THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2020-0034

NH Alpha of SAE

v.

Town of Hanover and Hanover Zoning Board of Adjustment

BRIEF OF THE APPELLEES/RESPONDENTS, TOWN OF HANOVER AND HANOVER ZONING BOARD OF ADJUSTMENT

Appeal Pursuant to Supreme Court Rule 7
From the Final Order of the Superior Court of Grafton County in
Docket No. 215-2019-CV-0489

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To Be Argued By:
Laura Spector-Morgan, Esquire

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I. Did the trial court properly hold that the Hanover Zoning Board of Adjustment had subject matter jurisdiction over appellant's appeal of an administrative decision under the clear language of RSA 676:5?

II. Did the trial err in denying appellees' request for attorney's fees where there is no good faith legal or factual basis for the claim that the Hanover Zoning Board of Adjustment lacked subject matter jurisdiction to hear appellant's appeal?

STATEMENT OF THE CASE AND RELEVANT FACTS

As this Court will recall from New Hampshire Alpha of SAE Trust v. Town of Hanover, 172 N.H. 69 (2019), in February, 2016, the Hanover Zoning Administrator issued a Notice of Violation to appellant, informing it that its continued occupancy of the property at 38 College Street was a violation of the Zoning Ordinance. Appellant appealed the Zoning Administrator's interpretation of the zoning ordinance to the Zoning Board of Adjustment pursuant to RSA 676:5, see Appendix to Brief of Appellant (SAE App.) at 103. The zoning board upheld the Zoning Administrator's interpretation, and appellant then appealed to the Grafton County Superior Court asking the court, among other things, to "find that the Zoning Administrator erred in her February 12, 2016 interpretation of Article IX, Section 902." The superior court upheld the decision of the zoning board, as did this Court, remanding the case on one narrow issue (whether appellant was, in and of itself, an institution, and if so, whether the residential use of the property was operated in conjunction with that institution). Appellant's appeal of the zoning board's decision on the merits of that issue is still pending in the Grafton County Superior Court.

Appellant appeared at the second hearing held in connection with that remand and, for the first time, declared that the zoning board did not have, and in fact had never had, subject matter jurisdiction over this appeal for the same reasons asserted in the pleadings in this case. The zoning board found that it did have jurisdiction, and proceeded with its consideration of the remanded issue. Rather than waiting for the final outcome of those proceedings and raising the jurisdiction issue as part of that appeal, appellant filed a *Petition for Declaratory Relief and Emergency Motion for Ex Parte Ruling to Stay ZBA Proceedings*, contesting the zoning board's jurisdiction over the very appeal appellant had initiated and asking the superior court to stay the zoning board's consideration of the remand while the jurisdictional issue was decided. The superior court correctly held that the zoning board did have jurisdiction over the matter pursuant to RSA 676:5, but incorrectly denied the appellees their attorney's fees incurred

in defending this matter. This appeal, and appellees' cross appeal on the issue of attorney's fees, followed.

SUMMARY OF ARGUMENT

This Court reviews the trial court's interpretation of a statute *de novo*. When a statute's language is plain and unambiguous, this Court need not look beyond it for further indication of legislative intent, and refuses to consider what the legislature might have said or add language that the legislature did not see fit to incorporate in the statute. Ouellette v. Town of Kingston, 157 N.H. 604, 609 (2008)(quoting Town of Rye Bd. of Selectmen v. Town of Rye Zoning Bd. of Adjustment, 155 N.H. 622, 624 (2007)). With regard to the appellees' cross-appeal of the trial court's denial of attorney's fees, an abuse of discretion standard is applied. See Town of Nottingham v. Newman, 147 N.H. 131, 136 (2001)(citing Glick v. Naess, 143 N.H. 172, 175 (1998)).

The trial court properly found that the Hanover Zoning Board of Adjustment has, and has had at all times, jurisdiction over appellant's appeal. It addressed and rejected each of the claims raised by appellant, denying the petition for declaratory judgment. This was a correct interpretation of the law, which this Court should affirm.

As an initial matter, appellees note that while subject matter jurisdiction may be raised at any time, appellant's attorney did not raise this issue until the parties had been litigating this matter for over three and a half years. Appellant's attorney's justification for this failure is "as of February 12th, 2016, [she] had never touched a land use case." SAE App. at 261. While that may be, appellant's attorney had a duty to inform herself of the law and not subject her client, the Town of Hanover, the Grafton County Superior Court, and this Court through years of litigation which she now claims was beyond the jurisdiction of any of those bodies.

Moreover, in focusing on whether the Notice of Violation was " a discretionary decision to commence formal or informal enforcement proceedings,"

appellant continues to ignore the relevant and controlling law which governs this issue. RSA 676:5, II(b) provides:

> (b) A "decision of the administrative officer" includes any decision involving construction, interpretation or application of the terms of the ordinance. It does not include a discretionary decision to commence formal or informal enforcement proceedings, ***but does include any construction, interpretation or application of the terms of the ordinance which is implicated in such enforcement proceedings.***

The proper question is therefore not whether the Notice of Violation was a discretionary decision to commence enforcement proceedings, but rather whether that Notice included a "construction, interpretation or application of the terms of the ordinance." It clearly did include such an interpretation.

The Notice of Violation at issue in this case states in relevant part:

> The Adopted Zoning Ordinance requires that student residences in the "I" Institution zoning district be operated in conjunction with another institutional use [Section 902]. Because it has been derecognized by Dartmouth College, the SAE facility is no longer being operated in conjunction with an institutional use. Therefore, the continued use of the property as a residence is a violation of the zoning ordinance.

SAE App. at 55.

The Notice of Violation, regardless of whether it is a discretionary decision to commence an enforcement proceeding, includes an interpretation of the Hanover Zoning Ordinance. Pursuant to RSA 676:5, it is clearly appealable to the zoning board, which undoubtedly had jurisdiction over the appeal. Appellant acknowledged this throughout the earlier litigation between the parties, and cannot in good faith now argue that it did not. This Court should so hold.

The trial court properly held that the February 12, 2016 Notice of Violation letter is not a prosecution of a zoning violation. Appellant challenges this decision on the basis that various statutes require, and the *Guide to District Court Enforcement of Local Ordinances and Codes* suggests, a notice of violation be issued prior to the commencement of an enforcement action. While it is true that notices of violations are necessary precursors to enforcement actions taken

under certain statutes, no such action has been brought by the town. In fact, the action here was brought by the appellant.

Moreover, if the town were to bring an enforcement action, it would do so in superior court, pursuant to RSA 676:15 and RSA 676:17. Those statutes have no requirement that any notice be given to the property owner prior to suit, but appellant urges this Court to read such a requirement into these statutes because other statutes regarding land use and enforcement actions require a Notice of Violation as a first step in an enforcement action. To the contrary, those other statutes clearly demonstrate that when the legislature wanted to require a Notice of Violation as a first step in an enforcement action, it knew how to do so.

Appellant also argues that because RSA 676:17 provides that any person who violates any local ordinance shall be guilty of a misdemeanor, that the courts have exclusive jurisdiction to hear them. The town does not dispute this; however, the Notice of Violation was not an action brought under that statute. In an effort to bolster its argument, appellant points to the 1987 legislative history of the adoption of RSA 502-A:11-a, which grants concurrent jurisdiction over zoning enforcement actions to the district court. That "legislative history" does not assist appellant, nor does the enforcement action brought by the Town of Hanover against Dartmouth Corporation of Alpha Delta in a proceeding in which appellant was not a party.

Appellant's attempt to conflate a Notice of Violation, a precursor to a prosecution of a zoning violation, and the actual prosecution of a zoning violation pursuant to any of the many statutes it cites, is simply not supported by the law, or by any good faith argument for an extension of the law. This Court should therefore reject appellant's arguments.

Appellant's attempt to rely on the case of Town of Derry v. Simonsen, 117 N.H. 1010 (1977) as support for its claim that the zoning board lacked subject matter jurisdiction is equally misplaced. As appellant knows or should have known, that case was decided under a previous version of RSA 676:5. In response to that case, in 1989, the legislature amended RSA 676:5 to add

paragraph II of the statute, which clearly and unambiguously grants the zoning board jurisdiction over the present appeal of the Zoning Administrator's interpretation of the zoning ordinance. Appellant has not, and cannot, point to any case decided since 1989 which even hints that the zoning board would not have jurisdiction over this appeal. In fact this question was squarely addressed in the 2005 case of 47 Residents of Deering, N.H. v. Town of Deering, 151 N.H. 795 (2005), in which this Court held "a zoning board of adjustment has the power to hear and decide appeals if it is alleged that a board of selectmen erred in its interpretation, construction or application of a zoning ordinance when making a decision involving the enforcement of that ordinance." Id. at 799.

Appellant attempts to point to decisions of other zoning boards of adjustment in other towns regarding other cases to support its position that Hanover is an outlier in hearing appeals of decisions of interpretations of the zoning ordinance. As the trial court found in excluding the very exhibits appellant relies upon, "if it's relevant, it's tangentially so." And, in fact, those other decisions are completely irrelevant. First, two decisions from zoning boards in other towns from 2016 and 2003 hardly demonstrate that "[z]oning boards in other towns routinely *decline* to hear appeals of landowners who wish to challenge a violation notice on the grounds that those boards lack subject matter jurisdiction to adjudicate those matters," as appellant claims on page 24 of its Brief. Second, those cases involved very different facts, were properly not admitted into evidence by the trial court, and should be disregarded by this Court as well.[1]

The legislature clearly intended for the zoning board to have jurisdiction over "the interpretation of the zoning ordinance, no matter [in] what administrative context that interpretation is made." Appendix to Brief of Appellees/Respondents

[1]Appellant's claims regarding statutes and cases from other states is equally unavailing. How other courts interpret other statutes in other states has no bearing on the New Hampshire legislature's intent or on the interpretation of the clear language of RSA 676:5.

Town of Hanover and Hanover Zoning Board of Adjustment, ("App.") at 48. The Notice of Violation here included an interpretation of the zoning ordinance, and the Hanover Zoning Board of Adjustment unquestionably had jurisdiction over any appeal of that interpretation. This Court should so find.

The remaining arguments raised by appellant also fail to demonstrate any error with the trial court's order. First, appellant attempts to fault the zoning board for addressing the numerous and varied claims it raised in its original appeal to the zoning board, SAE App. at 103 and 123, claiming that by doing so, the zoning board somehow conceded that the Notice of Violation was an enforcement action and that the board never interpreted the zoning ordinance in its decision. This is a fallacy.

Appellant also attempts to twist the wording of Section 1005.2(C)(1) of the Hanover Zoning Ordinance to make the Notice of Violation into something it is not, because the ordinance makes a distinction between appeals of decisions that a property owner has violated the ordinance and other decisions interpreting the ordinance, such as the issuance of a building permit. That does not, however, transform a Notice of Violation into an enforcement action. Likewise, appellant attempts to twist appellees' Answer to its claim of selective enforcement in the earlier litigation between the parties to argue that appellees have conceded that the present action is an enforcement action. This is simply untrue.

Appellant's claims of violations of due process are equally without merit. In fact, this entire argument is a red herring. The due process appellant seeks will be had if an enforcement action is ultimately brought by the Town of Hanover against appellant. While appellant may not relitigate the legal issues that are decided in this litigation, it would have the opportunity to contest whether its actions constitute a violation of the zoning ordinance as interpreted in this litigation.

There is simply no question that the zoning board has subject matter jurisdiction over this appeal. This case was brought only to delay the final judgment in this matter, in violation of Superior Court Rule 7 and Rule of

Professional Conduct 3.1. The trial court should have awarded the town its costs and attorney's fees incurred in defending this matter. Instead, it denied that request without explanation. See App. at 3.

This Court has held on multiple occasions, "the unnecessary character of judicial proceedings may justify a fee award." See, e.g., Daigle v. City of Portsmouth, 137 N.H. 572, 576 (1993)(*citing* Keenan v. Fearon, 130 N.H. 494 (1988); see also Harkeem v. Adams, 117 N.H. 687 (1977). A fee award "may rest on the objectively gratuitous character of the litigation, . . . [which is] pointlessly expensive in time, money and patience," victimizing the courts and the parties. Keenan, supra, at 502. Appellant's case falls squarely within this category of cases.

There is no support in the record for the trial court's decision. In fact, there is no explanation by the trial court as to why it denied the motion. See App. at 3. Yet the record in this case is replete with reasons why appellees should be awarded their attorney's fees. Appellant's case lacks any support in the law or the facts. Appellant was obligated to inform itself of the applicable law and determine if there was a good faith argument in support of its position. This it failed to do, and as a result appellant "has caused the filing of pounds of paper with the Court and an added burden and expense for the [appellees]. The [appellees are] entitled to attorney's fees." Chemical Bank v. Rinden Professional Association, 126 N.H. 688, 699 (1985)(quoting from the trial court's decision in that case). Moreover, this Court should exercise its discretion under Supreme Court Rule 23 and award appellees their attorney's fees incurred in this frivolous and bad faith appeal.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the trial court's statutory interpretation *de novo*. It is the final arbiter of the legislature's intent as expressed in the words of the statute considered as a whole. It examines the language of the statute, and, where possible, ascribes the plain and ordinary meanings to the words used. When a statute's language is plain and unambiguous, this Court need not look beyond it for further indication of legislative intent, and refuses to consider what the legislature might have said or add language that the legislature did not see fit to incorporate in the statute. Ouellette v. Town of Kingston, 157 N.H. 604, 609 (2008)(quoting Town of Rye Bd. of Selectmen v. Town of Rye Zoning Bd. of Adjustment, 155 N.H. 622, 624 (2007)).

With regard to the appellees' cross-appeal of the trial court's denial of attorney's fees, an abuse of discretion standard is applied. See Town of Nottingham v. Newman, 147 N.H. 131, 136 (2001)(citing Glick v. Naess, 143 N.H. 172, 175 (1998)). "To constitute abuse, reversible on appeal, the discretion must have been exercised for reasons clearly untenable or to an extent clearly unreasonable to the prejudice of the objecting party. If there is some support in the record fo the trial court's determination, [this Court] will uphold it." Glick, supra, at 175.

II. THE TRIAL COURT PROPERLY FOUND THAT THE ZONING BOARD OF ADJUSTMENT HAD SUBJECT MATTER JURISDICTION OVER APPELLANT'S APPEAL OF ADMINISTRATIVE DECISION

The trial court properly found that the Hanover Zoning Board of Adjustment has, and has had at all times, jurisdiction over appellant's appeal. It addressed and rejected each of the claims raised by appellant, denying the petition for declaratory judgment. This was a correct interpretation of the law, which this Court should affirm.

As an initial matter, appellees note that while subject matter jurisdiction may be raised at any time, appellant's attorney, who has been practicing since 1996, not only failed to raise this issue before the zoning board, superior court and this Court in the earlier litigation between the parties in this matter, she failed to raise it in the related case of Dartmouth Corporation of Alpha Delta v. Town of Hanover, 169 N.H. 743 (2017), which she also argued to this Court. Appellant's attorney's justification for this failure is "as of February 12th, 2016, [she] had never touched a land use case." SAE App. at 261. While that may be, appellant's attorney had a duty under the Rule of Professional Conduct 1.1 to provide competent representation to her client, including having "specific knowledge about the fields of law in which the lawyer practices," rather than dragging her client, the Town of Hanover, the Grafton County Superior Court and this Court through years of litigation which she now claims was beyond the jurisdiction of any of those bodies.

Moreover, appellant's analysis in focusing on whether the Notice of Violation was "a discretionary decision to commence formal or informal enforcement proceedings" continues to ignore the relevant and controlling law which governs this issue. RSA 676:5 provides:

> I. Appeals to the board of adjustment concerning any matter within the board's powers as set forth in RSA 674:33 may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer.
> . . .
>
> II. For the purposes of this section:
> (a) The "administrative officer" means any official or board who, in that municipality, has responsibility for issuing permits or certificates under the ordinance, or for enforcing the ordinance, and may include a building inspector, board of selectmen, or other official or board with such responsibility.

> (b) A "decision of the administrative officer" includes any decision involving construction, interpretation or application of the terms of the ordinance. It does not include a discretionary decision to commence formal or informal enforcement proceedings,[2] ***but does include any construction, interpretation or application of the terms of the ordinance which is implicated in such enforcement proceedings.***

The proper question is therefore not whether the Notice of Violation was a discretionary decision to commence enforcement proceedings, but rather whether that Notice included a "construction, interpretation or application of the terms of the ordinance." Instead of focusing on the actual issue before this Court, appellant spins an elaborate web of statutes, constitutional provisions, decisions of other zoning boards of adjustment, guidance documents, out of state decisions, and misstatements of facts to try to convince the Court to ignore the plain language of the statute. This it may not do.

A. Regardless of Whether the Notice of Violation Was a Discretionary Decision to Commence Enforcement Proceedings, it Was Properly Appealed to the Zoning Board of Adjustment

The Notice of Violation at issue in this case states in relevant part:

> The Adopted Zoning Ordinance requires that student residences in the "I" Institution zoning district be operated in conjunction with another institutional use [Section 902]. Because it has been derecognized by Dartmouth College, the SAE facility is no longer being operated in conjunction with an institutional use. Therefore, the continued use of the property as a residence is a violation of the zoning ordinance.

SAE App. at 55.

Appellant has asserted that this Notice constitutes a discretionary decision to begin an enforcement action, and therefore it is the courts, and not the zoning

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[2]As the legislative history of RSA 676:5 notes, the purpose of this language was to ensure that the zoning board could not "second-guess the discretion of the enforcement officer about whether or not to bring any particular enforcement action." App. at 48.

board of adjustment, which have jurisdiction over this matter. Although the Notice of Violation is not, in fact, a decision to commence enforcement proceedings, even if it were, it would still be appealable to the zoning board because it includes the "construction, interpretation or application of the terms of the ordinance." Though appellant attempts to argue that the Notice of Violation contains no such interpretation, its own statements prove otherwise.

In its February 18, 2016 appeal to the Hanover Zoning Board of Adjustment, appellant argued that "the Zoning Administrator erred in interpreting the definition of "Student Residence, 'I' District." SAE App. at 121. See also SAE App. at 111-13. In its Memorandum of Law submitted to the zoning board, appellant noted that "[o]n or about February 12, 2016, the Town's Zoning Administrator issued a "Zoning Violation Notice" to [SAE] interpreting Article IX, Section 902 (the definition of "Student Residence, 'I' District'") to exclude SAE." SAE App. at 163. In fact, throughout that 104 page memorandum of law, appellant repeatedly refers to the Zoning Administrator's interpretation of the ordinance.

The acknowledgment that the Notice of Violation contained an interpretation of the zoning ordinance continued in the proceedings before the trial court. The Verified Petition for Appeal Pursuant to RSA 677:4 filed by appellant in Docket No. 215-2016-CV-283, frames the appeal as:

> This is an appeal pursuant to RSA 677:4 of the ZBA's September 1, 2016 denial of the SAE Trust's Motion for Rehearing of the ZBA's July 18, 2016 denial of SAE Trust's administrative appeal of the Town of Hanover Zoning Administrator's February 12, 2016 interpretation and application of Article IX, Section 902 of the Town of Hanover Zoning Ordinance.

In its prayers for relief, appellant asked the trial court to "find that the Zoning Administrator erred in her February 12, 2016 interpretation of Article IX, Section 902." Similar arguments are found in appellant's trial memorandum and its post trial memorandum. See, e.g., SAE App. at 184 ("The Zoning

Administrator . . . determined that the "in conjunction with another institutional use" language meant that a fraternity which operated a student residence must operate "in conjunction with" Dartmouth College. This interpretation is incorrect."). SAE is therefore judicially estopped from now arguing that the Notice of Violation did not include an interpretation of the zoning ordinance. See, e.g., Appeal of New Hampshire Electric Cooperative, Inc., 170 N.H. 66 (2017).

The Notice of Violation, regardless of whether it is a preliminary step in an enforcement action, includes an interpretation of the Hanover Zoning Ordinance. Pursuant to RSA 676:5, it is clearly appealable to the zoning board, which undoubtedly had jurisdiction over the appeal. Appellant acknowledged this throughout the earlier litigation between the parties, and cannot in good faith now argue that it did not. This Court should so hold.

B. The February 12, 2016 Letter Is Not a Prosecution of a Zoning Violation

As the trial court properly held,

> The court is not persuaded, however, that a notice of violation is part of any enforcement action, whether formal or informal. To the contrary, a notice of violation is, as its name makes clear, simply a notice from the municipality informing a defendant that the municipality believes that he or she is not in compliance with the zoning ordinance. Such notice gives a defendant the opportunity to remedy any alleged violation before an enforcement proceeding commences. This is particularly true in the instant case where the Notice at issue explicitly provided that the plaintiff could appeal the decision of the zoning administrator to the ZBA, which gave the plaintiff an opportunity to resolve the dispute prior to any enforcement proceedings. Moreover, the zoning administrator's notice did not, as the plaintiff has argued, order the plaintiff to take or avoid any actions, and it did not impose any kind of penalty. Instead, the Notice expressed the zoning administrator's decision that the plaintiff's use of its property violated the Town zoning ordinance, and it explained the possible penalties for a continuing violation. As such, the court finds that the Notice was not a discretionary decision to commence enforcement proceedings, but was instead a decision involving the zoning administrator's interpretation and application of the terms of the zoning ordinance.

Order at 6; SAE App. at 9.

Appellant argues that the trial court is incorrect because various statutes require, and the *Guide to District Court Enforcement of Local Ordinances and Codes*[3] suggests, a notice of violation be issued prior to the commencement of an enforcement action. While it is true that notices of violations are necessary precursors to enforcement actions taken under RSA 676:17-b or RSA 31:39-c;[4] no such action has been brought by the town. In fact, the action here was brought by the appellant.

Moreover, if the town were to bring an enforcement action, it would do so in superior court, pursuant to RSA 676:15 and RSA 676:17, because it would be seeking an injunction; not simply civil penalties. Those statutes have no requirement that any notice be given to the property owner prior to suit being filed unless the town is seeking civil penalties, in which case the civil penalties begin accruing on the date of the first letter. See RSA 676:17, I. Appellant urges this Court to read such a notice requirement into these statutes because other statutes regarding land use and enforcement actions require a Notice of Violation

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[3]This document was not submitted to the trial court in this matter, and even if it had been, it clearly states that the procedures described in it "are not meant to be exclusive or exhaustive. Following them will not be a guarantee against procedural and legal challenges." SAE App. at 285. Further, not included in Appellant's Appendix is page 5 of that document, which explains:

> 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, . . 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.

App. at 50.

[4]Appellant's brief also makes reference to RSA 674:33-a, Equitable Waivers of Dimensional Requirements. This statute, of course, is even less applicable in this case than are RSA 676:17-b and RSA 31:39-c, as the alleged violation in this case is the use of the property, not a dimensional violation.

as a first step in an enforcement action. To the contrary, those other statutes clearly demonstrate that when the legislature wanted to require a Notice of Violation as a first step in an enforcement action, it knew how to do so. That it did not include such language in RSA 676:15 and 676:17 is telling as to its intent not to require such a notice. See, e.g., Rogers v. Rogers, 171 N.H. 738, 743 (2019)(citing In the Matter of McAndrews & Woodson, 171 N.H. 214, 219-20 (2018)("We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include.").

Appellant also argues that because RSA 676:17 provides that any person who violates any local ordinance shall be guilty of a misdemeanor, that the courts have exclusive jurisdiction to hear them. The town does not dispute this–any action brought by the town under RSA 676:15 and/or 676:17 would, in fact, be brought in court. But the Notice of Violation was not an action brought under either statute; it was a notice that if the zoning violation were not cured, the town would begin enforcement proceedings.

In an effort to bolster its argument, appellant points to the 1987 legislative history of the adoption of RSA 502-A:11-a, which grants concurrent jurisdiction over zoning enforcement actions to the district court. That "legislative history" which consists of a one page explanation of the bill and nothing else, see SAE App. at 77, does not assist appellant. It merely states that the "bill gives the district courts original jurisdiction, in certain instances, of the prosecution by a municipality of any violation of a local ordinance. . . .The district court's original jurisdiction includes, but is not limited to, alleged violations of local land use or planning and zoning ordinances." Again, the town does not contest that the district court has jurisdiction over zoning enforcement actions. But the Notice of Violation was not an enforcement action; it was a notice that if the zoning violation were not cured, the town would begin enforcement proceedings.

This is all confirmed by the documents provided by appellant. Specifically, appellant attaches a Complaint filed by the Town of Hanover against the Dartmouth Corporation of Alpha Delta in the Grafton County Superior Court. That Complaint *was* in fact a prosecution of a zoning violation, and was brought in superior court pursuant to RSA 676:17. SAE App. at 87. No such Complaint has been filed against appellant in this case. This case was initiated and at all times has been prosecuted by appellant, not the town.

Appellant argues that because the town brought an enforcement action against Alpha Delta after the conclusion of the Supreme Court appeal when it continued to use the property in violation of the ordinance, that the Notice of Violation issued in this case is part of an enforcement action. This is untrue. The Complaint against Alpha Delta was filed after the litigation between the parties was concluded and Alpha Delta continued to use the property in violation of the zoning ordinance. It had nothing to do with the original Notice of Violation, but instead was based on a new violation and preceded by a new Notice of Violation.[5]

Appellant's attempt to conflate a Notice of Violation, a precursor to a prosecution of a zoning violation, and the actual prosecution of a zoning violation pursuant to any of the many statutes it cites, is simply not supported by the law, or by any good faith argument for an extension of the law. This Court should therefore reject appellant's arguments.

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[5]Appellant also states that in that later enforcement action, Alpha Delta "was barred from challenging the ZBA's finding of a violation by the doctrines of res judicata and collateral estoppel." This is patently untrue; no mention of either legal theory is made in any of the pleadings in that case. In fact, that lawsuit concluded with a Stipulation in which "[t]he parties agree[d] that there is no present approved by the Town of Hanover use of the defendant's property." [sic] App. at 49.

C. Appellant's Reliance on the Case of *Town of Derry v. Simonsen*, 117 N.H. 1010 (1977) Is Misplaced in Light of the Legislature's Amendment of RSA 676:5 in Response to That Decision

Appellant's attempt to rely on the case of Town of Derry v. Simonsen, 117 N.H. 1010 (1977) as support for its claim that the zoning board lacked subject matter jurisdiction is equally misplaced. As appellant knows or should have known, that case was decided under a previous version of RSA 676:5. In response to that case, in 1989,[6] the New Hampshire Municipal Association asked the legislature to amend RSA 676:5 to "remedy some long-standing confusion about what types of decisions of the administrative officer can be appealed to the Board of Adjustment under RSA 676:5." See Testimony on HB 472, App. at 47. As that testimony went on to note, this Court's holding in Derry v. Simonsen was "completely at odds with the express language of RSA 674:33." The amendment was meant to harmonize the case and the statutes.

As a result, paragraph II of the statute was added, which paragraph defines both "administrative officer" and "decision of the administrative officer," and which clearly and unambiguously grants the zoning board jurisdiction over the present appeal of the Zoning Administrator's interpretation of the zoning ordinance. "The legislature enacted this scheme to give the local zoning board the 'first opportunity to pass upon any alleged errors in its decisions so that the court may have the benefit of the board's judgment in hearing the appeal.'" McNamara v. Hersh, 157 N.H. 72, 73-4 (2008)(quoting Robinson v. Town of Hudson, 154 N.H. 563, 567 (2006)).

Appellant has not, and cannot, point to any case decided since 1989 which even hints that the zoning board would not have jurisdiction over this appeal. In fact this question was squarely addressed in the 2005 case of 47 Residents of

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[6]Notably, this amendment was adopted after RSA 502-A:11-a was adopted. As appellant notes in its brief, presumably the legislature was aware of RSA 502-A:11-a when it adopted this relevant amendment.

Deering, N.H. v. Town of Deering, 151 N.H. 795 (2005), in which the property owner argued that the zoning board lacked jurisdiction to hear the residents' appeal of the selectmen's issuance of a junkyard license, and that instead the appeal of that decision should be governed by RSA 231:121. This Court held that because the selectmen's decision was based on the terms of the zoning ordinance and not the statute, the zoning board did have jurisdiction over the appeal. While appellant will surely note that this case did not involve the appeal of a notice of violation, this Court's language was unequivocal: "a zoning board of adjustment has the power to hear and decide appeals if it is alleged that a board of selectmen erred in its interpretation, construction or application of a zoning ordinance when making a decision involving the enforcement of that ordinance." Id. at 799.

Appellant attempts to point to decisions of other zoning boards of adjustment in other towns regarding other cases to support its position that Hanover is an outlier in hearing appeals of decisions of interpretations of the zoning ordinance. As the trial court found in excluding the very exhibits appellant relies upon, "if it's relevant, it's tangentially so." And, in fact, those other decisions are completely irrelevant. First, two decisions from zoning boards in other towns from 2016 and 2003 hardly demonstrate that "[z]oning boards in other towns routinely *decline* to hear appeals of landowners who wish to challenge a violation notice on the grounds that those boards lack subject matter jurisdiction to adjudicate those matters," as appellant claims on page 24 of its Brief. Second, those cases involved very different facts. One involved an attempt to appeal a determination that a property owner was operating outside the conditions of its approval. SAE App. at 70. The other case was an attempt to appeal a decision of the selectmen to issue a building permit pursuant to RSA

674:41. These decisions were therefore properly not admitted into evidence by the trial court and should be disregarded by this Court as well.[7]

The legislature clearly intended for the zoning board to have jurisdiction over "the interpretation of the zoning ordinance, no matter [in] what administrative context that interpretation is made." App. at 48. The Notice of Violation here included an interpretation of the zoning ordinance, and the Hanover Zoning Board of Adjustment unquestionably had jurisdiction over any appeal of that interpretation. This Court should so find.

D. The Remaining Arguments Raised by Appellant Also Fail to Demonstrate Any Error with the Trial Court's Order

Appellant attempts to fault the zoning board for addressing the numerous and varied claims it raised in its original appeal to the zoning board, SAE App. at 103 and 123, claiming that by doing so, the zoning board somehow conceded that the Notice of Violation was an enforcement action and that the board never interpreted the zoning ordinance in its decision. This is a fallacy.

The board's decision, SAE App. at 61, discusses the Grafton County Superior Court's decision in Dartmouth Corp. of Alpha Delta v. Town of Hanover and Town of Hanover Zoning Board of Adjustment, Docket No. 15-CV-259 and the court's interpretation of the Hanover Zoning Ordinance's requirement that student residences in the Institution District be used "in conjunction with" another institutional use. See Decision at ¶8-12, SAE App. at 64. Though it is true that the word "interpretation" does not appear in that discussion, there is no doubt that the board is interpreting its ordinance in light of the guidance from the superior court and the extensive documentation presented by appellant. That decision then goes on for an additional 5 pages addressing the factual and legal claims

[7]Appellant's claims regarding statutes and cases from other states is equally unavailing. How other courts interpret other statutes in other states has no bearing on the New Hampshire legislature's intent or on the interpretation of the clear language of RSA 676:5.

raised by appellant; however, that analysis does not render the Notice of Violation an enforcement action. Likewise, the fact that the town moved to strike appellant's First Amendment claims from appellant's first appeal does not support its position that the zoning board lacked jurisdiction over the appeal. [8]

Appellant also attempts to twist the wording of the Hanover Zoning Ordinance to make the Notice of Violation into something it is not. The particular section of the ordinance at issue is Section 1005.2(C)(1).[9]

> Any appeal taken from any decision of the Zoning Administrator shall be taken within fifteen (15) days of the date of the decision except for decisions that a violation exists. With regard to decisions by the Zoning Administrator that there has been a violation of the Zoning Ordinance, the alleged offender shall have seven (7) days from the date of receipt of the Notice of Violation to appeal the decision of the Zoning Administrator.

SAE App. at 98. Obviously, the ordinance makes a distinction between decisions that a property owner has violated the ordinance and other decisions interpreting the ordinance, such as the issuance of a building permit. That does not, however, transform a Notice of Violation into an enforcement action. Likewise, the fact that the Notice of Violation, zoning board decision, and court decisions refer to "violations of the zoning ordinance," does not mean that the Notice of Violation is an enforcement action. Clearly, there was, in fact, a dispute about whether appellant was utilizing its property in violation of the zoning ordinance, which is why appellant, the town, the trial court, and this Court utilized language that framed the appeal in terms of whether the continued use of the property

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[8]It is worth noting that appellant raised an issue of error regarding the trial court's decision to strike this claim in its first appeal to this Court, but then failed to brief it. This Court therefore deemed it waived. See New Hampshire Alpha of SAE Trust v. Town of Hanover, 172 N.H. 69, 77-78 (2019)(citing Town of Londonderry v. Mesti Dev., 168 N.H. 377, 379-80 (2015)).

[9]Appellant also argues that this provision of the Hanover Zoning Ordinance is preempted by state law. To the contrary, as set forth more fully herein, this provision is entirely consistent with RSA 676:5.

constituted a violation of the ordinance. However, the conclusion by the Zoning Administrator that the property was being used in violation of the zoning ordinance was based on her interpretation of the zoning ordinance; an interpretation which was properly appealed to the zoning board.

Appellant's next argument is that because it alleged selective enforcement in its original appeal and the town responded that "lax enforcement in the past does not commit the town to avoid enforcement at any time," that the town conceded that the Notice of Violation was an enforcement action, and it is now judicially estopped from arguing that it was not. The town's statement in its Answer, however, does not concede that the present action is an enforcement action; it simply notes that the town could bring an enforcement action if it so chose. That the courts may have used language that is more convenient for appellant's position does not judicially estop the town from correctly arguing that the Notice of Violation was not an enforcement action.

Appellant's claims of violations of due process are equally without merit. Appellant's entire due process argument rests on its assertion that "[l]andowners accused of offenses under RSA 676:17 are entitled to the due process of a court of law." Brief of Appellant, NH Alpha of SAE Trust, at 37. Focusing on the due process requirements of criminal actions ignores the facts in this situation. As discussed at length above, this is not an enforcement action brought by the town. As the trial court held:

> the court interprets the plaintiff's due process argument as asserting a violation of its right to procedural due process, as opposed to substantive due process. The court's threshold determination in a procedural due process claim is "whether the challenged procedures concern a legally protected interest." *State v. Veale*, 158 N.H. 632, 637 (2009)(quotation omitted). The plaintiff has not identified, and the court is unable to discern such an interest in this case. Because the zoning administrator's Notice and the plaintiff's appeal to the ZBA were not enforcement actions, the plaintiff was not deprived of any ascertainable interest protected by law. Accordingly, the plaintiff has failed to meet the threshold requirement for a successful procedural due process claim.

The trial court was correct. In fact, this entire argument is a red herring. The due process appellant seeks will be had if appellees ultimately prevail in this seemingly unending litigation; and if appellant continues thereafter to utilize the property to house students; and if the town then brings an enforcement action against appellant. While appellant could not relitigate the legal issues that are decided in this litigation (though based on its actions during the remand process, appellees have no doubt that it will try), it would have the opportunity to contest whether its actions constitute a violation of the zoning ordinance as interpreted in this litigation. Consistent with the cases cited by appellant in its brief, the town will have to prove by a preponderance of the evidence that appellant is in violation of the ordinance in any such litigation.

Appellant has not and cannot make any convincing or good faith argument that the zoning board lacked jurisdiction over the appeal it brought. The language of RSA 676:5 is exceedingly clear and unambiguous, and even if it were not, the legislative history is. When a town notifies a property owner that it believes that, based on its interpretation of the zoning ordinance, there is a zoning violation on his/her property, the proper avenue of appeal is to the zoning board. That is precisely what occurred in this case, and this latest effort to prolong this matter and increase the costs to the Hanover taxpayers must be rejected by this Court.

III. THE TRIAL COURT ERRED IN FAILING TO AWARD APPELLEES THEIR ATTORNEY'S FEES INCURRED IN DEFENDING THIS LEGALLY AND FACTUALLY BASELESS APPEAL

There is simply no question that the zoning board has subject matter jurisdiction over this appeal. This case was brought only to delay the final judgment in this matter, as is evidenced by the request to stay the remand proceedings while the jurisdictional issue is addressed, in violation of Superior Court Rule 7 and Rule of Professional Conduct 3.1. The trial court should have awarded the town its costs and attorney's fees incurred in defending this matter. Instead, it denied that request without explanation. See App. at 3.

This Court has held on multiple occasions, "the unnecessary character of judicial proceedings may justify a fee award." See, e.g., Daigle v. City of Portsmouth, 137 N.H. 572, 576 (1993)(*citing* Keenan v. Fearon, 130 N.H. 494 (1988); see also Harkeem v. Adams, 117 N.H. 687 (1977). It has also "recognized a constitutionally created court's power to award counsel fees in any action commenced, prolonged, required or defended without any reasonable basis in the facts provable by evidence, or any reasonable claim in the law as it is, or as it might arguably be held to be." Keenan, supra, at 502. A fee award "may rest on the objectively gratuitous character of the litigation, . . . [which is] pointlessly expensive in time, money and patience," victimizing the courts and the parties. Id. Appellant's case falls squarely within this category of cases.

It is true that this Court will review this decision under an abuse of discretion standard, and "if there is some support in the record for the trial court's determination, [this Court] will uphold it," Glick, supra, at 175; however, there is no support in the record for the trial court's decision. In fact, there is no explanation by the trial court as to why it denied the motion. See App. at 3. Instead, the record in this case is replete with reasons why appellees should be awarded their attorney's fees. Appellant's case lacks any support in the law or the facts. On the law, the language of the statute clearly and unambiguously

gives the zoning board jurisdiction over any decision involving the interpretation of the zoning ordinance, even if that decision is one to commence enforcement proceedings. The legislative history of the statute explains exactly why the statute was amended to so provide, and this Court has specifically held that the zoning board has jurisdiction to hear appeals if it is alleged that a town official erred in interpreting the zoning ordinance when making a decision, even if that decision is one regarding enforcement. Though an earlier decision of this Court supports appellant's position, that case was effectively overturned by a statutory amendment.

On the facts, appellant mischaracterizes the nature of its position in this litigation, the board's actions in this litigation, and the very nature of these proceedings. There is no doubt that appellees have not brought this action to gain compliance with the zoning ordinance or to impose civil penalties. Appellant initiated and has at all times pursued this litigation. Even if it loses, there is no threat in this litigation that it will be subject to civil penalties. Should there be future litigation seeking such penalties, appellant will have ample opportunity to be heard on whether it is in violation of the zoning ordinance as interpreted in this litigation. Appellant also mischaracterizes the town's actions and position in litigation involving an unrelated third party, Alpha Delta. From those mischaracterized facts, appellant then applies tortured logic to attempt to demonstrate that its rights have been violated.

Whether appellant's failures result from negligence, ignorance, or deceit is irrelevant to the question of whether the case has any basis in the facts or law. Appellant was obligated to inform itself of the applicable law and determine if there was a good faith argument in support of its position. This it failed to do, and as a result appellant "has caused the filing of pounds of paper with the Court and an added burden and expense for the [appellees]. The [appellees are] entitled to attorney's fees." Chemical Bank v. Rinden Professional Association, 126 N.H. 688, 699 (1985)(quoting from the trial court's decision in that case).

Because they have been required to defend against this action which was commenced without any reasonable basis in the facts provable by evidence, or any reasonable claim in the law as it is, or as it might arguably be held to be, appellees are entitled to an award of their attorney's fees and costs incurred in defending this action. Moreover, this Court should exercise its discretion under Supreme Court Rule 23 and award the town its attorney's fees incurred in this frivolous and bad faith appeal.

CONCLUSION

Despite appellant's herculean efforts to paint this as a complicated matter involving numerous statutes, the state and federal constitutions, and various legal doctrines, the primary question before the Court is quite simple: Did a Notice of Violation issued by the Hanover Zoning Administrator contain any "construction, interpretation or application of the terms of the ordinance" such that it was appealable to the Hanover Zoning Board of Adjustment under the plain language of RSA 676:5. Even a cursory review of that Notice of Violation reveals that it did contain an interpretation of the zoning ordinance, and therefore the zoning board of adjustment had jurisdiction over any appeals of that interpretation; a position which was asserted by appellant in its pleadings in earlier litigation between the parties. Under its de novo standard of review, the Court should affirm the jurisdiction of the zoning board over this appeal.

Appellant's position is that the Notice of Violation was either a discretionary decision to commence enforcement proceedings which cannot be appealed to the zoning board or is, in and of itself, the prosecution of a zoning violation which must be brought in court. The first position–that it was a discretionary decision to commence enforcement proceedings and therefore is not appealable to the zoning board–ignores both the plain language and the legislative history of RSA 676:5. The second position–that the Notice of Violation was the prosecution of a zoning violation–is belied by common sense, by the caption of this case, and by the fact that the town has sought neither an injunction nor civil penalties in this litigaiton. Appellant's attempt to conflate a Notice of Violation, a precursor to a prosecution of a zoning violation, and the actual prosecution of a zoning violation pursuant to any of the many statutes it cites, is simply not supported by the law, or by any good faith argument for an extension of the law. This Court should therefore reject appellant's arguments.

Appellant's tortured arguments rest on a decision of this Court which was overturned by statutory amendment, on mischaracterizations of the earlier

litigation between the parties and the town's position in that litigation, on mischaracterizations of earlier litigation between the town and an unrelated third party, on cases from other boards of adjustment which are not analogous to the facts in this case, on statutes and cases from other states which are not analogous to New Hampshire's statute, and on a myriad of other bases, none of which support its assertion that the zoning board lacked jurisdiction in this case. Those arguments ignore the plain language of RSA 676:5, the legislative history of that statute, and case law from this Court which is squarely on point. They must all be rejected.

It is for those reasons that the appellees requested that the superior court award them their attorney's fees incurred in this matter, which has no basis in the law or the facts. Without explanation, the trial court denied that request. That denial was an abuse of discretion and there is no evidence in the record to support it. This Court should overturn that decision, award appellees their costs and attorney's fees both from the superior court proceedings and from this unnecessary appeal.

REQUEST FOR ORAL ARGUMENT

The Town of Hanover and Hanover Zoning Board of Adjustment do not believe oral argument is necessary to resolve the issues before the Court; however, should the Court determine that such argument would be helpful, the Town of Hanover and the Hanover Zoning Board of Adjustment requests oral argument not to exceed 15 minutes, to be presented by Laura Spector-Morgan, Esquire.

CERTIFICATIONS

The appealed decisions were in writing and are appended to this Brief.

This document complies with the 14,000 word limit established by the Court's rules. It contains 9,256 words, inclusive of pages containing the table of contents, tables of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters.

I have forwarded copies of the foregoing brief to Carolyn Cole, Esquire via the Court's electronic filing system's electronic service.

Respectfully submitted,

TOWN OF HANOVER AND HANOVER ZONING BOARD OF ADJUSTMENT

By Its Attorneys
MITCHELL MUNICIPAL GROUP P.A.

Date: July 10, 2020

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