

STATE OF NEW HAMPSHIRE  
SUPREME COURT

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NEW HAMPSHIRE  
SUPREME COURT

2018 APR 19 P 1:03

No. 2017-0295

APPEAL OF JAMES COLE

**MEMORANDUM ON BEHALF OF JAMES COLE IN RESPONSE  
TO THE NH SUPREME COURT'S ORDER DATED APRIL 5, 2018**

James Cole ("Cole"), by and through his attorney, submits the following memorandum in response to the New Hampshire Supreme Court's Order dated April 5, 2018. It is Mr. Cole's position that this Honorable Court does have subject matter jurisdiction to hear this appeal for the reasons stated in the case of *Atwater v. Town of Plainfield*.

**I. THE QUESTION**

This Court's order of April 5, 2018 requested each party to file a memorandum on the following question:

Address the applicability, if any, of the analysis in *Atwater v. Town of Plainfield*, 156 N.H. 265 (2007) to the jurisdictional question raised in this case.

**II. ARGUMENT**

1. This Honorable Court correctly points out the relevance of the case *Atwater v. Town of Plainfield*, and in accordance with that case this Court should find that Mr. Cole's appeal was timely filed and that this Court has appropriate subject matter jurisdiction. In that case, the trial court had dismissed the petitioners' appeal to a decision from the Plainfield Planning Board for lack of subject matter jurisdiction. *Atwater v. Town of Plainfield*, 156 N.H. 265, 266 (N.H. 2007).

2. The petitioner had timely filed its appeal, but mistakenly named the intervener as the sole defendant in the action. *Atwater*, 156 N.H. at 266. The petitioners named the planning board in the body of the appeal and appended a copy of the board's decision to the appeal. *Id.* After the 30-day filing deadline had passed, the petitioners moved to substitute the Town of Plainfield as the defendant, asserting that they erred and incorrectly named the intervener as the defendant. *Id.* The Town filed a motion to dismiss on the grounds that the appeal was not timely filed, and the trial court granted the Town's motion. *Id.*
3. On appeal to this Court, the Court found that the petitioner established subject matter jurisdiction, even though it incorrectly named the defendant upon the initial filing. *Id.* at 268. The Court reasoned that while strict compliance with the 30-day filing deadline was required to vest subject matter jurisdiction, defective or untimely service of a timely appeal does not divest the court of its jurisdiction. *Atwater*, 156 N.H. at 267-68. The court further specifically stated that the "mere fact the order of notice was directed at the wrong party did not divest the trial court of its jurisdiction". *Id.*
4. The facts in *Atwater* are materially similar to that of the case of Mr. Cole. Just like in *Atwater*, Mr. Cole's appeal mistakenly named an incorrect party to the action. *See id.* at 266; *see* Petition at 1 (May 26, 2017); *see* Pet. Mot. Amend Pet. Also, similar to *Atwater*, the appeal was timely filed, contained Mr. Cole's name (the correct party) in the body of the appeal numerous times, and had in the appendix of the appeal the PAB's decision, which named Mr. Cole as the plaintiff. *See Atwater*, 156 N.H. at 267-68; *see* Petition generally (May 26, 2017); *see* App. to Pet at 51-65.

5. To the extent that the facts of *Atwater* and Mr. Cole's case are dissimilar, the facts and applied reasoning in *Atwater* still support the same conclusion, and in fact, are even stronger in Mr. Cole's situation. In *Atwater*, because the defendant was the incorrect party named in the appeal, the Town received late notice that it was named in a law suit. *Atwater*, 156 N.H. at 266. In the case of Mr. Cole, the State received timely notice of the appeal, and therefore was not harmed or prejudiced. *See* Petition (May 26, 2017).
6. Just like in *Atwater*, Mr. Cole filed a timely appeal, but had an error as to the party. *See* *Atwater*, 156 N.H. at 266-67; *see* Petition at 1 (May 26, 2017); and Pet. Mot. Amend Pet. The Court in *Atwater* determined that a timely appeal with a defect, specifically the incorrect naming of a party, did not divest the Court of subject matter jurisdiction, and it should find the same concerning the present situation regarding Mr. Cole. *See* *Atwater*, 156 N.H. at 267-68; *see* Petition (May 26, 2017); App. to Petition; *see* Pet. Mot. Amend Pet.

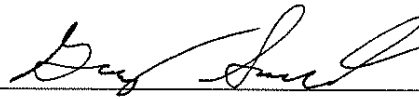
### III. CONCLUSION

For the reasons set forth herein, the case of *Atwater v. Town of Plainfield* is the controlling law and the Court should grant the motion to amend to add/substitute Mr. Cole as the appellant, and accept subject matter jurisdiction over this case.

Respectfully submitted,

James Cole  
By his attorney,

Dated: April 19, 2018



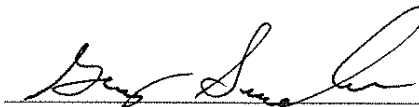
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**CERTIFICATE OF SERVICE**

In accordance with New Hampshire Supreme Court Rule 16.(7), the undersigned \_\_\_\_\_ hereby certifies that an original and eight (8) copies of Appellant's Memorandum have been hand delivered to the Clerk of the Supreme Court on this 19th day of April, 2018.

In accordance with New Hampshire Supreme Court Rule 16 (10), the undersigned hereby certifies that two (2) copies each of Appellant's Memorandum have been mailed, postage prepaid, to Scott Sakowski, Esq., and Jeanine Girgenti, Esq.; and one (1) copy to James Cole.

Dated: April 19, 2018



Gary Snyder, Esq.