THE STATE OF NEW HAMPSHIRE
SUPREME COURT

2020 TERM

DOCKET NO. 2020-0034

NH Alpha of SAE Trust

v.

Town of Hanover and the Town of Hanover Zoning Board of Adjustment

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RULE 7 MANDATORY APPEAL

REPLY BRIEF AND OPPOSITION BRIEF TO CROSS-APPEAL OF APPELLANT, NH ALPHA OF SAE TRUST

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TABLE OF CONTENTS

TABLE OF CASES 4

SECONDARY SOURCES 6

TABLE OF AND TEXT OF STATUTES AND CONSTITUTIONAL SOURCES 7

TABLE AND TEXT OF HANOVER ORDINANCES 16

ARGUMENT 17

I. ZONING BOARDS LACK JURISDICTION TO ADJUDICATE VIOLATIONS BECAUSE OF ANY CHALLENGE TO, OR PROSECUTION OF, A ZONING OFFICER'S ENFORCEMENT DECISION MUST BE IN COURT 17

A. RSA 676:5(II)(B) CODIFIED THE KEY HOLDING OF *SIMONSEN* 18

B. RSA 676:5 DID NOT CONFER SUBJECT MATTER JURISDICTION ON ZONING BOARDS TO ADJUDICATE ZONING VIOLATIONS 20

C. HANOVER'S POSITION RENDERS THE EXCLUSIONARY LANGUAGE OF RSA 676:5(B) MEANINGLESS 23

D. HANOVER'S AUTHORITIES ARE IRRELEVANT AND DO NOT SUPPORT ITS POSITION 24

E. THE VIOLATION NOTICE WAS A DISCRETIONARY DECISION TO ENFORCE THE ORDINANCE 26

1. The "Decision" Accused Appellant of Violating the Ordinance 26
2. The Zoning Administrator's Police Power to Enforce the Ordinance was Conferred by Section 1004 of the 2015 Ordinance 26
3. Hanover's Argument That It is Not Required to Send a Written Notice Prior to Court Action Proves that the Violation Notice was a Discretionary Decision to Enforce .. 28

F. THE COURTS ARE VESTED WITH EXCLUSIVE JURISDICTION TO DETERMINE IF A LANDOWNER HAS VIOLATED THE ZONING ORDINANCE AND ARE EQUIPPED TO PROTECT A LANDOWNER'S RIGHT TO DUE PROCESS 31

G. THE TOWN USURPED THE STATUTORY JUDICIAL PROCESSES AND ADJUDICATED MERITS WHOSE FINDINGS COULD BE BINDING ON FUTURE ENFORCEMENT ACTIONS 32

II. THE TRIAL COURT DID NOT ERR IN DENYING HANOVER'S MOTION FOR ATTORNEYS' FEES 38

CONCLUSION 42

CERTIFICATIONS 42

REQUEST FOR ORAL ARGUMENT 43

TABLE OF CASES

47 Residents of Deering, N.H. v. Town of Deering, 151 N.H. 795 (2005) 24, 25

Am. Fire & Casualty Co. v. Finn, 341 U. S. 6 (1951).....38

Appeal of the New Hampshire Department of Environmental Services, No. 2018-0650

(Hantz-Marconi, J., May 22, 2020).....23

Appeal of Old Dutch Mustard Co., Inc., 166 N.H. 501 (2014) 30

Appeal of Rainville, 143 N.H. 624 (1999) 23

Arbaugh v. Y & H Corp., 546 U.S. 500 (2006).....39

Ashland School Dist. v. N.H. Div. for Children,

141 N.H. 45 (1996).....25

Blue Jay Realty Trust v. City of Franklin,

132 N.H. 502 (1989).....25

California v. LaRue, 409 U. S. 109 (1972) 38

Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407 (1942) 36

City of Rochester v. Corpening, 153 N.H. 571 (2006).....20, 21, 31, 36

District Attorney's Office v. Osborne, 557 U.S. 52 (2009) 31

Francis v. Franklin, 471 U.S. 307 (1985) 31

Glick v. Naess, 143 N.H. 172 (1998).....41

Gordon v. Town of Rye, 162 N.H. 144 (2011) 29, 39

Hannah v. Larche, 363 U.S. 420 (1960). 37

Hemenway v. Hemenway, 159 N.H. 680 (2010) 39

In re Opinion of the Justices, 87 N.H. 492 (1935) 20

In re Winship, 397 U.S. 358 (1970) 31

Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,
456 U.S. 694 (1982). 38

Jackson v. Virginia, 443 U.S. 307 (1979) 31

Jenkins v. McKeithen, 395 U.S. 411 (1969) 36, 37

Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994) 39

Kontrick v. Ryan, 540 U.S. 443 (2004) 39

Marceau v. Concord Heritage Life Ins. Co., 149 N.H. 216 (2003) 24

McNamara v. Hersh, 157 N.H. 72 (2008) 25

Metzger v. Brentwood, 115 N.H. 287 (1975) 18, 33

NAACP v. Alabama, 357 U.S. 449 (1958) 36

New Hampshire Alpha of SAE Tr. v. Town of Hanover,
172 N.H. 69 (2019). 27, 30, 31, 34

Rogers v. Rogers, 171 N.H. 738 (2019). 22

Town of Amherst v. Gilroy, 157 N.H. 275 (2008) 31

Town of Derry v. Simonsen, 117 N.H. 1010 (1977) 17, 18, 20, 21, 25, 28, 41

Williams v. Babcock, 121 N.H. 185 (1981) 30

Winslow v. Town of Holderness Planning Bd., 125 N.H. 262 (1984). 37

SECONDARY SOURCES

Black's Law Dictionary Online (https://thelawdictionary.org)..... 23, 27

15 Loughlin, *"New Hampshire Practice: Land Use and Zoning"*

(LexisNexis Matthew Bender, 4th ed.)..... 17, 21, 31, 33, 41

New Hampshire Bar Association

"Guide to District Court Enforcement of Local Ordinances and Codes"... 31, 41

New Hampshire Municipal Association

"Guide to Effective Enforcement (2018)"..... 27, 28, 29, 30

P. Salkin, Anderson's American Law of Zoning 40:5 (5th ed)..... 33

13 Wright & Miller, *Federal Practice and Procedure* § 3522 (2020) 40

TABLE AND TEXT OF CONSTITUTIONAL SOURCES AND STATUTES

U.S. Constitution, Amendment V 36, 37

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment VI 36

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Constitution, Amendment XIV, § 1 36

> **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.

N.H. Constitution, Part I, Art. 14 36

> **[Art.] 14. [Legal Remedies to be Free, Complete, and Prompt.]** Every subject of this State is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

N.H. Constitution, Part I, Art. 15 37

> **[Art.] 15. [Right of Accused.]** No subject shall be held to answer for any crime, or offense, until the same is fully and plainly, substantially and formally, described

to him; or be compelled to accuse or furnish evidence against himself. Every subject shall have a right to produce all proofs that may be favorable to himself; to meet the witnesses against him face to face, and to be fully heard in his defense, by himself, and counsel. No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land; provided that, in any proceeding to commit a person acquitted of a criminal charge by reason of insanity, due process shall require that clear and convincing evidence that the person is potentially dangerous to himself or to others and that the person suffers from a mental disorder must be established. Every person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown; this right he is at liberty to waive, but only after the matter has been thoroughly explained by the court.

N.H. Constitution, Part I, Art. 20 36

[Art.] 20. [Jury Trial in Civil Causes.] In all controversies concerning property, and in all suits between two or more persons except those in which another practice is and has been customary and except those in which the value in controversy does not exceed $1,500 and no title to real estate is involved, the parties have a right to a trial by jury. This method of procedure shall be held sacred, unless, in cases* arising on the high seas and in cases relating to mariners' wages, the Legislature shall think it necessary hereafter to alter it.

N.H. Constitution, Part I, Art. 35 36

[Art.] 35. [The Judiciary; Tenure of Office, etc.] It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit. It is therefore not only the best policy, but for the security of the rights of the people, that the Judges of the Supreme Judicial Court should hold their offices so long as they behave well; subject, however, to such limitations, on account of age, as may be provided by the Constitution of the State; and that they should have honorable salaries, ascertained and established by standing laws.

N.H. Constitution, Part I, Art. 37 ..... 20, 36

[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.

N.H. Constitution, Part II, Art. 4 36

[Art.] 4. [Power of General Court to Establish Courts.] The general court (except as otherwise provided by Article 72 a of Part 2) shall forever have full power and authority to erect and constitute judicatories and courts of record, or other courts, to beholden, in the name of the state, for the hearing, trying, and determining, all manner of crimes, offenses, pleas, processes, plaints, action, causes, matters and things whatsoever arising or happening within this state, or between or concerning persons inhabiting or residing, or brought, within the same, whether the same be criminal or civil, or whether the crimes be capital, or not capital, and whether the said pleas be real, personal or mixed, and for the awarding and issuing execution thereon. To which courts and judicatories, are hereby given and granted, full power and authority, from time to time, to administer oaths or affirmations, for the better discovery of truth in any matter in controversy, or depending before them.

NH RSA 31:39-c 30

31:39-c Administrative Enforcement of Ordinances. –

Notwithstanding any other provision of law, a town may use the following provisions in the enforcement of its ordinances and regulations:
I. Any town may establish, by ordinance adopted by the legislative body, a system for the administrative enforcement of violations of any municipal code, ordinance, bylaw, or regulation and for the collection of penalties, to be used prior to the service of a formal summons and complaint. Such a system may be administered by a police department or other municipal agency. The system may include opportunities for persons who do not wish to contest violations to pay such penalties by mail. The system may also provide for a schedule of enhanced penalties the longer such penalties remain unpaid; provided, however, that the penalty for any separate offense shall in no case exceed the maximum penalty for a violation as set forth in RSA 31:39, III.
II. A written notice of violation containing a description of the offense and any applicable schedule of penalties, delivered in person or by first-class mail to the last-known address of the offender, shall be deemed adequate service of process for purposes of any administrative enforcement system established under paragraph I.
III. If the administrative enforcement system established under paragraph I is unsuccessful at resolving alleged violations, or in the case of a town that has not

established such a system, a summons may be issued as otherwise provided by law, including use of the procedure for plea by mail set forth in RSA 31:39-d.

NH RSA 31:69 (Repealed 1983, 447:5, I, eff. Jan. 1, 1984)..... 19, 21, 22

31:69 (Repealed 1983, 447:5, I, eff. Jan. 1, 1984) Appeals to Board. –

Appeals to the board of adjustment 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. Such appeal shall be taken within a reasonable time, as provided by the rules of the board, by filing with the officer from whom the appeal is taken and with the board a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

NH RSA 31:72 (Repealed 1983, 447:5, I, eff. Jan. 1, 1984)..... 19

31:72 (Repealed 1983, 447:5, I, eff. Jan. 1, 1984) Powers of Board of Adjustment.

The board of adjustment shall have the following powers:

I. To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement hereof or of any ordinance adopted pursuant thereto.

II. To hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance.

III. To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

IV. In exercising the above-mentioned powers such board may, in conformity with the provisions hereof, reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from and may make such order, or decision, as ought to be made, and to that end shall have all the powers of the officer from whom the appeal is taken.

V. The concurring vote of three members of the board shall be necessary to reverse any action of such administrative official, or to decide in favor of the applicant on any matter upon which it is required to pass under any such ordinance, or to effect any variation in such ordinance.

NH RSA 236:121 24

236:121 Motor Vehicle Recycling Yards and June Yards. Grant or Denial of Application; Renewal; Appeal. –

I. After the hearing the local governing body shall, within 2 weeks, make a finding as to whether or not the application should be granted, giving notice of their finding to the applicant by mail, postage prepaid, to the address given on the application. If approved, the license, including the certificate of approved location, shall be forthwith issued to remain in effect until the following July 1. Approval is personal to the applicant and is not assignable.

II. Licenses shall be renewed thereafter upon payment of the annual license fee without a hearing, if all provisions of this subdivision are complied with during the license period, if the junk yard does not become a public nuisance under the common law or is not a nuisance under RSA 236:119, and if the applicant is not convicted of any type of larceny or of receiving stolen goods. In addition, applications to renew a license to operate an automotive recycling yard or motor vehicle junk yard shall include certification of compliance with best management practices established by the department of environmental services for the automobile salvage industry.

III. A writ of certiorari lies from the denial of the application to the superior court of the county in which the proposed location is situated.

NH RSA 502-A:11-a 17, 21, 31, 40

502-A:11-a Local Regulation Enforcement. –

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

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

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

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

II. This section shall not be construed to diminish the jurisdiction of the superior court to hear and decide matters in which municipalities seek to enforce local

ordinances, codes, or regulations through equitable or other relief.

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

NH RSA 674:33, I(a)(1) 25

674:33, I(a)(1) Powers of Zoning Board of Adjustment. –

I. (a) The zoning board of adjustment shall have the power to:
(1) Hear and decide appeals if it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any zoning ordinance adopted pursuant to RSA 674:16

NH RSA 674:33, II 20, 30

674:33, II Powers of Zoning Board of Adjustment. –

II. In exercising its powers under paragraph I, the zoning board of adjustment may reverse or affirm, wholly or in part, or may modify the order, requirement, decision, or determination appealed from and may make such order or decision as ought to be made and, to that end, shall have all the powers of the administrative official from whom the appeal is taken.

NH RSA 674:33-a, II 30

674:33-a, II Equitable Waiver of Dimensional Requirement. –

II. In lieu of the findings required by the board under subparagraphs I(a) and (b), the owner may demonstrate to the satisfaction of the board that the violation has existed for 10 years or more, and that no enforcement action, including written notice of violation, has been commenced against the violation during that time by the municipality or any person directly affected.

NH RSA 676:5 ..... 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 29, 42

676:5 Appeal to Board of Adjustment. –

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. Such appeal shall be taken within a

reasonable time, as provided by the rules of the board, by filing with the officer from whom the appeal is taken and with the board a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

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, but does include any construction, interpretation or application of the terms of the ordinance which is implicated in such enforcement proceedings.
III. If, in the exercise of subdivision or site plan review, the planning board makes any decision or determination which is based upon the terms of the zoning ordinance, or upon any construction, interpretation, or application of the zoning ordinance, which would be appealable to the board of adjustment if it had been made by the administrative officer, then such decision may be appealed to the board of adjustment under this section; provided, however, that if the zoning ordinance contains an innovative land use control adopted pursuant to RSA 674:21 which delegates administration, including the granting of conditional or special use permits, to the planning board, then the planning board's decision made pursuant to that delegation cannot be appealed to the board of adjustment, but may be appealed to the superior court as provided by RSA 677:15.
IV. The board of adjustment may impose reasonable fees to cover its administrative expenses and costs of special investigative studies, review of documents, and other matters which may be required by particular appeals or applications.
V. (a) A board of adjustment reviewing a land use application may require the applicant to reimburse the board for expenses reasonably incurred by obtaining third party review and consultation during the review process, provided that the review and consultation does not substantially replicate a review and consultation obtained by the planning board.
(b) A board of adjustment retaining services under subparagraph (a) shall require detailed invoices with reasonable task descriptions for services rendered. Upon request of the applicant, the board of adjustment shall promptly provide a reasonably detailed accounting of expenses, or corresponding escrow deductions, with copies of supporting documentation.

NH RSA 676:15.....34, 35

676:15 Injunctive Relief. –

In case any building or structure or part thereof is or is proposed to be erected, constructed, altered, or reconstructed, or any land is or is proposed to be used in violation of this title or of any local ordinance, code, or regulation adopted under this title, or of any provision or specification of an application, plat, or plan approved by, or any requirement or condition of a permit or decision issued by, any local administrator or land use board acting under the authority of this title, the building inspector or other official with authority to enforce the provisions of this title or any local ordinance, code, or regulation adopted under this title, or the owner of any adjacent or neighboring property who would be specially damaged by such violation may, in addition to other remedies provided by law, institute injunction, mandamus, abatement, or any other appropriate action or proceeding to prevent, enjoin, abate, or remove such unlawful erection, construction, alteration, or reconstruction.

NH RSA 676:17.....17, 20, 21, 26, 27, 28, 31, 34

676:17 Fines and Penalties; Second Offense. –

I. Any person who violates any of the provisions of this title, or any local ordinance, code, or regulation adopted under this title, or any provision or specification of any application, plat, or plan approved by, or any requirement or condition of a permit or decision issued by, any local administrator or land use board acting under the authority of this title shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person; and shall be subject to a civil penalty of $275 for the first offense, and $550 for subsequent offenses, for each day that such violation is found to continue after the conviction date or after the date on which the violator receives written notice from the municipality that the violator is in violation, whichever is earlier. Each day that a violation continues shall be a separate offense.

II. In any legal action brought by a municipality to enforce, by way of injunctive relief as provided by RSA 676:15 or otherwise, any local ordinance, code or regulation adopted under this title, or to enforce any planning board, zoning board of adjustment or building code board of appeals decision made pursuant to this title, or to seek the payment of any fine levied under paragraph I, the municipality shall recover its costs and reasonable attorney's fees actually expended in pursuing the legal action if it is found to be a prevailing party in the action. For the purposes of this paragraph, recoverable costs shall include all out-of-pocket expenses actually incurred, including but not limited to, inspection fees, expert fees and investigatory expenses.

III. If any violation of a local ordinance, code or regulation, or any violation of a planning board, zoning board of adjustment or building code board of appeals

decision, results in the expenditure of public funds by a municipality which are not reimbursed under paragraph II, the court in its discretion may order, as an additional civil penalty, that a violator make restitution to the municipality for such funds so expended.

IV. The superior court may, upon a petition filed by a municipality and after notice and a preliminary hearing as in the case of prejudgment attachments under RSA 511-A, require an alleged violator to post a bond with the court to secure payment of any penalty or remedy or the performance of any injunctive relief which may be ordered or both. At the hearing, the burden shall be on the municipality to show that there is a strong likelihood that it will prevail on the merits, that the penalties or remedies sought are reasonably likely to be awarded by the court in an amount consistent with the bond sought, and that the bond represents the amount of the projected expense of compliance with the injunctive relief sought.

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

NH RSA 676:17-b, I..... 30

676:17-b, I Local Land Use Citations; Pleas by Mail. –

I. No local land use citation as set forth in this section shall be served unless the defendant has first been given written notice of the violation by the municipality. If the notice involves or includes a decision which may be appealed to the zoning board of adjustment pursuant to RSA 676:5, or to the building code board of appeals pursuant to RSA 674:34, such notice to the building code board of appeals pursuant to RSA 674:34, such notice shall set forth a reasonable period, as provided by the rules of the respective board, in no case less than 7 days, within which such appeal shall be filed after receipt of the written notice, and the citation shall not be served until after the end of such period. If such an appeal is filed, further proceedings shall be governed by RSA 676:6.

NH RSA 677:6..... 35

677:6 Burden of Proof. –

In an appeal to the court, the burden of proof shall be upon the party seeking to set aside any order or decision of the zoning board of adjustment or any decision of the local legislative body to show that the order or decision is unlawful or unreasonable. All findings of the zoning board of adjustment or the local legislative body upon all questions of fact properly before the court shall be prima facie lawful and reasonable. The order or decision appealed from shall not be set aside or vacated, except for errors of law, unless the court is persuaded by the balance of probabilities, on the evidence before it, that said order or decision is unreasonable.

TABLE AND TEXT OF HANOVER ORDINANCES

Article X, Section 1004 *(now Section 201)* ……..……26, 27, 28

Article X, Section 1004 of the 2015 Ordinance (now Section 201):

1004.1 This Ordinance shall be enforced by the Zoning Administrator, if any building or use of land is or is proposed to be erected, constructed, reconstructed, altered, converted, maintained, or used in violation of this Ordinance. The Zoning Administrator shall institute, in the name of the Town, any appropriate action, injunction or other proceeding to prevent, restrain, correct or abate such construction or use or to prevent in or about the premises any act, conduct, business, or use constituting a violation.

1004.2The owner of record of a property is solely responsible for ensuring at all times that such property complies in full with all provisions of this Ordinance. Any person who violates this Ordinance shall be subject to fines and penalties as provided by State Law, including RSA 676:17.

Article X, Section 1005.2(c)(1) *(now Section 206.5(D))* ……..……..……26, 32

Article X, Section 1005.2(c)(1) of the 2015 Ordinance (now Section 206.5(D)):

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. 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***.

ARGUMENT

I. ZONING BOARDS LACK JURISDICTION TO ADJUDICATE VIOLATIONS BECAUSE ANY CHALLENGE TO, OR PROSECUTION OF, A ZONING OFFICER'S ENFORCEMENT DECISION MUST BE IN COURT

This Honorable Court should grant Appellant's appeal and reverse the trial court's order. Appellee ("Hanover" or "Town") argues that its Zoning Board of Adjustment ("ZBA") has subject matter jurisdiction to adjudicate a landowner's alleged zoning violations because alleging violations involves an act of interpretation and, therefore, any challenge falls within the limited exception of RSA 676:5(II)(b).[1] Hanover is incorrect.

In 1977, this Court held that zoning boards have no jurisdiction to review a municipal order demanding that a landowner cease operating its property where such use is alleged to be a violation of the town's zoning ordinance. "Any attack upon an order of the selectmen regarding the enforcement of a zoning ordinance should be in the superior court." *Town of Derry v. Simonsen*, 117 N.H. 1010, 1013 (1977). Hanover erroneously claims that *Simonsen* was legislatively overruled by RSA 676:5(II)(b) in 1989, and therefore, a present-day attack upon a zoning administrator's violation notice is properly appealed to the ZBA. Hanover's historical account is incorrect, as evidenced by *Simonsen's continued reference* to the present day in Loughlin's authoritative practice manual.[2] As discussed below, the 1989 statute *codified Simonsen*.

Additionally, prior to 1989 the legislature expressly conferred original jurisdiction upon the district court over *the adjudication* of *alleged* zoning violations by creating RSA 502-A:11-a. RSA 676:17(V) (1988) explicitly cross-references RSA 502-A:11-a within the Planning and Zoning section of New Hampshire Statutes, demonstrating the

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[1] "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." Hanover Brief ("Hanover Br.") at 26.

[2] "Once the selectmen or other officials have commenced enforcement proceedings, that enforcement is not appealable to the ZBA." *Loughlin, 15 New Hampshire Practice: Land Use Planning and Zoning, Ch. 22, Powers of ZBA, §22.02 Administrative Appeals (LexisNexis Matthew Bender) (Fourth Edition),* (hereinafter "Loughlin") n. 27 citing *Simonsen*.

intentionality of the statutes and their interrelationship. These jurisdictional statutes remain unchanged today.

Following Hanover's instructions to its detriment, Appellant appealed the February 2016 Violation Notice to the ZBA. At issue before this Court is whether *Simonsen* survives today in light of the 1988-1989 legislation. If so, this Court must determine that the ZBA lacked the subject matter jurisdiction to hear and adjudicate the merits of the alleged violation, and void *ab initio* all rulings in this case.

A. RSA 676:5(II)(b) Codified the Key Holding of *Simonsen*

In *Town of Derry v. Simonsen*, landowner Simonsen operated a campground on his property. On September 3, 1975, Derry wrote to Simonsen alleging his use to be in violation of the Derry Zoning Ordinance, ordering him to cease operating this campground no later than September 26, 1975 and advising him that any operation after that date would be deemed a violation of the town's zoning ordinance. Simonsen appealed the order to the Board of Adjustment, challenging the enforcement on legal and factual grounds. The Board of Adjustment refused to hear Simonsen's appeal. *Simonsen*, 117 N.H. 1010, 1013 (1977).

Subsequently, Derry sought an injunction in the superior court that ordered the defendant to cease operation of the campground. The court enjoined Simonsen and denied his cross-petition.

Simonsen appealed to this Court contending, *inter alia*, that the Zoning Board of Adjustment should have been ordered to hear his challenge of the violation. Derry contended that zoning boards do not have the subject matter jurisdiction to adjudicate the merits of zoning violations. Relying on *Metzger v. Brentwood*, 115 N.H. 287, 290 (1975), Derry argued that the issues raised by the landowner were questions of law to which exhaustion of administrative remedies did not apply. Derry further argued that boards of adjustment possess no special expertise to evaluate questions of fact relative to an alleged violation.

The Court agreed with Derry's argument that zoning boards are neither appropriate nor qualified venues to adjudicate alleged violations, ruling "it is plain that the Zoning Board had no jurisdiction to review an order of the Board of Selectmen.…Any attack upon

an order of the selectmen regarding *the enforcement of a zoning ordinance* should be in the superior court." *Id*. The Court thus determined that a simple letter warning the landowner to cease using his property by a date certain, *after which* it would be deemed a violation of the zoning ordinance, was "the enforcement of a zoning ordinance."

Simonsen was decided under RSA 31:69 – the predecessor to RSA 676:5 – which dated back to 1925. Zoning statutes of the 1970s provided more expansive rights of appeal to zoning boards than the current statute provides. To illustrate, RSA 31:69 provided that:

> "Appeals to the Board of Adjustment 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." Reply Br. App. 453.

Furthermore, RSA 31:72, entitled "Powers of the Board of Adjustment," empowered zoning boards as follows:

> "The board of adjustment shall have the following powers:
>
> I. To hear and decide appeals where it is alleged that there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement hereof or of any ordinance adopted thereto;
>
> IV. In exercising the above-mentioned powers the board may, in conformity with the provisions hereof, reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from and may make such order, or decision, as ought to be made, ***and to that end shall have all the powers of the officer from whom the appeal is taken***.

RSA 31:72 [Emphasis added.] Reply Br. App.455.

Despite RSA 31:69 *et seq*. having no express limitation on the appeal of enforcement actions, this Court held that the zoning board did not have subject matter jurisdiction to adjudicate zoning violations. Pursuant to RSA 31:72(IV), the zoning board only possessed the powers of the administrative officer that issued the violation notice,

and no more. That limitation exists today. *See* RSA 674:33(II).[3] The zoning administrator may commence formal or informal enforcement proceedings but may not adjudicate the merits of her own decision. *In re Opinion of the Justices*, 87 N.H. 492 (1935) (jurisdiction is not conferred upon administrative official or board to resolve enforcement disputes and decision thereof by such official or board in such case would have no force as judgment. *See* Const. Bill of Rights, Art. 37. *See also* RSA 676:17(V). When acting upon an appeal of an administrative decision, a zoning board stands in the shoes of the administrative officer to make the decision that ought to have been made. As the zoning administrator has no original jurisdiction to adjudicate the merits of a violation notice or to opine on whether the town-legislated ordinance is unlawful, unconstitutional, or unenforceable, neither does the zoning board standing in the shoes of the zoning administrator.

B. RSA 676:5 Did Not Confer Subject Matter Jurisdiction on Zoning Boards to Adjudicate Zoning Violations

Hanover argues that the 1989 enactment of RSA 676:5 legislatively overruled *Simonsen*, giving zoning boards subject matter jurisdiction to adjudicate zoning violations. Hanover is wrong. Prior to 1988, the ZBA's lack of authority was only inferred from the legislation through the *Simonsen* decision. In 1988, that lack of authority was expressly stated and codified.

In 1988 the legislature amended RSA 676:17 which simultaneously *criminalized* land use violations (RSA 676:17(I)) "to give[ ] some teeth to the current laws,"[4] and, to ensure due process safeguards, required municipalities to prosecute all alleged violations

[3] RSA 674:33(II) states: "In exercising its powers under paragraph I, the zoning board of adjustment may reverse or affirm, wholly or in part, or may modify the order, requirement, decision, or determination appealed from and may make such order or decision as ought to be made and, to that end, shall have all the powers of the administrative official from whom the appeal is taken."

[4] In discussing changes to the statutes, Senator White indicated the legislature's intent to strengthen a town's enforcement mechanisms. *Corpening*, 153 N.H. at 580.

in the courts (RSA 676:17(V)). At the same time, the legislature included in the same bill an addition to RSA chapter 502–A to expand the jurisdiction of the superior courts concurrently to the district court to hear cases arising under RSA 676: 17. *See City of Rochester v. Corpening*, 153 N.H. 571, 581 (2006) (Broderick, J. dissenting relative to fines) (citing legislative history, *Laws 1988*, 19:1 (enacting RSA 502–A:11–a)).

The 1988 legislative session provided a second judicial venue for adjudication of alleged zoning violations, adding explicit jurisdiction of the district court. The 1989 legislative session picked up where 1988 finished, ensuring that there would be no doubt that enforcement was the solely the province of the judicial system. The legislature codified *Simonsen* through the addition of RSA 676:5(II)(b), clearly harmonizing jurisprudence and statute into a logical and unified schematic and circumscribing the language of RSA 31:69 to remove its applicability to enforcement decisions. Loughlin explains this curtailment of authority, stating that the "Laws of 1989, ch. 69 added 676:5(II)(b), **removing discretionary decisions concerning enforcement from the purview of the ZBA**.[5]

Hanover's citation to testimony from Bernie Waugh is irrelevant since the statute is clear and unambiguous. Nonetheless, Hanover's reliance is misplaced. According to Waugh, the New Hampshire Municipal Association ("NHMA") was concerned that literal application of the Court's holding in *Simonsen* -- which required anyone aggrieved by *any* decision of a board of selectmen to appeal to the Superior Court -- would force aggrieved landowners in small communities to litigate in the Superior Court if they were unhappy over the issuance of building permits, for example.[6]

The modifications in 1989 reconciled *Simonsen's* requirement that enforcement actions be adjudicated in court with the desire for small towns to ensure that their lack of full time administrators did not preclude an administrative appeal route for routine

[5] Loughlin, *§*22.02 n. 31

[6] "… under the literal interpretation of the Derry v. Simonsen case, landowners have no appeal from interpretations of the Zoning ordinance except to the superior court – an expensive and, we believe, unnecessary step." Hanover App. at 37-38.

interpretative matters such as permit grants and denials. Paragraph II(a) was added to RSA 676:5 to define "administrative officer," satisfying the NHMA's concerns.[7] To avoid any potential misunderstandings and carefully circumscribe the limits of local authority, Paragraph II(b) curtailed the prior rights of appeal provided under RSA 31:69 *et seq*. and distinguished between decisions of the administrative officer which could be appealed to the zoning board and which were reserved for the courts:

> (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.

By defining "Administrative Decisions," RSA 676:5(II)(b) clarified that it is the *subject matter of the decision* and not the title of the executive decision-maker that determines whether appellate jurisdiction at the zoning board exists. The statute unambiguously excludes enforcement from the realm of appealable "administrative decisions." The *decision to commence formal or informal enforcement proceedings* is not appealable to the ZBA. It is manifestly unreasonable to believe that the legislature would institute an explicit grant of authority to the district court to adjudicate alleged zoning violations but leave the question of ZBA jurisdiction to be inferred from the definition of administrative decision in RSA 676:5(II)(b) that was specifically adopted to remove the ZBA's jurisdiction. Had the legislature intended to convey jurisdiction over enforcement proceedings to the ZBA, it would have done so in the same plain and explicit terms. *See Rogers v. Rogers*, 171 N.H. 738 (2019).

[7] "Clearly landowners in towns where a Board of Selectmen makes zoning decisions should have just as much right to appeal those decisions to the ZBA as they do in towns where those decision are made by a building inspector." *Id.*

C. Hanover's Position Renders the Exclusionary Language of RSA 676:5(II)(b) Meaningless

As Mr. Waugh testified, the zoning board only has the authority to interpret the *meaning* of the zoning ordinance, not to hear enforcement proceedings and adjudicate zoning violations:

> "However, the ZBA should not be able to second-guess the discretion of the enforcement officer (either Building Inspector of Selectmen) about whether or not to bring any particular enforcement action. . . .The ZBA's jurisdiction should be the interpretation of the zoning ordinance, no matter what administrative context that interpretation is made." [8]

The normative processes of interpretation and adjudication are distinct. "Interpretation" is the process of discovering and expounding the intended significance or meaning of the language used in a statute or ordinance;[9] adjudication is the process of settling a dispute on the factual and legal merits by rendering a final judgment on the rights and responsibilities between the parties. [10] RSA 676:5(II)(b) specifically excluded the zoning board's power to adjudicate enforcement decisions. Hanover's attempt to redefine "enforcement" as "interpretation" does not make it so. Board actions "must comply with the governing statute, in both spirit and letter." *Appeal of the New Hampshire Department of Environmental Services*, No. 2018-0650 (Hantz-Marconi, J., May 22, 2020)*, citing Appeal of Rainville*, 143 N.H. 624, 627 (1999).

Dodging the exclusory language of RSA 676:5(II)(b), Hanover claims that "[t]he Notice of Violation here included an interpretation of the zoning ordinance." Hanover Br. at 24. Hanover asks this Court to contort RSA 676:5(II)(b) to authorize the zoning board to hear and decide the merits of an alleged zoning violation simply because "[t]here's no way to determine whether there's a violation of the zoning ordinance unless one interprets the zoning ordinance."[11] All police power, by Hanover's analysis, is suddenly

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[8] *Id.*
[9] Black's Law Dictionary online: https://thelawdictionary.org/interpretation/
[10] Black's Law Dictionary online: https://thelawdictionary.org/adjudication/
[11] App. 271.

"interpretive." However, it is not within the zoning board's *interpretive* powers to "determine whether there is a violation of the zoning ordinance," as this is the sole province of the courts. Hanover's position renders the second sentence of RSA 676:5(II)(b) meaningless, subjecting every decision of the administrative officer to zoning board appellate review, and leaving no decisions subject to the courts' original jurisdiction. *Id., citing Marceau v. Concord Heritage Life Ins. Co.*, 149 N.H. 216, 219 (2003) (declining to interpret a statute in a manner that would render a phrase within the statute "virtually meaningless"). This Court should reject Hanover's argument that the legislature empowered zoning boards to adjudicate violations when RSA 676:5(II)(b) was specifically adopted to remove enforcement from the ZBA's authority.

D. Hanover's Authorities are Irrelevant and Do Not Support Its Position

Hanover devotes scant effort to support its position that the ZBA may hear and decide the instant matter, and its reliance on two inapposite citations is misplaced. Hanover cites dicta from *47 Residents of Deering, N.H. v. Town of Deering* to conjure jurisdiction: "[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." Hanover Br. at 23, citing *47 Residents of Deering, N.H. v. Town of Deering,* 151 N.H. 795, 799 (2005). *47 Residents* is inapposite because it did not involve an appeal of an alleged zoning violation. *47 Residents* was an appeal by abutters to the zoning board of the selectmen's affirmative grant of a junkyard license to a landowner and subsequent refusal to revoke that license. After the zoning board reversed the selectmen's decision, the landowner appealed, contending that the zoning board lacked subject matter jurisdiction because the appeal should have been governed by "junkyard statutes" (RSA 236:121 *et seq*.). The Court disagreed and correctly held that, pursuant to RSA 676:5, the zoning board had subject matter jurisdiction to hear and decide appeals of the granting of a license. *Id*. In the instant matter, enforcement actions are specifically excluded from the realm of decisions appealable to the ZBA. In *47 Residents*, the matter

was not excluded because *the selectmen were not alleging a violation, either formally or informally*.

Hanover then offers dicta from *McNamara v. Hersh* that *appears* dispositive until scrutinized: "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.'" Hanover Br. at 22 citing *McNamara v. Hersh*, 157 N.H. 72, 73-4 (2008). However, when read in context, *McNamara* undermines Hanover and supports Appellant's case.

McNamara, like *47 Residents*, did not involve an appeal to the zoning board of a zoning violation by an accused landowner. Rather, the appeal was filed by the abutters, the McNamaras, of a decision by superior court to deny their petition for declaratory judgment after the town's board of selectmen issued a building permit to the abutter's neighbor's predecessor-in-interest. The Court held that the McNamaras' declaratory judgment action was barred because they failed to exhaust their administrative remedies pursuant to RSA 674:33; RSA 676:5; RSA 677:3 (1996) where the issue involved a decision to issue a building permit. Abutters aggrieved by the issuance of a building permit have a clear right to appeal to the ZBA. However, *McNamara* proves Appellant's argument – indeed, Derry's argument in *Simonsen* -- that zoning boards are not equipped to handle arguments involving statutory construction or constitutional defenses when it recites the following well established principles:

> " [I]t is unnecessary to "burden local legislative bodies and [zoning boards] with the responsibility for rulings on subjects that are beyond their ordinary competence." *Blue Jay Realty Trust v. City of Franklin,* 132 N.H. 502, 509, 567 A.2d 188 (1989).
>
> Judicial treatment may be particularly suitable when the constitutionality or validity of an ordinance is in question or when the agency at issue lacks the authority to act. *Metzger,* 115 N.H. at 290, 343 A.2d 24. These are the types of legal issues "as to which specialized administrative understanding plays little role." *Ashland School Dist. v. N.H. Div. for Children,* 141 N.H. 45, 47–48, 681 A.2d 71 (1996).

McNamara, 157 N.H. at 74.

E. The Violation Notice was a Discretionary Decision to Enforce the Ordinance

1. The "Decision" Accused Appellant of Violating the Ordinance

Hanover's zoning officer served Appellant with a written decision ("Decision") that Appellant was in violation of the town's zoning ordinance.[12] The Decision, entitled "Notice of Violation" ("Violation Notice"), accused Appellant of offenses citing RSA 676:17 and advised that if Appellant wished to appeal the Decision to the Town's zoning board of adjustment, it must do so with seven (7) days from the receipt of the notice, citing the Amended Zoning Ordinance, Section 1005.2.[13] A violation of the zoning ordinance is a criminal act subject to civil penalties.[14] Although the Violation Notice is not, as Appellee reminds, "a Complaint," Hanover Br. at 21, an accusation under the zoning ordinance presupposes a criminal action.

2. The Zoning Administrator's Police Power to Enforce the Ordinance was Conferred by Section 1004 of the 2015 Ordinance

Although the Violation Notice charged Appellant with offenses encompassed within RSA 676:17, the Town now litigates against its own letter, insisting that "the Notice of Violation was not an action brought under [this] statute; it was a *notice* that if the *zoning violation were not cured*, the town would begin enforcement proceedings." Hanover Br. at 20. The Court should be aware that the only "cure" referenced in the Violation Notice was to cease *all use* of the property and vacate the premises. That is not a cure which would enable the continued usage to be brought in compliance with

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[12] *See* Violation Notice dated February 12, 2016. App. 55.
[13] *Id*. Section 1005 in the 2015 is now Section 201 in the current ordinance.
[14] RSA 676:17 provides that "[a]ny person who violates any provision of … any local ordinance … shall be guilty of a misdemeanor if a natural person or guilty of a **felony if any other person**; and shall be subject to a civil penalty of $275 for the first offense and $550 for subsequent offenses for each day that such violation is found to continue **after the conviction date or after the date on which the violator receives written notice from the municipality that the violator is in violation**, whichever is earlier."

the Ordinance.[15] The cure and the proposed fines for not curing were identical in nature in that they deprived the landowner of property. Even if Hanover's *post-facto* revisioning is accepted, *this notice* is inarguably an action intended to correct or abate any use that allegedly violates the ordinance.

The Zoning Administrator's power to enforce the ordinance pursuant to RSA 676:17 is conferred by the 2015 Hanover Zoning Ordinance Section 1004,[16] which states:

> **Section 1004 Enforcement and Penalty**
>
> 1004.1 This Ordinance shall be enforced by the Zoning Administrator, if any building or use of land is or is proposed to be erected, constructed, reconstructed, altered, converted, maintained, or used in violation of this Ordinance. The Zoning Administrator shall institute, in the name of the Town, ***any appropriate action***, injunction or other proceeding to prevent, restrain, correct or abate such construction or use or to prevent in or about the premises any act, conduct, business, or use constituting a violation.

RSA 676:5(II)(b) renders an administrative decision unappealable to the zoning board if it is a discretionary decision to commence formal or informal enforcement proceedings. "Enforcement" is defined as "making sure a rule or standard or court order or policy is properly followed."[17] The New Hampshire Municipal Association's *Guide to Effective Enforcement (2018)* describes the *appropriate actions* a zoning officer would take to effect both formal and informal enforcement:

> **I. Informal Enforcement**
>
> Assuming that the violation is not an emergency situation (i.e. something that poses an imminent threat to the public safety, health or welfare), the

[15] To avoid a facial challenge on unlawful delegation, Hanover argued against its own notice in the prior Supreme Court proceeding, alleging for the first time that there are "many ways" to meet the conjunction requirement. This Court agreed in *New Hampshire Alpha of SAE Tr. v. Town of Hanover*, 172 N.H. 69, 74 (2019). The Zoning Administrator did not give Appellant any opportunity to cure the alleged violation by allowing any other satisfaction of the "conjunction" requirement. Appellant's as-applied challenge was also brought against the Violation Notice, which was not ruled upon.

[16] Section 1004 in the 2015 Ordinance is now Section 201. Reply Br. App. 464.

[17] Black's Law Dictionary online: https://thelawdictionary.org/enforcement/.

> community should provide the landowner with at least one notice of the problem, in the form of a warning, and provide an opportunity to cure prior to assessing fines and threatening to file a lawsuit. ***This step is up to the discretion of the local official***, depending on the seriousness of the violation, and how likely the violator is to respond. It may include telephone calls, personal visits, etc.. . .. If informal discussions with the landowner do not solve the problem, the code enforcement official should send a written notice of warning, informing the landowner of the particular violation and what needs to be done to remedy the problem. . . .If the landowner, despite receiving a warning of the zoning violation, elects not to cure the problem and come into compliance, the community should then ***send a second notice that formally finds the landowner in violation of the ordinance, and assesses civil fines running from the date of the letter*** (remember that under RSA 676:17, I each day a violation continues is considered a separate offense and subject to a larger fine). Under RSA 676:17, I (b) the potential for a civil penalty begins to accrue "after the day on which the violator receives written notice from the municipality that he is in violation..." . . . Further, depending upon the court that the community chooses to utilize for prosecuting the lawsuit, this second letter can be captioned as a Cease and Desist order or Notice of Violation. [18]

Pursuant to Section 1004.1, as well as the Town's representation, the Violation Notice was sent with the goal of "preventing" any "act, conduct, business or use constituting a violation. The Violation Notice is an exercise of police power in an attempt to compel compliance through formal or informal actions.

3. Hanover's Argument That It is Not <u>Required</u> to Send a Written Notice Prior to Court Action Proves that the Violation Notice was a <u>Discretionary</u> Decision to Enforce

In *Simonsen*, the Derry Board of Selectmen wrote to the landowner ordering him to cease operating his campground and advising him that any operation of the campground after a certain date would be deemed a violation of the town's zoning ordinance. When the landowner sought to appeal this decision to the zoning board, this Court found that that the Selectmen's letter was enforcement, and thus determined that the zoning board had no jurisdiction to hear an appeal disputing the violation. *Simonsen*, 117 N.H. at 1013.

[18] *NHMA Guide to Effective Enforcement (2018)*. Reply App. 465, 471.

Here, with a substantially identical notice issued by Hanover's zoning officer demanding Appellant cease operating its property because such use has been deemed a violation of the town's zoning ordinance, the Town argues that "the Notice of Violation is not, in fact, a decision to commence enforcement proceedings," Hanover Br. at 17, but rather only a "a precursor to a prosecution of a zoning violation," Hanover Br. 31.

Hanover confuses a discretionary decision to commence formal or informal enforcement actions with prosecution in court, claiming enforcement had not commenced since "[n]o such Complaint has been filed against appellant in this case." Hanover Br. 21. Hanover further argues that a written notice is not enforcement because there is "no [statutory] requirement that any notice be given to the property owner prior to suit being filed." Hanover Br. at 19. Hanover again proves Appellant's point: sending such a notice is *discretionary* as contemplated by RSA 676:5(II)(b). In any event, an action *in court* could not have been what the legislature contemplated in the exclusory language of RSA 676:5(II)(b) since a criminal prosecution in court is never appealable to a zoning board. Hanover is not saved by incorrectly asserting that court action is the only "formal" enforcement for zoning violations contemplated by RSA 676:5(II)(b), since the legislature also excluded "informal" enforcement from the ZBA's jurisdiction. Examples of actions constituting "informal or formal" enforcement are illustrated in The New Hampshire Municipal Association's *Guide to Effective Enforcement.* The Violation Notice satisfies either category.

After briefing, this Court now has, on one hand, Hanover's hollow, unsupported declaratory statement: "the Notice of Violation is not, in fact, a decision to commence enforcement proceedings."[19] On the other: Appellant's presentation of a comprehensive and congruent statutory scheme that proves written violation notices to be enforcement.

This court should evaluate Appellant's and Hanover's competing arguments in the context of the overall statutory scheme and not in isolation. *Gordon v. Town of Rye*, 162 N.H. 144, 150 (2011). These include the reference to the written notice of violation in

[19] In lieu of citing to authority, Hanover uses the modifiers "clearly" 14 times, "there is no doubt" or "undoubtedly" five (5) times, and "unquestionably" two (2) times.

RSA 676:17-b(I); the reference to written notice of violation and administrative enforcement system in RSA 31:39-c(I); the description of a notice of violation as an enforcement tool within the New Hampshire Municipal Association's Guide to Enforcement of RSA 31:39-c; the reference to a written notice of violation as enforcement in RSA 674:33-a (II); and Hanover's adoption of the identical language of RSA 674:33(a)(II) within Section 211.2 of its own Ordinance. Because all of these statutes share a common purpose and relate to the same subject, they must be construed together as one law, regardless of whether they contain any reference to one another. *Appeal of Old Dutch Mustard Co., Inc*., 166 N.H. 501, 509–10 (2014). *See also Williams v. Babcock,* 121 N.H. 185, 190 (1981) (statutes in *pari materia* should be read as a part of a unified cohesive whole"). In this case, to view the Violation Notice as anything other than the decision to initiate informal or formal enforcement proceedings would frustrate the comprehensive and constitutional statutory scheme enacted by the State.

Beyond the statutes, the ZBA and all courts have viewed Hanover's actions to be in the manner of enforcement. Hanover's ZBA stated that its evaluation in the *Alpha Delta* case was in the manner of adjudicating a violation;[20] Hanover has consistently characterized Appellant's hearings as an adjudication of a violation and not an interpretation in its decisions;[21] the Superior Court believed that it was adjudicating a violation decision;[22] this Court believed that it had heard an appeal of a violation decision;[23] Hanover believed the remand from this Court was in the manner of a violation

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[20] But the special exception requirement **was not the basis for the Zoning Administrator's enforcement letter. . .**. App. 84.

[21] "**N.H. Alpha of SAE** . . . **appeals a decision of the Zoning Administrator** dated February 12, 2016 **that the continued use** of its property at 38 College Street as a 'student residence' **is in violation of the Zoning Ordinance**. App. 56..

[22] ….. administrative decision **finding that** SAE's **use** of its property at 38 College Street in Hanover **violated the Town zoning ordinance**. App. 237

[23] …upholding a **decision** by the Zoning Board of Adjustment (ZBA) for the defendant, Town of Hanover (Town), **that the use** of SAE's property at 38 College Street (the property) **violates the Town's zoning ordinance.** *See New Hampshire Alpha of SAE Tr.*, 172 N.H. at 69.

hearing;[24] and Hanover successfully argued that it is not precluded from enforcing against Appellant at present even though they had not done so against similarly-situated landowners in the past.[25]

A zoning officer who alleges a violation is engaging in an accusative and not interpretative act. The ZBA may not second-guess or undermine the officer's accusation, and the Town may not self-adjudicate its own police action.

F. The Courts are Vested with Exclusive Jurisdiction to Determine if a Landowner has Violated the Zoning Ordinance and are Equipped to Protect a Landowner's Right to Due Process

By statute, in order to obtain a finding that a landowner has violated a zoning ordinance, a municipality must commence an action either in the district court pursuant to RSA 502-A:11-a, or in the superior court. RSA 676:17, V since the courts are vested with exclusive jurisdiction to adjudicate zoning violations. *See* RSA 502-A:11-a. *Town of Amherst v. Gilroy*, 157 N.H. 275, 277 (2008); *Corpening*, 153 N.H. at 581.

The municipality bears the burden of proving that the violation exists, since the most basic requirement of due process is that the municipality must prove each element of a crime beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 364 (1970); *Jackson v. Virginia,* 443 U.S. 307, 309 (1979). The municipality may not shift its burden of proof to the defendant, *Francis v. Franklin,* 471 U.S. 307, 313 (1985), as the Due Process Clause ensures that "a defendant has no obligation to prove his innocence." *District Attorney's Office v. Osborne,* 557 U.S. 52, 87 n.5 (2009). This is true for zoning violations. "Criminal actions for zoning violations brought in the district court require that every element of the offense must be proved beyond a reasonable doubt."[26]

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[24] .. **AN APPEAL OF AN ADMINISTRATIVE DECISION THAT** RESIDENTAL **USE** OF 38 COLLEGE STREET . . .**IS IN VIOLATION OF HANOVER ZONING**. App. 95.

[25] *New Hampshire Alpha of SAE Tr*., 172 N.H. at 76.

[26] *See*, *Loughlin, Burden of Proof in Enforcement Actions, §7.20 Administrative Appeals. See also New Hampshire Bar Association Guide to District Court Enforcement of Local Ordinances and Codes at page 8 "It is recommended that all parties treat such violations as quasi-criminal in nature rather than civil, and that it should be assumed that the burden of proof required to be met is PROOF BEYOND A REASONABLE DOUBT."* Citing no authority, Hanover alleges the

G. The Town Usurped the Statutory Judicial Processes and Adjudicated Merits Whose Findings Could be Binding on Future Enforcement Actions

Hanover, through its zoning ordinance, asserts that its ZBA has the authority to decide zoning violations, requiring that landowners accused of zoning violations appeal the zoning officer's "decision" that "a violation exists" within seven (7) days of receipt of the notice of violation. By doing so, Hanover bypasses the court's adjudicative process. Hanover proclaims that the *failure to appeal* the notice of violation to the ZBA acts to waive a landowner's right *ever* to contest the violation.[27]

The Town's Ordinance distinguishes appeals of enforcement decisions from interpretative decisions which are entitled to a 15-days appeal period.[28] Thus, if the Zoning Administrator's Decision was one in which her interpretation of the terms of the Ordinance were implicated in the notice, Appellant would have had 15 days in which to file an appeal to the ZBA. However, since the "Decision" is that "a violation exists," Appellant's appeal period was truncated to only seven (7) days.[29] Hanover's Ordinance dispositively defines the Violation Notice as enforcement rather than interpretation by virtue of is election of the 7-, rather than 15-, day notice period.

Detrimentally relying on Hanover's instructions, Appellant appealed in the manner set forth in the Violation Notice and pleaded affirmative and factual defenses that Appellant *was not in violation* of the Ordinance, asserting, among other things, statutory, Constitutional, and common law defenses under both federal and state law.[30] The

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contrary, that it may convict through its own ZBA and then receive the extraordinary remedy of injunctive relief simply through a preponderance of its own evidence. Hanover Br. at 27.

[27] App. 74**.**

[28] *Id.* Section 1005.2(C)(1) of the Ordinance (now Section 206.5(D)) states: App. 98.

> "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. 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***."

[29] *Id.*

[30] *See* original ZBA Appeal and Memo of Law at App. 103-122 and App. 123. *See*, App. 127.

defenses brought against the violation notice were questions of law to which administrative remedies do not apply. *Metzger,* 115 N.H. at 290. Where facts lurked within the defense, they were those that a court would be specially suited to evaluate through sworn testimony, document authentication, and witness confrontation. The appeal second-guessed the discretion of the enforcement officer in bringing the enforcement action. It neither sought nor received an interpretation of the ordinance; instead; it was an attack on the violation notice itself. Citations to the word "interpretation" in the underlying appeal did not seek the abstracted clarification of a term in the ordinance without reference to how it may be later used.

And even if, *arguendo*, Appellant did seek a review of the Zoning Administrator's interpretation of a term in the ordinance, as the Town claims, the ZBA *sua sponte* converted it into an *adjudication* on the facts and law presented and found that the violation existed.[31] The rulings of the ZBA addressed matters never addressed or contemplated by the Zoning Administrator, strayed beyond any jurisdiction that even Hanover can claim to exist. As Loughlin explains, "[t]he jurisdiction vested in the board of adjustment to hear administrative appeals is an *appellate* jurisdiction, not original jurisdiction. Anderson points out, for example, that the board is without authority to render an advisory opinion concerning the meaning of a zoning regulation or its application to a particular set of circumstances, but has jurisdiction to interpret the zoning regulations upon appeal from an interpretation of the ordinance by the zoning officer."[32]

Adjudication is the legal process by which an arbiter or judge reviews evidence and argumentation, including legal reasoning set forth by opposing parties to come to a decision which determines the rights and obligations between the parties. The Town usurped the judicial processes required by statute and its ZBA acted as an "enforcement court" adjudicating the merits, as Hanover confirmed:

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[31] *See* Hanover Answer, ¶ 21: "The Zoning Board did conduct a hearing on petitioner's appeal, and made may findings of fact and law, as set forth in the July 18, 2016 decision." App. 231.
[32] Loughlin 22.02 referencing 4 P. Salkin, Anderson's American Law of Zoning 40:5 (5th ed).

> "Had the Petitioner chosen not to appeal the interpretation of the zoning ordinance, the town would have brought an enforcement action under RSA 676:15 and 17."[33]

And indeed, the sole function of the ZBA was to determine "if a violation exists," as its decision defined the appeal:

> "**N.H. Alpha of SAE** . . . **appeals a decision of the Zoning Administrator** dated February 12, 2016 **that the continued use** of its property at 38 College Street as a 'student residence' **is in violation of the Zoning Ordinance.**"[34]

On appeal, the Superior Court understood that the appeal was of the violation itself:

> "[s]pecifically, SAE appeals the ZBA's July 16, 2016 decision denying its administrative appeal of the Zoning Administrator's February 12, 2016 administrative decision **finding that** SAE's **use** of its property at 38 College Street in Hanover **violated the Town zoning ordinance** . . .."[35]

Even this Honorable Court recognized that that the appeal took the form of an enforcement action:

> LYNN, C.J. The plaintiff, New Hampshire Alpha of SAE Trust (SAE), appeals an order of the Superior Court (MacLeod, J.) upholding a **decision** by the Zoning Board of Adjustment (ZBA) for the defendant, Town of Hanover (Town), **that the use** of SAE's property at 38 College Street (the property) **violates the Town's zoning ordinance**.[36]

The Town's remand notice for the ZBA meeting on December 19, 2019 to determine "if SAE is an institution"[37] continued to define the dispute as an adjudication of a violation:

> CASE #38002-Z2019-20: SUPREME COURT **REMAND** OF CASE NO. Z2016, REHEARING OF CASE NO. Z2016-05, **AN APPEAL OF AN ADMINISTRATIVE DECISION THAT** RESIDENTAL **USE** OF 38 COLLEGE STREET . . . **IS IN VIOLATION OF HANOVER ZONING**.[38]

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[33] App. 270.
[34] App. 56.
[35] App. 237.
[36] *See New Hampshire Alpha of SAE Tr.*, 172 N.H. at 69.
[37] *Id*. at 76.
[38] App. 95.

Nowhere does the word "interpretation" appear. Hanover's Ordinance improperly empowers the ZBA to adjudicate zoning violations and determine criminal culpability[39] - *but without safeguards to which the accused are constitutionally entitled*. The ZBA did not take testimony under oath, did not authenticate documents, relied upon hearsay evidence, and precluded Appellant from confronting and cross examining its accusers.[40] The Town presented no evidence that the violation existed but rather required Appellant to prove its innocence.[41] Hanover admits that the ZBA's findings of fact, *entitled to deference by appellate courts pursuant to RSA 677*,[42] are intended to serve as part of the process of further prosecution seeking penalties or injunctive relief[43] where the existence of the violation is deemed *res judicata* and the ZBA's underlying findings may be used to deprive Appellant of liberty or property, precisely as happened in the *Alpha Delta* case immediately preceding the case at bar.[44] The facts establishing the violation are thus never heard, *de novo*, by a court. This is exceptionally important because even a landowner *convicted* in the district court of violating an ordinance is entitled to a *de novo*

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[39] The ZBA, believing its decision was a binding conviction, ordered penalties to attach: the ZBA voted "to DENY the appeal of the [landowner], *subject to the condition that fines for non-compliance not be levied until this Board's decision becomes final*." *See Alpha Delta* ZBA Decision, p. 6, June 4, 2015 at App. 85.

[40] *See* Hanover Answer at ¶¶ 22-26, App. 231-232.

[41] *Id.* at ¶¶ 27, 29, App. 232.

[42] The Superior Court refused to "gainsay" the contradictory evidence presented by Appellant and instead deferred to the ZBA's findings as prima facie lawful pursuant to RSA 677. See Decision at App. 243.

[43] Hanover intends to use the findings in future civil or criminal proceeding: "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." Hanover Br. at 29.

[44] The ZBA, believing its decision that the landowner violated the Ordinance was a binding conviction, ordered penalties to attach: the ZBA voted "to DENY the appeal of the [landowner], *subject to the condition that fines for non-compliance not be levied until this Board's decision becomes final*. *See* App. 85. On appeal, the Superior and Supreme Court treated the ZBA's factual findings as *prima facie* lawful pursuant to RSA 677:6 and affirmed that ZBA decision. When the appeals were exhausted, the Town successfully moved for injunctive relief and fines from the court pursuant to 676:15 using the affirmed ZBA decision, circumventing all constitutional protections. *See* Petition for Injunctive Relief and Fines, together with Court Decision. App. 87.

jury trial upon appeal to the Superior Court.[45] If a bench trial of an alleged zoning violation with full process at the district court offers a *de novo* jury trial on appeal, why should a ZBA enforcement hearing on the identical subject matter held with no due process protections be entitled to deferential treatment on appeal?

Applying the precedential United States Supreme Court decision *Jenkins v. McKeithen,* Hanover's process is unconstitutional, as it deprives Appellant of the "rights, privileges and immunities secured to them by the Constitution and laws of the United States" guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and the New Hampshire State Constitution at Part One, Articles 14, 20, 35 and 37, and Part Two, Article 4. *Jenkins v. McKeithen*, 395 U.S. 411, 419 (1969) (holding that a statute empowering an agency that engaged in trial-like processes to determine criminal law violations without affording traditional trial rights of cross-examination was unconstitutional).

Hanover responds that the ZBA's actions were not prosecutorial because the Town has not yet sought to impose civil fines, and then shamelessly declares "[t]here is no doubt that appellees have not brought this action to gain compliance with the zoning ordinance or to impose civil penalties." Hanover Br. at 29. This statement shocks and offends to the core. It begs the question: to what end and for what purpose has Hanover spent the past half-decade litigating against a taxpaying landowner and nearly driving it to extinction if not to "gain compliance with the zoning ordinance," which would be the *only* legal justification for any of its actions?

It is, however, no answer that the Town has not sought sanctions from Appellant; it is enough that the ZBA's actions will have a substantial impact on later proceedings, particularly where, as here, Hanover expects that its findings will be binding on future enforcement/penalty actions. *Jenkins*, 395 U.S. 424–25; *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407 (1942); cf. *NAACP v. Alabama*, 357 U.S. 449, 460—463 (1958).

[45] A concise summary of the present statutory scheme is found in Justice Broderick's dissent in *Corpening* 153 N.H. at 578.

To the extent that the Ordinance purports to give authority to the ZBA to act in an adjudicatory or accusatory function without procedural safeguards, it is unconstitutional. When an such agency's function finds landowners guilty of crimes – violating a land ordinance -- or makes similar determinations finally and directly affecting substantial personal interests, the due process clause requires the full panoply of procedural safeguards traditionally required in adjudicatory proceedings. *Id.* at 429. Fewer safeguards are required by the due process clause in hearings before purely *investigative* agencies or agencies conducting purely *investigative* hearings which was at issue in *Hannah v. Larche*, 363 U.S. 420 (1960). *Jenkins*, 395 U.S. 426 (distinguishing a fact-finding board that adjudicates from an investigative agency whose function is to inform future legislation).

Appellant's due process rights were implicated when it was accused of violating the Ordinance and the Town sought to deprive Appellant of the continued enjoyment of its vested land rights. *See* N.H. Constitution, Part I, Art. 15, U.S. Constitution, Amendment V. The trial court committed plain error when it found that due process rights are not implicated until such time that the Hanover seeks to introduce its "findings" to a court. This Court previously held that landowners enjoy due process rights even when only seeking *prospective relief* from a land use board. *Winslow v. Town of Holderness Planning Bd.*, 125 N.H. 262, 267 (1984). A landowner accused of a violation could not have less entitlement to due process protections than a landowner seeking a new permit. Hanover's use of the ZBA to evade due process for the purposes of stacking the deck with unassailable hometown "facts" and "findings" is repugnant to liberty, *ultra vires*, and violates the core foundations of the separation of powers between the executive and judicial branches of government. Hanover's claim that Appellant is not entitled to due process at the fact-finding stage simply because in "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***" defies comprehension: due process rights are meaningless if they are received after the conviction on the walk to the gallows.

II. THE TRIAL COURT DID NOT ERR IN DENYING HANOVER'S MOTION FOR ATTORNEYS' FEES

Hanover's cross-appeal, as posed in the second question of its brief, lacks the basic elements of a justiciable controversy and should be summarily dismissed. Hanover asks "Did the trial [sic] 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 subjected matter jurisdiction to hear the appellant's appeal?

Hanover did not prevail in its claim that this action was brought in bad faith. The trial court did not find that Appellant lacked a good faith legal or factual basis for its declaratory judgment request. In the absence of that finding, no claim for attorney's fees can be considered absent a contractual or statutory entitlement. Hanover did not appeal the trial court's decision not to find frivolity and did not raise it in its question. Hanover's claim is therefore both defective and waived.

Moreover, Hanover argues that Appellant has waived its present challenge by having appealed to the ZBA; indeed, it claims, Appellant should be sanctioned for even having raised jurisdiction at this juncture. Hanover is wrong. The principles of waiver, consent, and estoppel do not apply to jurisdictional issues; the actions of litigants cannot vest a court with jurisdiction beyond its limitations, even those of an attorney who was practicing land use for the first time under a seven-day deadline to appeal a Notice of Violation. The United States Supreme Court has held that subject-matter jurisdiction "is an Art. III as well as a statutory requirement; it functions as a restriction on federal power and contributes to the characterization of the federal sovereign. Certain legal consequences directly follow from this. For example, no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, *California v. LaRue*, 409 U. S. 109 (1972), principles of estoppel do not apply, *Am. Fire & Casualty Co. v. Finn*, 341 U. S. 6, 17-18 (1951), and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings." *Insurance Corp. of Ireland v. Compagnie des*

Bauxites de Guinee, 456 U.S. 694 (1982).

In federal court, the objection that a court lacks subject-matter jurisdiction may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment. *Arbaugh v. Y & H Corp*., 546 U.S. 500, 506 (2006); *see also Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.") This is equally true in New Hampshire and a litigant or the court can raise a defect in jurisdiction at any time, even after a court has entered judgment. *Gordon*, 162 N.H. 149–50; *Hemenway v. Hemenway,* 159 N.H. 680, 684 (2010).

> Hanover claims to be victimized for having been asked to prove the threshold prerequisite to any action: does the tribunal adjudicating the case have subject matter jurisdiction to hear it? - calling such a request "frivolous," "brought in bad faith," "negligence," "ignorance," and "deceit," and "in violation of Superior Court Rule 7 and Rule of Professional Conduct 3.1." However, proving subject matter jurisdiction is a minimal burden to Hanover's inexorable march to deprive Appellant of its right to enjoy its property. It is, after all, Hanover's burden.

Appellant cannot find a single case in which this Court has ever had the need to explicitly state the burdens and obligations of establishing subject matter jurisdiction. To the extent that the Court must do so now, Appellant submits that this Court has ample and well-established federal schemes for guidance and should adopt the federal approach that:

> "It is to be presumed that a cause lies outside limited jurisdiction, and the burden of establishing the contrary rests on the party asserting jurisdiction" *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted).

Hanover claims that it is entitled to fees because Appellant's present jurisdictional challenge is only intended to delay Hanover's enforcement.[46] Hanover is, ironically,

[46] "And for them [Appellant] at this point to attempt to stay these proceedings so that the students can continue to reside in that building in violation of the zoning ordinance is simply bad faith, frivolous, wanton and oppressive litigation that this Court should not sanction." App.273.]

blind to the irony of its statements. From one side of its mouth, the Town insists that no action taken in the prior five years has been in the manner of enforcement.[47] From the other side, the Town insists that its five years of enforcement have been stymied by this jurisdictional argument. Obviously, if the Town's actions are exclusively interpretive, no enforcement exists and Hanover is not harmed by any delay since it has always been free to bring an action to remedy any alleged violation *in court* pursuant to RSA 502:A-11(a). Alternatively, if the Town, by issuing and adjudicating the Violation Notice, was enforcing its Ordinance, Appellant prevails in this case. Hanover cannot have it both ways.

Hanover fails to state a claim upon which relief can be granted and its cross-appeal would not survive an old-fashioned demurrer. If, *arguendo*, Appellant's sole motivation was to delay loss of its property rights, the propriety of a jurisdictional challenge would still be completely appropriate at this juncture. Federal practice makes it clear that a party may invoke the court's jurisdiction, *even to avoid an adverse judgment*, to assert a challenge that a tribunal lacked jurisdiction. "Indeed, the independent establishment of subject matter jurisdiction is so important that a party ostensibly invoking federal jurisdiction may later challenge it as a means of avoiding an adverse result on the merits." 13 Wright & Miller, *Federal Practice and Procedure* § 3522, pp. 122–23 (2020).

But delay is not the motive, as this case is not frivolous, flawed, or erroneous. This may be the first challenge in 43 years to a zoning board's authority to adjudicate alleged zoning violations, but that may have more to do with the fact that municipalities are barred from adjudicating zoning violations in front of their own lay boards. A town like Hanover might find it an attractive proposition to be the prosecutor, judge, jury, and executioner in the enforcement of its Ordinance, but that is not the New Hampshire way. Appellant provided incontrovertible authority to prove that a Violation Notice is consistently characterized as enforcement, including numerous relevant New Hampshire

[47] "The prior proceedings were not an enforcement by the Town of Hanover," App 270, and "There is no doubt that appellees have not brought this action to gain compliance with the zoning ordinance or to impose civil penalties." Hanover Br. at 29.

statutes *in pari materia*, *see App. Br.*, section (B)(1), *Town of Derry v. Simonsen*, Loughlin's *New Hampshire Practice Land Use and Zoning*; New Hampshire Bar Association's *Guide to District Court Enforcement of Local Ordinances and Codes* ("NHBA Guide"); even Hanover's Amended Zoning Ordinance. The trial court found Appellant's claims were not improper when it issued a 10-page ruling addressing Appellant's claims. Although not the decision that Appellant wanted, there is no finding of frivolity or vexatiousness. To the contrary, the trial court simply ruled that it was not "persuaded" by Appellant's arguments. When reviewing a denial of attorney's fees, this Court provides tremendous deference to the trial court, and will sustain that court's decision unless the judge's discretion was clearly untenable or clearly prejudicial. *Glick v. Naess*, 143 N.H. 172, 175 (1998). The trial court's denial of fees was correct and no prejudice was suffered by Hanover.

Throughout its brief, the Town protests Appellant's "elaborate web of statutes, constitutional provisions, decisions of other zoning boards of adjustment, guidance documents, out of state decisions" Hanover. Br. at 16. The elaborate "web" that has ensnared Hanover *is* nothing less than the laws of the State of New Hampshire and its relevant jurisprudence. Beyond protestations, however, Hanover has no response. Besides authoritative-sounding *ipse dixit* pronouncements, confidence-laced conclusory sentences, and the gratuitous *ad hominem* attacks on Appellant's counsel's incompetence and bad manners, the Town does not offer *a single authority* to prove its case. That for which she condemns another is often an indictment of self.

CONCLUSION

The Laws of 1989, ch. 69, added 676:5(II)(b) and codified *Simonsen by* expressly removing discretionary decisions concerning enforcement from the purview of the ZBA. Hanover's Notice of Violation, whether formal or informal in nature, was a discretionary decision to commence enforcement and not a "decision of the administrative officer" that is appealable to the zoning board. In issuing the Notice of Zoning Violation, the zoning officer engaged in accusation, not interpretation. A zoning board's determination that a violation exists is similarly not "interpretive" but impermissibly accusatory and beyond the scope of its limited jurisdiction.

For the reasons stated in this brief, Appellant respectfully requests that this Honorable Court reverse the Superior Court's decision, find that the ZBA lacked subject matter jurisdiction to adjudicate the merits of the Violation Notice and void the ZBA's actions *ab initio*.

For the reasons stated above, and as already found by the trial court, Appellant's challenge to the ZBA's subject matter jurisdiction is not frivolous, and Appellee possesses no entitlement to its attorneys' fees for having been asked to prove its subject matter jurisdiction. Appellant respectfully requests that this Honorable Court affirm the trial court's denial of Hanover's attorney's fees.

CERTIFICATIONS

The undersigned certifies that the foregoing Reply Brief conforms with Supreme Court Rule 26(2), (3), and (4).

The undersigned certifies that the foregoing brief conforms with Supreme Court Rule 16(11) and contains 9289 words.

The undersigned certifies that this appeal has been served on opposing counsel.

REQUEST FOR ORAL ARGUMENT

The Appellant respectfully requests 15 minutes of oral argument to be presented by Carolyn Cole.

Respectfully submitted,

NH ALPHA OF SAE TRUST
APPELLANT

By its Attorneys,
COLE ASSOCIATES CIVIL LAW, PLLC

Dated: August 10, 2020

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