 N.H. 296 (1936). This “Separation of Powers” clause is violated only when one branch usurps the essential power of another. *Duquette v. Warden, NH State Prison*, 154 N.H. 737 (2007). When the actions of one branch of government defeat or materially impair the inherent functions of another branch, such actions are unconstitutional. *N.H. Bar Assoc.*, 151 N.H. 112, 116 (2004). The separation of powers directive “is violated by an improper imposition upon one branch of constitutional duties belonging to another, or, an encroachment by one branch upon a constitutional function of another branch of government”. *In re Petition of Judicial Conduct Committee*, 151 N.H. 123, (2004) (Quoting: *Opinion of the Justices*, 110 N.H. 359, 363, (1970)(citations omitted)). When the actions of one branch of government defeat or materially impair the inherent functions of another branch, such actions are not constitutionally acceptable. *In re Rosenkrantz*, 29 Cal.4th 616, 128 Cal.Rptr.2d 104, 59 P.3d 174, 208 (2002), *cert. denied*, 538 U.S. 980, 123 S.Ct. 1909, 155 L.Ed.2d 669 (2003).

The New Hampshire legislature has plenary control over municipalities and similar corporations which include village districts. *Town of Lisbon v. Lisbon Village Dist.*, 104 N.H. 255, 258 (1962). Village districts are like towns in that they only have such powers as are granted to them, and are bound by the limits imposed by the Legislature from which they derive their powers. *Opinion of the Justices*, 101 N.H. 544, 545 (1957). Through this enumerated power, the New Hampshire legislature created a comprehensive legislative scheme that included the specific events that must occur in order to dissolve the village district. (SEE: RSA 52 generally, and RSA 52:21). RSA 52:21 states:

Any village district and any district now in existence having the rights and powers of a village district, may, at an annual meeting, **by a 2/3 vote of its legal voters**, terminate its existence and dispose of its corporate property. Upon the dissolution of any such district, the property, real and personal, which is contained within the former boundaries of the dissolved district shall continue to be subject to taxation and betterment assessments for the purpose of paying any unpaid bonds, notes, bills or other obligations incurred while the district was in existence, in the same manner as if the said district had not been dissolved. The selectmen of the town or towns in which the district was situated shall assess the taxes and betterment assessments in the same manner as if the district had not been dissolved and shall have the duty, authority, and power to pay such bonds, notes, bills or other obligations after the moneys received from such taxes and assessments. Provided, however, that in no case shall the total of any such taxes or assessment exceed the balance necessary to pay said bonds, notes, bills or other obligations after the net income derived from the property disposed of has been applied for the payment of the same. (*Emphasis added*).

It is axiomatic that a party can challenge subject matter jurisdiction at any time. (SEE: *In re: Michelle G.*, 52 Conn.App. 187, 727 A.2d 226, 228 (1999); *Thompson v. County of Franklin*, 15 F.3d 245, 248 (2d Cir. 1994); cf. *Conway v. Water Resources Board*, 89 N.H. 346, 348-49, 199 A. 83, 87 (1938)). As recognized by New Hampshire Law, “Subject matter jurisdiction is jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things. In other words, it is a tribunal’s authority to adjudicate the type of controversy involved in the action. A court lacks power to

hear or determine a case concerning subject matters over which it has no jurisdiction. A party may challenge subject matter jurisdiction at any time during the proceeding, including on appeal, and may not waive subject matter jurisdiction.” *In the Matter of Gray & Gray*, 160 N.H. 62, 65, 993 A.2d 203 (2010) (quotations, citations and brackets omitted); *see State v. Demesmin*, 159 N.H. 595, 597, 992 A.2d 569 (2010) (**subject matter jurisdiction may be raised on appeal by the court sua sponte**). (Emphasis added).

It is apparent that the procedures provided by RSA 52:21 to dissolve a village district were not argued by the Town of Campton, nor was it raised by the other parties to the action that appeared pro se and were allowed to intervene. The only mention of RSA 52:21 is in the Town of Campton’s Petition for Dissolution where they state, “Although an article was placed on the warrant to consider the dissolution of BRVD, the meeting did not act upon the article, as it was confused regarding RSA 52:21’s requirement that 2/3 of the legal voters vote to dissolve the district.” (*Town of Campton’s Pet’n for Dissolution*, p. 3).

Thus, even though JFF/SWH, LLC is not technically recognized as a “party” due to the denial of their motion to intervene, it is JFF/SWH, LLC’s obligation to point out to this Court that the trial court was never informed of and did not consider whether it had subject matter jurisdiction to dissolve the Beebe River Village District. Simply stated, the trial court never had proper subject matter jurisdiction to enter the order to dissolve the BRVD. RSA 52:21 states specifically that, “Any village district and any district now in existence having the rights and powers of a village district, may, at an annual meeting, by a 2/3 vote of its legal voters, terminate its existence and dispose of its corporate property.” No other procedures for dissolution are promulgated in the statute, and there is no supporting law raised by the Town of Campton as to how the trial court had subject matter jurisdiction over the dissolution of the village district.

The BRVD was established as a village district under RSA 52:1 on or about March 19, 1997. At the time of formation, the village district was small in nature. Today, it has only 43 lots and 37 voters. According to the Town of Campton, when they hold annual meetings approximately 12 people attend. Eleven people attended the 2011 BRVD annual meeting. In fact, it is important to note that only 9 voters formed the BRVD in 1997. (*Sally Moulton's Obj. to Mot. For Entry of Final Judgment* – p. 1). At no time during this annual meeting, or any before it, was the dissolution of the BRVD put to vote. In fact, in the Town of Campton's Petition for Dissolution, they offer that the 2011 BRVD meeting involved a discussion about dissolution but that it was not approved. No commissioner was elected at this time for BRVD. The Town contends this left BRVD and the Town in a state of confusion and sought judicial dissolution. No effort was made to call a meeting to conduct a vote pursuant to RSA 52:21. Instead the Town filed a Petition to Dissolve the BRVD.

The Trial Court below did not offer any written opinion on why RSA 52:21 did or did not apply in its Final Order of August 28, 2012 (*Grafton Sup. Ct. Final Order* – 8/28/12). In fact, the Trial Court granted the Town's Motion for Entry of Final Judgment, which did not address RSA 52:21 and was entered based on the default of the alleged commissioner of the BRVD. (*Town's Motion for Entry of Final Judgment* – 7/31/12). This Motion was filed after the initial Petition for Dissolution, which included an allegation that no commissioner would serve the BRVD. (*Town's Petition for Dissolution* – 4/10/12). The only mention of a vote pursuant to RSA 52:21 is in paragraph 9 of the Petition for Dissolution, which states that an “article was placed on the warrant to consider the dissolution of the BRVD, [but] the meeting did not act on the article as it was confused regarding 52:21's requirement that 2/3 of the legal voters vote to dissolve the district”. (*Town's Petition*, p. 3, par. 9). Thus, even though the BRVD and the Town of Campton

were aware of RSA 52:21, neither apparently encouraged or proceeded with the vote on dissolution itself. Instead, the Town filed the Petition for Dissolution, requesting the Court to dissolve the district without any argument as to why a RSA 52:21 was to be abrogated in favor of judicial dissolution.

There is no reasoning provided by the Grafton Superior Court as to why the dissolution was granted with no vote pursuant to RSA 52:21. In fact, no such analysis exists in the underlying case anywhere in the record. The reality is that the Town was likely aware that a vote may result in lower than a 2/3 majority, which would render the town unable to dissolve the BRVD. Thus, they filed the action below to dissolve the BRVD without conducting a vote pursuant to RSA 52:21, and instead sought judicial dissolution to avoid this integral property right of the legal voters of the BRVD. RSA 52 is completely dedicated to the regulation of village districts in New Hampshire. It provides specific and detailed procedures for formation, determining what obligations the district has, and ultimately dissolution if it does not work. The fact BRVD has been an alleged headache for the Town of Campton in some small ways does not allow them to go beyond the detailed legislative scheme provide by the New Hampshire legislature that specifically regulates the formation and dissolution of village districts. RSA 52:21 has a detailed procedure that provides the legal voters of a village district, those affected most by its dissolution, the legal right to determine the fate of the district in which they live. The legislature recognized that legal voters should be responsible for the formation and dissolution of a village district, as recognized in the legislative scheme they created and approved. The Court, by granting the dissolution in the absence of a vote pursuant to RSA 52:21, has “defeated or materially impaired the inherent functions of the New Hampshire legislature”. The New Hampshire legislature gave the power of dissolution to the people of the village districts, and the

Court below has usurped that authority without providing any reasoning whatsoever as to why RSA 52:21 does not apply. This cannot be. The New Hampshire Constitution provides for separation of powers principles inherent in our nation's history of jurisprudence for this exact type of situation. The legislature provided protections for legal voters of village districts, and if the dissolution is upheld, those protections will be functionally useless and lead to future Town's having the ability to unilaterally dissolve a village district as if RSA 52:21 never existed.

II. The denial of JFF/SWF, LLC'S Motion to Intervene was an unsustainable exercise of discretion and deprived them of their property rights without due process of law.

Superior Court Rule 139 states, in pertinent part: "Any person shown to be interested may become a party to any proceeding in equity on his petition briefly setting forth his relation to the cause." (N.H.Sup.Ct.R.139). "The right of a party to intervene in pending litigation in this state has been rather freely allowed as a matter of practice." *Brzica v. Trustees of Dartmouth College*, 147 N.H. 443, 446, (2002) (quotation omitted). A trial court should grant a motion to intervene if the party seeking to intervene has a right involved in the trial and a direct and apparent interest therein. *Snyder v. N.H. Savings Bank*, 134 N.H. 32, 35, (1991). To determine this issue, we look to the standard a trial court should use in deciding whether to grant a motion to intervene: "[A] person who seeks to intervene in a case must have a right involved in the trial and his interest must be 'direct and apparent; such as would suffer if not indeed be sacrificed were the court to deny the privilege.'" R. Wiebusch, 4 New Hampshire Practice, Civil Practice and Procedure § 176, at 129-30 (1984) (citations omitted) (*See: Snyder*, 134 N.H. 32, 35). A trial court's decision

will not be overturned unless the Supreme Court is persuaded that the Court's exercise of discretion is unsustainable. *See Id* at 34, and *State v. Lambert*, 147 N.H. 295 (2001) (explaining "unsustainable exercise of discretion standard"). Unsustainable exercise of discretion requires the appealing party to "demonstrate that the court's ruling was clearly untenable or unreasonable to the prejudice of [their] case". *State v. Johnson*, 145 N.H. 647, 648 (2000) (quotation omitted). This Court has found the lower Court's granting of intervener status acceptable when a party has used an improper form to get involved in a matter, but where they have no direct or apparent interest in the outcome. (SEE: *Lamarche v. McCarthy*, 158 N.H. 197, (2008) (Granting of Office of Mediation and Arbitration's Motion to Intervene upheld, despite no direct or apparent interest. Upheld on basis that OMA raised constitutional question about validity of RSA 170, compelling a \$50.00 fee for parties to participate in mediation); AND, *Petition of Keene Sentinel*, 136 N.H. 121 (1992) (Newspaper found not to have any direct or apparent interest, but upheld granting of intervener status to newspaper. Found intervener status was correctly granted because the newspaper had a meritorious claim to access the records.). The above cases reflects the Court's general policy of freely allowing a party to intervene in pending litigation. *Brzica*, 147 N.H. 443, 446, (2002).

Denials of Motions to Intervene have been upheld generally where the moving party has some other way to protect their rights in the litigation. (SEE: *Knox Leasing v. Turner*, 132 N.H. 68 (1989) (Court upheld denial based on fact that interveners had taken title to property at issue as partners, rather than individually, thus their attempt to intervene as individuals was not necessary as RSA 304-A:25, II(d) provided that a deceased partner's right in specific partnership property vests in surviving partners); AND, *Scamman v. Sondhheim*, 97 N.H. 280 (1952) (Court upheld denial based on fact interveners, as legatees, could protect their interest in probate court

and have recourse on the executor's bond. Further, the policy of orderly and expeditious settlement of estates can require control of the litigation to be by the personal representative, thus it was not an abuse of discretion to deny the motion).

The Court has found a number of occasions where intervention should be granted. (*SEE: In re Goodlander*, 161 N.H. 490 (2011), (children of Petitioner intervened to protect interest in a trust they were beneficiaries of that Petitioner claimed an interest in. While the children withdrew before the final hearing, the Court found the intervention was properly granted as the children had a direct effect on their interest in the trust at issue); *AND, Brzica v. Trustees of Dartmouth College*, 147 N.H. 443 (2002) (alumni association intervention upheld as alumni relief Plaintiff's sought against the college would have a direct effect on the alumni association)).

The Court also will examine whether procedural due process requires intervention be granted to the moving party. *In Re Stapleford*, 156 N.H. 260 (2007). The first step of a due process analysis is to determine whether a legally protected interest has been implicated. *Appeal of Town of Bethlehem*, 154 N.H. 314, 328, (2006). Once this is determined, the Court moves on to a three-prong balancing test, considering: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail. *In re Father 2006-360*, 155 N.H. 93, 94-96, 921 A.2d 409, 411 (2007); *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

JFF has a special and particular interest in the outcome of the dissolution proceedings brought by the Town of Campton. The Trial Court originally ordered service by publication as

part of the overall Orders of Notice Regarding Service, (Vaughn, J.) on April 18, 2012. Allowing service by publication was an implicit recognition that there were property owners within the BRVD that had a substantial and material right involved in the matter at bar, but were not registered voters of the village district. The land owned by JFF/SWH, LLC is totally within the precinct and is served and accessed by Beebe River Road. Under the terms of establishment of the BRVD, the village district operates and maintains Beebe River Road. Beebe River Road is the only access to the commercial real estate owned by JFF/SWF, LLC, and thus operation and maintenance of this road is integral and vital to the property interest of JFF/SWF, LLC. If BRVD is dissolved, the road will not be maintained, which will result in a substantial negative impact on JFF/SWF, LLC's business and property values. Moreover, it will jeopardize the ability of their tenant, EMM America, Inc. to operate the distributorship at 72 Beebe Road, forcing the corporation to a new location. This would cause a substantial loss of monetary value in the property, rendering the property itself no longer viable for commercial use, which would leave JFF with a substantial deprivation of property without due process of law. Moreover, the Proposed Order filed by the Town of Campton in this matter, and adopted by the Trial Court as a Final Order, states specifically that they "... will take no other action with respect to or responsibility for the BRVD's assets, including the roads." Thus, the Town plans to leave all residents, corporations and individuals alike, alone to fend for themselves should any issues with the roadway arise. This means no plowing or sanding service in the winter, which will result in JFF's inability to access their parcel on Beebe River Road.

Similar to *Goodlander* and *Brzica* above, JFF has a direct and apparent interest in the outcome of the Petition by the Town of Campton to dissolve the BRVD. Like the alumni association in *Brzica*, any decision by the trial court to dissolve the BRVD would have a material

and substantially negative effect on the property owned by JFF. Like the heirs in *Goodlander*, JFF would stand to lose that property interest if their rights are not protected by allowing them to participate in the process.

Furthermore, JFF's procedural due process rights have been violated. JFF has a legally protected interest in the property they own at 72 Beebe River Road. By dissolving the BRVD without allowing JFF to intervene, the Court has taken official action that will deprive them of the value of the property they own on Beebe River Road. As stated by the Town of Campton, after the dissolution the Town will not perform any work whatsoever on the roads in the BRVD. This leaves JFF with no other procedural safeguards to protect their interest in the property they own in the BRVD. Allowing JFF to intervene would have involved little to no additional burdens on the Court and the State, and would have given JFF an opportunity to raise the arguments others have not in this matter.

III. The Town of Campton was Judicially Estopped from Objecting to JFF's Motion to Intervene as they accepted other similarly situated parties to intervene as parties to the case, which was in violation of the Equal Protection Clause

The doctrine of judicial estoppel generally prevents a party from prevailing in one phase of a case using one argument and then relying upon a contradictory argument to prevail in another phase. *In the Matter of Carr & Edmunds*, 156 N.H. 498, 502, (2007). We have noted three factors that "typically inform the decision whether to apply the doctrine in a particular case." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001). These three factors are: (1) whether the party's later position is clearly inconsistent with the party's earlier position; (2) whether the

earlier position was accepted by the court; and (3) whether the party seeking to assert a later inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Carr & Edmunds*, 156 N.H. at 502. Indeed, in *New Hampshire v. Maine*, the Supreme Court restated the observation of other courts that "the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle." *New Hampshire v. Maine*, 532 U.S. at 750 (quotation and brackets omitted). "In enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts." *Id.* at 751. In the context of this case, it is also important to note that the New Hampshire equal protection clause mandates that "those who are similarly situated be similarly treated." *Belkner v. Preston*, 115 N.H. 15, 17, (1975); U.S.Const. amend. XIV; N.H.Const. pt. I, art. 1.

After the Petition for Dissolution was filed by the Town of Campton, two individual property owners that were not legal voters filed appearances in the instant action. These individuals were Trudy Cote and Robert Oakes. No objection to these appearances was filed by the Town of Campton, and the Court did not reject them *sua sponte*. Timothy Harvey and Trudy Cote would later file Motions to Intervene in this case. The Town of Campton did not object to these individuals filing appearances, nor did they object to their Motions to Intervene. The Grafton Court, by order of August 28, 2012, found the Motions to Intervene filed by Mr. Harvey and Ms. Cote to be "moot", as they were already deemed parties to the case as a result of their filing appearances. This is an important fact, because Trudy Cote and Robert Oakes were individuals who were allowed to participate in the Trial Court's process, despite the fact they were not residents of the Beebe River Village District and were not registered voters. In fact,

these individuals were merely property owners in the district. The Town of Campton alleged that those parties' Motions to Intervene were deemed "moot" because they were registered voters, but this is simply not the case. Those parties were allowed to participate because they had filed Appearances with the Court prior to filing the Motions to Intervene, and they were allowed to appear without any objection being raised from the Court or by the Town of Campton. JFF/SWF, LLC, was identically situated to Robert Oaks and Trudy Cote in that they were property owners in Beebe River Village District, but were not deemed "residents" and were also not registered voters. Thus, JFF was identically situated from a legal standing to Robert Oaks and Trudy Cote.

This analysis is further buttressed by the initial procedural posture of the Town of Campton and the Court when the Petition was originally filed. The Trial Court's initial decision on Notice required the Town of Campton to serve notice to parties via publication. This decision was an implicit recognition by the Court and the Town that non-registered voters have a concrete and definite interest in the outcome of this case. The objection by the Town and ultimate denial JFF/SWF's Motion to Intervene after they received such notice and sought to have their say in Court, was inconsistent with the purpose and intent of the Trial Court's prior orders and conduct in the case.

Thus, the Town's position and decision to object to JFF's Motion to Intervene was clearly inconsistent with their previous position of allowing Mr. Oaks and Ms. Cote to enter the matter as parties. Both contrary positions were accepted by the Court. The Court ordered the Motions to Intervene filed by Mr. Oaks and Ms. Cote as "moot" due to the fact they were already parties. The Court then denied JFF's Motion to Intervene based on the Town of Campton's objection. This latter inconsistent position by the Town resulted in the Town gaining an unfair advantage in this matter. JFF has the resources to litigate this matter to a conclusion, which

creates a significantly greater risk of the dissolution being denied if JFF was allowed to intervene and assert their various arguments against the Town of Campton. The individual parties do not have the same resources available to them as JFF. By allowing those individuals to proceed unrepresented, despite the fact they were identically situated to JFF, provided the Town with a significantly unfair advantage in petitioning the court for dissolution. The Court's denials of JFF's Motion to Intervene, despite previously allowing Ms. Cote and Mr. Oaks to proceed when they were identically situated to JFF, was a violation of JFF's equal protection rights as they were similarly situated to those parties and deserved the same equal protection of the laws.

CONCLUSION

In accord with the foregoing, this Court should reverse the decision of the Grafton Superior Court dissolving the Beebe River Village District, reverse the denial of JFF's Motion to Intervene, and remand this case to Grafton Superior Court for further hearing.

Respectfully Submitted,
JFF/SWH, LLC
By and through its attorneys,
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Date

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for JFF/SWF, LLC, requests that Attorney William B. Parnell be given fifteen (15) minutes for oral argument because the issues in this case should be decisively determined in this jurisdiction.

I hereby certify a copy of the foregoing has been sent via first class mail, postage prepaid, to Laura Spector-Morgan, Esquire, counsel of record, Timothy Harvey, Sally Moulton, Robert Oaks, Lawson Glidden, Gloria Glidden, Trudy Cote, Adam Cook, Esquire and the Beebe River Village District.

Date

Rory J. Parnell

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