

**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**

**BRIEF OF APPELLANT, NH ALPHA OF SAE TRUST**

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**Oral Argument to be presented  
by:**

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Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Constitution, Amendment V .....16, 22, 37, 38, 40, 41

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 .....16, 22, 37, 38, 40, 41

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 .....16, 22, 37, 38, 40, 41

**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 .....16, 22, 37, 38, 40, 41, 44

**[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 .....16, 22, 38, 44

**[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 .....16, 22, 38, 44

**[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 .....16, 22, 38, 44

**[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 .....16, 22, 38, 44

**[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 .....16, 22, 38, 44

**[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, complaints, actions, 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 .....28

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 491:7 .....17, 36, 43, 44

491:7 Jurisdiction. –

The superior court shall take cognizance of civil actions and pleas, real, personal, and mixed, according to the course of the common law, except such actions as are required to be brought in the family division under RSA 490-D, district courts under RSA 502-A, or the probate courts under RSA 547; of writs of mandamus and quo warranto and of proceedings in relation thereto; of petition and appeals relating to highways and property taken therefor and for other public use; of actions commenced in the probate or district courts where a right to jury trial is guaranteed by the constitution; of actions commenced in a district court which are transferable by statute to the superior court; of suits in equity under RSA 498:1; of petitions for new trials; of petitions for the redemption and foreclosure of mortgages; of all other proceedings and matters to be entered in, or heard at, said court by special provisions of law; and of all other proceedings and matters cognizable therein for which other special provision is not made.

NH RSA 502-A:11-a.....17, 25, 28, 36, 37, 43, 44

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 673:1, IV .....25

673:1, IV Establishment of Local Land Use Boards. –

Every zoning ordinance adopted by a local legislative body shall include provisions for the establishment of a zoning board of adjustment. Members of the zoning board of adjustment shall be either elected or appointed, subject to the provisions of RSA 673:3.

NH RSA 674:16 .....25

674:16 Grant of Power. –

For the purpose of promoting the health, safety, or the general welfare of the community, the local legislative body of any city, town, or county in which there are located unincorporated towns or unorganized places is authorized to adopt or amend a zoning ordinance under the ordinance enactment procedures of RSA 675:2-5.

NH RSA 674:33, I(a)(1) .....21, 25, 26

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-a, II .....29

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, 20, 21, 24, 25, 35, 36, 42, 43

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 .....38, 42

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.

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 .....28, 43

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 .....17, 42

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.

PENNSYLVANIA STATUTE: 53 P.S. § 10909.1 .....37

53 P.S. § 10909.1 Jurisdiction. –

- (a) The zoning hearing board shall have exclusive jurisdiction to hear and render final adjudications in the following matters:
  - (1) Substantive challenges to the validity of any land use ordinance, except those brought before the governing body pursuant to sections 609.1 and 916.1(a)(2). 1
  - (2) Deleted by 2008, July 4, P.L. 319, No. 39, § 3, imd. effective.
  - (3) Appeals from the determination of the zoning officer, including, but not limited to, the granting or denial of any permit, or failure to act on the application therefor, the issuance of any cease and desist order or the registration or refusal to register any nonconforming use, structure or lot.

**TABLE AND TEXT OF HANOVER ORDINANCES**

Article II, Section 211.2.....29

**211.2 Equitable Waivers**

211.2 In lieu of the findings required by the Zoning Board of Adjustment under subparagraphs 211.1 A and B, the owner may demonstrate to the satisfaction of the Board that the violation has existed for ten 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.

Article X, Section 1005.2(c)(1) (*now Section 206.5(D)*) .....19, 26, 32, 37, 43

**Article X, Section 1005.2(c)(1) of the 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*.

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Superior Court erred when it determined that the Zoning Board of Adjustment had subject matter jurisdiction to hear the appeal of the “Notice of Zoning Violation” and to hear and adjudicate the existence of a zoning violation when the legislature conferred exclusive original jurisdiction on the courts. App. 20-22, 38-48, 53, 253-260.
2. Whether the Superior Court erred in failing to rule that the Zoning Board exceeded its subject matter jurisdiction. App. 20-22, 38-48, 53, 253-260.
3. Whether the Superior Court erred when it ruled that the Violation Notice was not enforcement. App. 43-49, 53, 265-267.
4. Whether the Superior Court erred in ruling that Appellant, accused by municipal government of violating local ordinances, does not have interests in substantive and procedural due process in the adjudication of those allegations, where the consequences of an adverse ruling could result in criminal or civil liability. App. 49-50, 53.
5. Whether the Superior Court’s ruling on the matters of subject matter jurisdiction and due process frustrates a clear and unambiguous statutory scheme, offends public policy, and violates the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and the New Hampshire State Constitution at Part One, Articles 14, 15, 20, 35 and 37, and Part Two, Article 4 by, *inter alia*, placing the burden on the Appellant to prove its innocence, prohibiting the swearing in of witnesses and cross-examination, and not following evidentiary rules. App. 23, 42, 50-52, 53.



## STATEMENT OF THE CASE

The February 12, 2016 “Notice of Violation” (“Violation Notice”) issued from the Town of Hanover (“Hanover” or “the Town”) to New Hampshire Alpha of SAE Trust (“Appellant”) was a discretionary decision to commence informal or formal enforcement proceedings. The letter accused Appellant of violating the law, ordered it to cease activity, and threatened fines pursuant to RSA 676:17. It is not an “administrative decision” as that term is defined under RSA 676:5(2)(B), and the Hanover Zoning Board of Adjustment (“ZBA”) had no subject matter jurisdiction to adjudicate the merits of the Violation Notice.

Pursuant to RSA 676:17(V), enforcement of alleged violations is through the court system. The Superior Court maintains original jurisdiction over these alleged offenses via its general grant of authority in RSA 491:7 and the District Court has concurrent original jurisdiction via its explicit grant of authority in RSA 502-A:11-a(III). When adjudicating alleged offenses, the municipality has the burden of proof in each and every element of the claimed violation. The landowner does not have to demonstrate its innocence.

Hanover inverts the process with its Amended Zoning Ordinance, which it applied to the instant matter. Hanover’s ZBA tries alleged violations, presumes accused landowners to be guilty, and requires them to prove violations do not exist. Without constitutionally-mandated processes or protections, the ZBA adjudicates matters of statute, constitutional law, and issues findings of fact. Hanover then uses RSA 677:6 improperly by asking courts to assign a presumption of *prima facie* lawfulness to affirm its own decisions, utilizing affirmed decisions on a *res judicata* basis as the predicate for injunctive relief and civil and criminal penalties. Hanover’s inverted framework usurps judicial authority, violates New Hampshire law, violates the state and federal constitutions, and is repugnant to liberty and common sense. The consequences that flow from such actions are sufficient for Appellant to meet the requirement that it suffer a legally redressable injury.

Subject matter jurisdiction must be established as a threshold matter, inflexibly and without exception. Thus, if the Court determines that subject matter jurisdiction does

not exist, it must dismiss the case and void all determinations made by the ZBA *ab initio*.

Appellant requests that this Honorable Court reverse the ruling of the Superior Court, find that the ZBA had no subject matter jurisdiction to adjudicate the merits of the alleged violation, and void *ab initio* all rulings in this case. In the alternative, Appellant requests that the Superior Court's ruling be vacated and remanded to the Superior Court for all matters outside of the ZBA's jurisdiction to be individually identified and voided.

## STATEMENT OF THE FACTS

Appellant owns real property located at 38 College Street in Hanover (the “Property”).<sup>1</sup> On February 16, 2016, Hanover’s Zoning Administrator issued a “Notice of Zoning Violation” (“Violation Notice”) alleging that it was in violation of the Hanover Zoning Ordinance (the “Ordinance”) and advised that “continued occupancy of the property after March 15, 2016 *will subject* it to fines in the amount of \$275 per day each day the violation continues [pursuant to] RSA 676:17.”<sup>2</sup> The Violation Notice stated “this is Administrative Decision which you have the right to appeal to the Zoning Board of Adjustment. Should you wish to appeal, you have seven (7) days from the date of the receipt of this Notice of Violation to file an appeal,” citing the Amended Zoning Ordinance, Section 1005.2].<sup>3</sup> The seven-day deadline is, according to the Ordinance, the deadline for appealing “decisions that a violation exists,” and therefore confirmation that an enforcement action has started.

Relying on these instructions, Appellant appealed in the manner set forth in the 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.<sup>4</sup>

The ZBA provided none of the due process safeguards to which the accused is Constitutionally entitled: no testimony was under oath, no documents were authenticated, hearsay evidence was relied upon, and Appellant was precluded from cross

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<sup>1</sup> See *New Hampshire Alpha of SAE Tr. v. Town of Hanover*, 172 N.H. 69, 71 (2019).

<sup>2</sup> See Violation Notice (emphasis added) dated February 12, 2016. App. 55.

<sup>3</sup> *Id.* Section 1005.2(C)(1) of the Ordinance (now Section 206.5(D)) states:

“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.*” See App. 96-102.

<sup>4</sup> See original ZBA Appeal and Memo of Law at App. 103-122 and App. 123. See, in particular, App. 127.

examining and confronting accusers and witnesses.<sup>5</sup> The ZBA required Appellant to prove its innocence and it adjudicated both facts and legal issues as wide-ranging as an unconstitutional taking, selective enforcement, equal protection, administrative law, and other matters of Constitutional and statutory defenses.<sup>6</sup> The ZBA upheld the Violation Notice, denied the appeal, and thereby determined that the Appellant violated the Ordinance.<sup>7</sup>

Appellant, unaware that the ZBA had no *original* jurisdiction, appealed the ZBA's decision to the Superior Court. The Superior Court deferred to the ZBA's findings of fact.<sup>8</sup> The Superior Court provided no *de novo* review of any interpretation, and upheld the ZBA's decision on Appellant's statutory, Constitutional, and common law claims.<sup>9</sup>

The Supreme Court upheld the trial court's order in part, vacated the ZBA's ruling in part and remanded the case back to the ZBA.<sup>10</sup> The Town's remand notice demonstrates the Town's belief that the only issue before the ZBA is whether the Appellant is in violation of the ordinance:

CASE #38002-Z2019-20: SUPREME COURT REMAND OF CASE NO. Z2016, REHEARING OF CASE NO. Z2016-05, **AN APPEAL OF AN ADMINISTRATIVE DECISION THAT RESIDENTIAL USE OF 38 COLLEGE STREET (TAX MAP 38, LOT 2, IN THE "I" INSTITUTION ZONING DISTRICT) IS IN VIOLATION OF HANOVER ZONING.**<sup>11</sup>

Appellant sought a declaratory judgment from the Superior Court that the ZBA lacked subject matter jurisdiction to adjudicate the merits of the Violation Notice because

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<sup>5</sup> Hanover admits that the ZBA does not take testimony under oath, does not authenticate documents, relies upon hearsay, and precludes landowners from confronting their accusers. Rather, the Town's process prosecutes without presenting evidence and requires a landowner to prove its innocence. *See*, Hanover Answer ¶¶ 22-29, App. 231-232.

<sup>6</sup> *Id.* at ¶¶ 21, 27.

<sup>7</sup> **"N.H. Alpha of SAE Appellant (the "appellant") 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."** *See* ZBA Decision dated July 18, 2016 at App. 61.

<sup>8</sup> *See*, Superior Court Order at App. 237, 241.

<sup>9</sup> *Id.* App. 237 *et seq.*

<sup>10</sup> The remand question is presently on appeal at the Superior Court and is not at issue in this instant proceeding. *See*, *New Hampshire Alpha of SAE Tr.*, 172 N.H. 69.

<sup>11</sup> App. 95. [Emphasis added.]

it was the appeal of the Zoning Administrator's discretionary decision to commence enforcement proceedings and therefore any appeal therefrom may not be heard by the ZBA pursuant to RSA 676:5(II). The Superior Court rejected this argument, ruling that:

**“The court is not persuaded, however, that a notice of violation is part of any enforcement action, whether formal or informal. . . . [t]he zoning administrator’s notice did not. . . order the plaintiff to take or avoid any actions, and it did not impose any kind of a 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 formal or informal enforcement proceedings, but was instead a decision involving the zoning administrator’s interpretation and application of the terms of the zoning ordinance. As such, the court rules that the ZBA had jurisdiction to review the Notice pursuant to RSA 674:33,I(a)(1) and 676:5,I.<sup>12</sup>**

The trial court further held that the Town’s procedures did not concern a legally protected due process interest of the Appellant and, therefore, Appellant was not deprived of any ascertainable interest protected by law.<sup>13</sup>

This Appeal follows.

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<sup>12</sup> Superior Court Order [Emphasis added.] App. 8-9.

<sup>13</sup> *Id.* App. 12.

## SUMMARY OF THE ARGUMENT

The Superior Court erred when it determined that the ZBA had subject matter jurisdiction to hear the appeal of the Violation Notice and to adjudicate the existence of a zoning violation, as the legislature conferred exclusive original jurisdiction on the courts to adjudicate alleged violations of local ordinances.

The Superior Court erred when it ruled that the Violation Notice was not formal or informal enforcement, as a violation notice is explicitly characterized as enforcement by all relevant New Hampshire statutes, the Supreme Court precedent of *Town of Derry v. Simonsen*, Loughlin's *New Hampshire Practice Land Use and Zoning*, the New Hampshire Bar Association's *Guide to District Court Enforcement of Local Ordinances and Codes*, as well as the Town's Zoning Ordinance and the ZBA itself. The Town is judicially estopped from denying that the Violation Notice is enforcement, given that the Town defeated Appellant's selective enforcement claim in the prior case arguing it was free to enforce against Appellant even though it had not enforced against others.

The Superior Court's rulings on the matters of subject matter jurisdiction and due process constitute plain error, frustrate a clear and unambiguous statutory scheme, offend public policy, and violate the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and the New Hampshire State Constitution at Part One, Articles 14, 15, 20, 35 and 37, and Part Two, Article 4 by, *inter alia*, usurping judicial authority, placing the burden on the Appellant to prove its innocence, prohibiting the swearing in of witnesses and cross-examination, and not following evidentiary rules.

The Superior Court erred in ruling that Appellant, accused by municipal government of violating local ordinances, does not have a substantive or procedural due process interest in the adjudication of those allegations, where the consequences of an adverse ruling could result in criminal or civil liability, and/or forfeiture of property rights.

This Court should determine, as a threshold matter, that the ZBA did not have subject matter jurisdiction and then dismiss the case and void *ab initio* all determinations on the merits made by the ZBA.

## STANDARD OF REVIEW

A party may challenge subject matter jurisdiction at any time during the proceeding, including on appeal, and may not waive subject matter jurisdiction. *Gordon v. Town of Rye*, 162 N.H. 144, 149–50 (2011) citing *In the Matter of Gray & Gray*, 160 N.H. 62, 65 (2010). Jurisdiction over the subject matter of a controversy cannot be acquired by agreement of the parties. *Id.* Absent subject matter jurisdiction, a tribunal's order is void. *Id.*, citing *Hemenway v. Hemenway*, 159 N.H. 680, 684 (2010). Furthermore, when the objection goes to the jurisdiction of the original tribunal over the subject matter, the judgment is void, and *the appellate tribunal acquires no jurisdiction of the merits upon appeal.* *Daine v. Daine* 157 N.H. 426, 428 (2008). The Supreme Court “review[s], *de novo*, whether the trial Court in this case had subject matter jurisdiction.” *In re Ball & Ball*, 168 N.H. 133, 140 (2015). Constitutional issues are questions of law that are reviewed *de novo.* *Berthiaume v. McCormack*, 153 N.H. 239, 244 (2006).

## ARGUMENT

### **I. THE ZBA DOES NOT HAVE SUBJECT MATTER JURISDICTION TO HEAR AND ADJUDICATE THE MERITS OF A VIOLATION NOTICE**

Zoning 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 these matters.<sup>14</sup> Hanover, however, *requires* landowners to contest a violation notice before its ZBA without due process protections.<sup>15</sup> This scheme violates state law, frustrates an unambiguous regulatory scheme, and improperly and unconstitutionally places the burden of proof on the landowner to prove its innocence to avoid civil or criminal penalties.

The Town interprets RSA 676:5 to empower zoning boards to hear appeals of zoning violations. Indeed, it proclaims that the *failure to appeal* the notice of violation to the ZBA acts to waive the landowner's right *ever* to contest the violation.<sup>16</sup> However, this Court recently held that State agencies, “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). “Even a long-standing administrative interpretation of a statute is irrelevant if that interpretation clearly conflicts with express statutory language.” *Id.* [emphasis added]. “Agency regulations that contradict the terms of a governing statute exceed the agency’s authority.” *Id.*, *citing Appeal of Gallant*, 125 N.H. 832, 834 (1984).

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<sup>14</sup> For instance, the Hollis zoning board of adjustment refused to hear the appeal of violation notice issued to the Montessori School because it did not have subject matter jurisdiction to hear the appeal. App. 70. *See also*, Decision of the Wilton ZBA stating that the ZBA has no enforcement authority and *may not* review a decision of a zoning administrator relative to state law (or the constitution). App. 71. *See, also Simonsen*, 117 N.H. 1010. (Derry zoning board refused to hear appeal of zoning violation).

<sup>15</sup> Hanover admits that the ZBA does not take testimony under oath, does not authenticate documents, relies upon hearsay and precludes landowners from confronting their accusers. Rather, the Town’s process allows it to prosecute without presenting evidence and requires a landowner to prove its innocence. *See*, Hanover Answer ¶¶ 22-29. App. 231-232.

<sup>16</sup> App. 74.



Like state agencies, municipalities are subdivisions of the State with only such authorities as granted to them by statute.

The ZBA does not have, and has never had, subject matter jurisdiction to hear and adjudicate whether Appellant is violating the Ordinance.

**A. THE LEGISLATURE DID NOT CONFER SUBJECT MATTER JURISDICTION UPON ZONING BOARDS TO HEAR APPEALS FROM A ZONING ADMINISTRATOR’S DISCRETIONARY DECISION TO COMMENCE FORMAL OR INFORMAL ENFORCEMENT PROCEEDINGS**

Zoning boards of adjustment are created by statute, *see* RSA 673:1, IV, and a zoning board’s power must be expressly conferred upon it by statute or are necessarily implied by those statutory grants. *Dembiec v. Town of Holderness*, 167 N.H. 130, 135 (2014). *See Town of Rye*, 162 N.H. at 151–52. Zoning boards are not authorized to exercise “judicial power,” including the adjudication of alleged zoning violations, unless explicitly granted by statute. *Dembiec*, 167 N.H. at 133.

The powers and jurisdiction of zoning boards are conferred by RSA 674:16, 674:33, and most relevant, RSA 676:5, which states

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 ...by any decision of the administrative officer. . . .

II. (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. (emphasis added)

Once a municipality alleges that a landowner has violated an ordinance and seeks to force compliance through injunctions and civil penalties, the enforcement procedure is statutory: pursuant to RSA 676:17(V), it “may commence an action . . . either in the district court pursuant to RSA 502-A:11-a, or in the superior court.” Landowners accused of land use violations are entitled to the due process from a court of law. *Town of Nottingham v. Newman*, 147 N.H. 131, 134–35 (2001).

Hanover circumvents that statutory process. Section 1005.2(C)(1) of the Ordinance requires landowners who wish to dispute the Zoning Administrator's decision to issue a violation notice to appeal directly to the ZBA to determine if the violation exists, stating:<sup>17</sup>

**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.***

The plain language of the pertinent statutes does not confer subject matter jurisdiction upon a zoning board to adjudicate the merits of a zoning violation. Original jurisdiction to adjudicate zoning violations resides within the courts. By contrast, the jurisdiction vested in a board of adjustment to hear administrative appeals is an appellate jurisdiction, not original jurisdiction, and a zoning board has no statutory power to issue findings on the merits after the commencement of an enforcement proceeding.<sup>18</sup> “Once the selectmen or other officials have commenced enforcement proceedings, that enforcement is not appealable to the ZBA, although the landowner could, under certain circumstances, seek a determination from the ZBA of the terms of the ordinance implicated in the enforcement action.”<sup>19</sup> On taking an appeal from a decision of the zoning administrator, the ZBA takes on all of the powers of the zoning administrator, but no more (RSA 674:33). Accordingly, no landowner must appeal to zoning boards to rule on subjects that are beyond the board's authority or ordinary competence. *Dembiec*, 167 N.H. at 133, *citing McNamara v. Hersh*, 157 N.H. 72, 74 (2008).

The Superior Court correctly identified the focal issue to determine whether the ZBA has subject matter jurisdiction to hear the instant appeal. “It all boils down to” whether the Violation Notice was a tool of enforcement, in which case the ZBA would

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<sup>17</sup> Section 1005.2(C)(1) is now Section 206.5(D) of the most current Ordinance. *See* <https://www.hanovernh.org/sites/hanovernh/files/uploads/2019-zo.pdf> and App. 96-102.

<sup>18</sup> *See, Loughlin, 15 New Hampshire Practice: Land Use Planning and Zoning, Ch. 22, Powers of ZBA, §22.02 Administrative Appeals (LexisNexis Matthew Bender) (Fourth Edition).*

<sup>19</sup> *Id.*, *citing Town of Derry v. Simonsen, infra.*

lack jurisdiction, or an act of interpretation.<sup>20</sup> Because the Violation Notice is a tool of enforcement, the ZBA has no jurisdiction.

**B. THE TOWN COMMENCED INFORMAL OR FORMAL ENFORCEMENT PROCEEDINGS THROUGH THE ISSUANCE OF THE VIOLATION NOTICE.**

Black’s Law Dictionary Online defines “Interpretation” as “[t]he art or process of discovering and expounding the intended signification of the language used in a statute.”<sup>21</sup> “Enforcement” is defined as “making sure a rule or standard or court order or policy is properly followed.”<sup>22</sup> The Violation Notice advised that “continued occupancy of the property after March 15, 2016 *will subject* [the landowner] ... to fines in the amount of \$275 per day each day the violation continues [pursuant to] RSA 676:17.<sup>23</sup> The plain language of the Violation Notice defines it as an unambiguous exercise of police power in an attempt to compel compliance. The trial court, however, was not “persuaded [ ] that a notice of violation is part of any enforcement action, whether formal or informal.” This holding is the fundamental error of law that warrants reversal.

Reading all relevant New Hampshire statutes *in pari materia*, a Violation Notice is consistently characterized as enforcement *See infra*, section (B)(1). *See also 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”); and Hanover’s Amended Zoning Ordinance. Furthermore, at all relevant times prior to Appellant’s jurisdictional claim, the Town characterized the action as enforcement.

**1. Relevant Statutes Define a Violation Notice as Enforcement**

This Court is the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole. *Gordon*, 162 N.H. at 150. When examining the

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<sup>20</sup> “[I]s it a notice, or an actual charge, really. . . isn't what this all boils down to?” Transcript, line 7-8. App. 262.

<sup>21</sup> Black’s law dictionary online: <https://thelawdictionary.org/interpretation/>

<sup>22</sup> Black’s Law Dictionary online: <https://thelawdictionary.org/enforcement/>

<sup>23</sup> *See* Violation Notice dated February 12, 2016, App. 55.

language of a statute, the Court interprets a statute in the context of the overall statutory scheme and not in isolation. *Id.* When viewed individually and in the aggregate scheme, the legislature defines a violation notice as a tool of enforcement.

**a. RSA 676:17-b**

Violation notices are a condition precedent to the service of a land use citation in front of the district courts as set forth in RSA 676:17-b (I) (“***Enforcement Procedures***”):

“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.**

The discretionary decision of the Zoning Administrator to issue the Violation Notice satisfies the notice requirement of RSA 676-17-b and commences enforcement proceedings pursuant to RSA 676:17(V) and RSA 502-A:11-a.

**b. RSA 31:39-c Administrative Enforcement of Ordinances**

RSA 39:31-c (I) defines the Notice of Violation as enforcement:

“Notwithstanding any other provision of law, **a town may use the following provisions in the enforcement of its ordinances and regulations: . . .**

**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.”**

The New Hampshire Municipal Association’s *Guide to Effective Enforcement (2018)* advises municipalities of the significance of RSA 31:39-c, stating

“Importantly, ***this enforcement tool*** cannot be utilized until it is first adopted by the local legislative body at town meeting. Once adopted, this system allows for what would hopefully be a fairly straightforward enforcement action where it is believed the violator will concede the violation and pay the requisite fine. **Indeed, many municipalities already use this tool without realizing it as they will send a landowner a letter captioned “notice of violation” or similar title, and in that letter the municipality will explain the violation(s) and assess a monetary**

**penalty, and also warn that failure to cure the violation and pay the penalty will result in formal legal action.** <sup>24</sup>

**c. RSA 674:33-a**

RSA 674:33-a defines these notices to be enforcement:

**674:33-a 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. (Emphasis added.)

Hanover mimics the language of RSA 674:33-a in its Ordinance:

**“211.2** In lieu of the findings required by the Zoning Board of Adjustment under subparagraphs 211.1 A and B, the owner may demonstrate to the satisfaction of the Board that the violation has existed for ten 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.”<sup>25</sup>

Because all statutes noted above 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. “We construe statutes, where reasonably possible, so that they lead to reasonable results and do not contradict each other.” *Appeal of Old Dutch Mustard Co., Inc.*, 166 N.H. 501, 509–10 (2014) citing *Grant v. Town of Barrington*, 156 N.H. 807, 812 (2008). 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”); *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990). In this case, to view the Violation Notice as anything other than the decision to initiate informal or formal enforcement would be to contradict every statute on this issue.

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<sup>24</sup> *NHMA Guide to Effective Enforcement (2018)*. App. 278, 281.

<sup>25</sup> See, Town of Hanover Amended Zoning Ordinance at 211.2, App. 282-284.

## 2. Supreme Court Precedent Defines a Violation Notice as Enforcement

In *Town of Derry v. Simonsen*,<sup>26</sup> the landowner was issued a violation notice alleging that operation of his campground after a certain date would be deemed a violation of the zoning ordinance. Simonsen appealed the violation notice to the Town's zoning board, but the zoning board refused to hear the appeal and did not take any action. When the landowner did not comply, Derry sought to enforce the violation notice in court. The landowner objected to the court's jurisdiction, arguing that he had appealed the matter to the zoning board, the identical process Hanover now imposes. This Court disagreed, holding that a zoning board lacked subject matter jurisdiction to hear an appeal where the landowner had been issued a notice of violation. *Simonsen* is still good law, and Appellant respectfully requests that this Honorable Court apply its precedent to the instant matter.

## 3. New Hampshire Bar Association's *Guide to District Court Enforcement of Local Ordinances and Codes* defines a Written Notice of Violation as Enforcement.

The New Hampshire Bar Association's *Guide to District Court Enforcement of Local Ordinances and Codes* (the "Guide") instructs municipalities on how to enforce their local zoning ordinances:

"Step 4 - **The Formal Notice of Violation**. Under RSA 676:17, I(b) the potential for a \$275.00 per day civil penalty begins to accrue "after the day on which the violator receives written notice from the municipality that he is in violation..." **This notice is therefore the first step of formal enforcement**, and should be sent by registered mail, so that the prosecuting official can prove in court that it was received."<sup>27</sup>

As seen above, the discretionary decision of the Zoning Administrator to issue the formal notice of violation is the first step in the prosecution of formal enforcement

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<sup>26</sup> *Town of Derry v. Simonsen*, 117 N.H. 1010 (1977).

<sup>27</sup> See page 4, <https://www.nh.gov/osi/resource-library/laws-rules-cases/documents/2001-nhba-district-court-enforcement-guide.pdf> and App. 285-286.

against a landowner accused of violating the zoning ordinance, and therefore that decision is not appealable to the ZBA.

#### 4. The ZBA Considers Violation Notices to be Enforcement Actions

On April 23, 2015, after Dartmouth de-recognized the Alpha Delta fraternity, the Zoning Administrator issued a "Zoning Violation Notice" to that landowner stating that occupancy of the Property violated the Ordinance and "must cease immediately." The landowner appealed the violation to the ZBA, which found the landowner "not in compliance,"<sup>28</sup> which understood that it was adjudicating an enforcement action:

8. We assume, without deciding, that Alpha Delta would be considered 'grandfathered' from the requirement of getting a special exception..... But the special exception requirement **was not the basis for the Zoning Administrator's enforcement letter**, and is not now before us.<sup>29</sup>

Similarly, in the Appellant's 2016 case, the ZBA issued its ruling upholding the Zoning Administrator's Violation Notice by adjudicating facts and the legal issues as wide-ranging as unconstitutional taking, selective enforcement, equal protection, administrative law, and a panoply of Constitutional and statutory claims.<sup>30</sup> In a nine-page decision, the ZBA failed to make a single mention of an interpretation of the Ordinance. Indeed, the ZBA failed to reference a single *section* of the Ordinance.<sup>31</sup> The appeal of the Violation Notice was *not* treated as an appeal of the interpretation of the terms of the ordinance.<sup>32</sup> It was treated as an adjudication of merits of the allegations within the Violation Notice and the defenses against those accusations; in other words, as a means of enforcement.

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<sup>28</sup> See Alpha Delta ZBA Decision at App. 84.

<sup>29</sup> *Id.* at ¶ 8, App. 82.

<sup>30</sup> See July 18, 2016 ZBA Decision at App. 61-69.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* Landowners know how to appeal the interpretation of a term in the zoning ordinance. See, e.g., *Forster v. Town of Henniker*, 167 N.H. 745 (2015) (Hicks, J. dissenting) (interpreting the term "agritourism"); *Batchelder v. Town of Plymouth Zoning Bd. of Adjustment*, 160 N.H. 253 (2010) (interpreting the term "incidental to").

## 5. Hanover's Ordinance Distinguishes Between Interpretive Decisions and Enforcement Decisions

Section 1005.2(C)(1) of the Ordinance states that “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.*”<sup>33</sup>

Here, the Town's own ordinance clearly distinguishes between interpretive decisions and enforcement decisions. Interpretive decisions of the Town are provided 15 days to appeal to the ZBA. However, if the “decision” is that “a violation exists,” the appeal period is truncated to only seven (7) days. The Violation Notice identifies its decision, and the relevant appeal period, as a decision “that a violation exists.”

## 6. The Town Has Consistently Characterized the Appeal as a Challenge of the Violation Itself and Not a Question of Interpretation

The Town attempts to retain jurisdiction simply by recasting Appellant's dispute as an appeal of the interpretation of the terms of the Ordinance.<sup>34</sup> Its *present* position is flatly contradicted by the Town's repeated characterizations of the appeal as a challenge to the violation notice and not an appeal of an interpretation of a term in the ordinance:

**“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.”**<sup>35</sup>

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 . . . .”**<sup>36</sup>

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<sup>33</sup> Section 1005.2(C)(1) is now Section 206.5(D) of the most current Ordinance. See App. 96 and <https://www.hanovernh.org/sites/hanovernh/files/uploads/2019-zo.pdf>

<sup>34</sup> See Letter of Laura Spector-Morgan, Esq. dated October 1, 2019, App.74. This Letter of the Town attorney was adopted by the ZBA at the October 10, 2019 deliberations in response to the Appellant's objection to the ZBA proceedings based on the lack of subject matter jurisdiction.

<sup>35</sup> App. 56.

<sup>36</sup> App. 237.



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.**<sup>37</sup>

The Town’s remand notice for the ZBA meeting on December 19, 2019 to determine “if SAE is an institution,”<sup>38</sup> demonstrates Hanover’s belief that the only issue before the ZBA is whether the Appellant is in violation of the ordinance:

CASE #38002-Z2019-20: SUPREME COURT **REMAND** OF CASE NO. Z2016, REHEARING OF CASE NO. Z2016-05, **AN APPEAL OF AN ADMINISTRATIVE DECISION THAT RESIDENTIAL USE OF 38 COLLEGE STREET (TAX MAP 38, LOT 2, IN THE “I” INSTITUTION ZONING DISTRICT) IS IN VIOLATION OF HANOVER ZONING.**<sup>39</sup>

Thus, the Town has demonstrated a consistent pattern of treating this entire dispute as a matter of the merits of the violation, not merely an “interpretation” of certain language in the Ordinance.

### **7. The Town is Judicially Estopped From Disputing that the ZBA was Adjudicating an Enforcement Action**

In its 2017 appeal to the Superior Court, Appellant argued that that the Violation Notice constituted selective enforcement. Appellant claimed that, prior to 2015, the Town in at least 10 similar instances knowingly had not enforced the Ordinance.<sup>40</sup> The Town argued that its present enforcement against Appellant was lawful and proper.<sup>41</sup> The trial court agreed with the Town, holding that “the mere fact that a Town may have been lax

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<sup>37</sup> See *New Hampshire Alpha of SAE Tr.*, 172 N.H. at 69.

<sup>38</sup> *Id.* at 76.

<sup>39</sup> App. 95.

<sup>40</sup> App. 330-331, 334 *et seq.*

<sup>41</sup> “[T]he town notes that lax enforcement in the past does not commit the town to avoid enforcement at any time.” Answer at ¶ 74, App. 423.

in its enforcement [of the zoning ordinance] in the past does not prohibit enforcement in the present.”<sup>42</sup> Indeed, this Court affirmed the trial court’s decision, stating:

“We squarely addressed the selective enforcement argument in Alpha Delta, holding that “the mere fact that a Town may have been lax in its enforcement in the past does not prohibit enforcement in the present.”<sup>43</sup>

Now, in response to Appellant’s dispute of subject matter jurisdiction, the Town has changed to a contrary position to suit the exigencies of the moment. Hanover is judicially estopped from asserting that the Violation Notice was not enforcement and that the appeal was not an adjudication of the violation. Under the judicial estoppel doctrine, when a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who acquiesced in the position formerly taken by him. *New Hampshire v. Maine*, 532 U.S. 742, 794 (2001).

**8. On the Original Appeal of the ZBA Decision, the Town Persuaded the Superior Court to Reject Appellant’s Constitutional Claim Because Appellant had not Raised the Claim to the ZBA**

The Town never believed it was interpreting the Ordinance. Appellant sought review of the July 2016 ZBA ruling in the Superior Court, arguing, *inter alia*, that the decision violated the First Amendment of the United States Constitution.<sup>44</sup> The Town moved to strike that claim because Appellant had not argued it before the ZBA.<sup>45</sup> This Court agreed and struck the claim. The Town viewed the ZBA as the original finder of fact on all matters of the alleged violation, with authority to evaluate and reject statutory and Constitutional defenses that a landowner would ordinarily be able to bring in its defense before a court of law.<sup>46</sup> This would only be the case if the ZBA was adjudicating

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<sup>42</sup> GCSC Order, quoting *Dartmouth Corp. of Alpha Delta v. Town of Hanover*, 169 N.H. 743, 753 (2017), App. 242, 244.

<sup>43</sup> *New Hampshire Alpha of SAE Tr.*, 172 N.H. at 76.

<sup>44</sup> Trial Memorandum, App. 342.

<sup>45</sup> Motion to Strike, App. 445 *et seq.*

<sup>46</sup> *Id.*

the merits of the Violation Notice, as opposed to a limited interpretation of the ordinance, where a term may be interpreted irrespective of the specific facts of the case. The ZBA has never had jurisdiction to decide any of the statutory or Constitutional issues brought before the it. *See Dembiec*, 167 N.H. at 133 *citing McNamara*, 157 N.H. at 74 (judicial treatment is suitable when the Constitutionality or validity of an ordinance is in question).

Based on the foregoing, there can be no dispute that the Violation Notice was a tool of enforcement used in furtherance of the statutory enforcement procedure. Once the Zoning Administrator commenced enforcement proceedings, that enforcement was not appealable to the ZBA.”<sup>47</sup> RSA 676:5(II)(b). The ZBA lacked subject matter jurisdiction to adjudicate the merits of the Violation Notice.

## **II. COURTS HAVE EXCLUSIVE JURISDICTION TO ADJUDICATE ALLEGED VIOLATIONS OF THE ZONING ORDINANCE SUBJECT TO CRIMINAL AND CIVIL PENALTIES**

### **A. ORIGINAL JURISDICTION TO FIND ZONING VIOLATIONS RESIDES WITH THE COURTS**

Land use violations are defined as criminal offenses subject to convictions which could result in civil penalties and forfeiture of property. RSA 676:17 states

**“Any person who violates . . . 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.”**

Original Jurisdiction to preside over challenges to land use violations encompassed in RSA 676:17 resides exclusively in the courts and all enforcement actions must proceed through the courts pursuant to RSA 676:17(V). The Superior Court has original jurisdiction by virtue of its broad grant of authority in RSA 491:7 and the District Court’s jurisdiction is via explicit statutory grant in 502-A:11-a(III):

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<sup>47</sup> *See, Loughlin, 15 New Hampshire Practice: Land Use Planning and Zoning, Ch. 22, Powers of ZBA, §22.02 Administrative Appeals (LexisNexis Matthew Bender) (Fourth Edition), citing Simonsen.*

III. *The jurisdiction conferred by this section shall include ... any offense encompassed by RSA 676:17....*

The legislative history of RSA 502-A:11-a explains:

***“The district court’s original jurisdiction includes, but is not limited to, alleged violations of local land use or planning and zoning ordinances.”***<sup>48</sup>

Appellant respectfully suggests that this Honorable Court’s analysis of jurisdiction in the 2019 *Rogers v. Rogers*<sup>49</sup> case should be applied here. Like *Rogers*, the legislature can be presumed to know the limitations of jurisdiction found in *Simonsen*. Nearly a decade after *Simonsen*, the legislature expanded the original jurisdiction over alleged zoning violations by creating RSA 502-A:11-a and granting jurisdiction to the district court in explicit terms. The legislature then created RSA 676:17(V), explicitly cross-referencing RSA 502-A:11-a within the Planning and Zoning section of New Hampshire Statutes. It is unreasonable to believe that the legislature would have created an explicit grant of authority to the district court but left the question of ZBA jurisdiction to be inferred from an expression in the definition of administrative decision in RSA 676:5(II)(b). Instead, 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.

Other states provide an interesting study in contrast. Pennsylvania enacted legislation requiring landowners to appeal violations *only* by way the town's zoning hearing board.<sup>50</sup> See, e.g. *Johnston v. Upper Macungie Twp.*, 638 A.2d 408 (1994)

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<sup>48</sup> See HB 403 HISTORY, **Source.** 1988, 19:1, eff. Jan. 1, 1989. App. 77.

<sup>49</sup> *Rogers v. Rogers*, 171 N.H. 738 (2019).

<sup>50</sup> See, e.g., Section 909.1 of the Pennsylvania Municipalities Planning Code (“MPC”), 53 P.S. § 10909.1, Jurisdiction.—(a) The zoning hearing board shall have *exclusive jurisdiction* to hear and render *final adjudications* in the following matters:

- .....
- (3) Appeals from the determination of the zoning officer, including, but not limited to, the granting or denial of any permit, or failure to act on the application therefor, *the issuance of any cease and desist order* or the registration or refusal to register any nonconforming use, structure or lot. (Emphasis added.)

(zoning hearing board had exclusive jurisdiction over ordinance violation determinations). Previously, Pennsylvania’s municipalities enforced zoning ordinances through criminal complaints before a district justice. *Plains Township v. Krasner*, 298 A.2d 627 (1972); *Commonwealth v. Joki*, 479 A.2d 616 (1984). In 1988, Pennsylvania de-criminalized zoning violations and explicitly authorized zoning boards to determine zoning violations. *Johnston*, 638 A.2d 408.

The opposite happened in New Hampshire. In 1988, New Hampshire criminalized land use violations through RSA 676:17 (1988) and gave concurrent original jurisdiction to hear and adjudicate land use violations to the circuit and superior courts. *See* RSA 502-A:11-a (1988). Vesting original jurisdiction in the courts is sound policy, since Part 1, Art. 14 of the N.H. Constitution and the 5<sup>th</sup>, 6<sup>th</sup>, and 14<sup>th</sup> Amendments of the U.S. Constitution entitle one accused of a crime to the due process rights afforded by a criminal trial.

**B. LANDOWNERS ACCUSED OF VIOLATING ORDINANCES ARE ENTITLED TO PROCEDURAL AND SUBSTANTIVE DUE PROCESS**

Landowners accused of offenses under RSA 676:17 are entitled to the due process from a court of law. Hanover, by contrast, accuses a landowner of violating its Ordinance subject to prosecution pursuant to RSA 676:17, and then requires the landowner to protest its innocence at its ZBA.<sup>51</sup> Moreover, Section 1005.2(C)(1) of the Ordinance designates an appeal of a Violation Notice to the ZBA as the exclusive remedy to challenge the accusation:

“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.*”

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<sup>51</sup> *See* Section 1005.2(C)(1) of the Ordinance. *See also* Hanover Answer ¶ 27 “This matter was (and remains) an appeal from an administrative decision. The burden of proof in such a case lies with the party seeking to overturn an administrative decision.” App. 232.

The Town's position is that landowners who *fail to appeal* the notice of violation to the ZBA waive their rights *ever* to contest the violation,<sup>52</sup> and the Town's procedures substitute judicial processes required by statute with a hometown pseudo-trial in front of the ZBA adjudicating the merits:

“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.”<sup>53</sup>

This antediluvian procedure provides none of the due process safeguards to which the accused is Constitutionally entitled. The ZBA does not take testimony under oath, does not authenticate documents, relies upon hearsay evidence, and precludes landowners from confronting their accusers.<sup>54</sup> At ZBA hearings, the Town presents no evidence that the violation exists but rather the landowner is required to prove its innocence.<sup>55</sup> This process violates 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.

The most basic requirement of due process in criminal cases is that the state 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 state may not shift its burden of proof to the defendant. *Francis v. Franklin*, 471 U.S. 307, 313 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979); *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975). 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.”<sup>56</sup> In a criminal case, the Due Process Clause ensures that “a defendant has no obligation to prove his innocence.” *District Attorney's Office v.*

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<sup>52</sup> “[F]ailure to so appeal that decision acts as a waiver of a right to claim the decision was in error.” App. 74.

<sup>53</sup> App. 270.

<sup>54</sup> See Hanover Answer at ¶¶ 22-26, App. 231-232.

<sup>55</sup> *Id.* at ¶¶ 27, 29, App. 232.

<sup>56</sup> See, *Loughlin*, 15 *New Hampshire Practice: Land Use Planning and Zoning*, Ch. 22, *Burden of Proof in Enforcement Actions*, §7.20 *Administrative Appeals* (LexisNexis Matthew Bender) (Fourth Edition).

*Osborne*, 557 U.S. 52, 87 n.5 (2009) (Alito, J., concurring). *Ei incumbit probatio qui dicit, non qui negat*<sup>57</sup> — "Proof lies on him who asserts, not on him who denies." The presumption of innocence is a principle of justice so rooted in the traditions and conscience of the people as to be ranked as fundamental. *Nelson v. Colorado*, 137 S. Ct. 1249, 1256 (2017).

This holds true for persons accused of not merely criminal violations, but of *civil land use violations* as well in which civil fines are assessed. Civil fines for land use violations are punitive and criminal if imposed retrospectively for a "completed act of disobedience." *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821(1994); *see also Town of Ogunquit v. McGarva*, 570 A.2d 320 (Me.1990) (a \$200 per day fine, a civil penalty, for land use violations was a penalty where it was incurred when violation began); *Reagan v. Racal Mortg., Inc.*, 1998 ME 188, ¶ 13 (penalty was incurred at the time of the wrongful act). No landowner may be fined with civil penalties for violation of local zoning ordinance or condition of permit unless he/she is afforded due process. *Town of Nottingham*, 147 N.H. 131.

RSA 676:17 provides, in relevant part:

**"Any person who violates . . . 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 Violation Notice advised that "continued occupancy of the property after March 15, 2016 *will subject* [the landowner] . . . to fines in the amount of \$275 per day each day the violation continues [pursuant to] RSA 676:17.<sup>58</sup> A \$275 per day fine provision is a 'penalty ... incurred' entitling Appellant to the court processes, pursuant to Part I, Article 14 of the New Hampshire Constitution. The purpose of this provision is "to make civil remedies readily available, and to guard against arbitrary and discriminatory

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<sup>57</sup> "Digesta seu Pandectae 22.3.2." Grenoble: *Université Pierre-Mendès-France*.

<sup>58</sup> *See* Violation Notice dated February 12, 2016. App. 55.

infringements on access to the courts.” *Estate of Cargill v. City of Rochester*, 119 N.H. 661, 665 (1979). Landowners accused of offenses under RSA 676:17 are entitled to the due process from a court of law. *Town of Nottingham*, 147 N.H. at 134–35. *See also, Town of Henniker v. Homo*, 136 N.H. 88, 90 (1992) (holding that, landowner was heard by the court, but did not have a right to a *jury* trial, since the maximum fine of \$100 *per violation* did not exceed the \$500 limit.)

The trial court erroneously held that the Town’s procedures did not concern a legally protected interest of the Appellant and, therefore, Appellant was not deprived of any ascertainable interest protected by law.<sup>59</sup> The Superior Court’s ruling on the matters of subject matter jurisdiction and due process constitutes plain error, frustrates a clear and unambiguous statutory scheme, offends public policy, and violates the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and the New Hampshire State Constitution at Part One, Articles 14 by, *inter alia*, depriving access to the courts, placing the burden on the Appellant to prove its innocence, prohibiting the swearing in of witnesses and cross-examination, and not following evidentiary rules. A landowner, such as Appellant, accused by municipal government of violating local ordinances, clearly has interests in substantive and procedural due process in the adjudication of those allegations, where the consequences of an adverse ruling could result in criminal or civil liability or loss of property. *Nelson v. Colorado*, 137 S. Ct. at 1255.

**C. THE ZBA IMPROPERLY FOUND FACTS WITHOUT HAVING ORIGINAL JURISDICTION – AND THE TOWN SEEKS TO USE THESE FINDINGS AS A PREDICATE FOR THE PUNISHMENT OF INJUNCTIVE RELIEF AND/OR FINES.**

The Town attempts to recast its decision as merely “interpretive” using unsupportable banalities and circular reasoning, such as:

“There’s no way to determine whether there’s a violation of the zoning ordinance unless one interprets the zoning ordinance.”<sup>60</sup>

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<sup>59</sup> *GCSC Order*, App. 12.

<sup>60</sup> App. 271.



This Court should reject the Town’s efforts to dodge the demands of Part 1, Art. 14 of the N.H. Constitution as well as the 5<sup>th</sup>, 6<sup>th</sup>, and 14<sup>th</sup> Amendments of the U.S. Constitution by relabeling a prosecution as “an interpretation,” because any authorized punishment contingent on the finding of fact requires due process, no matter what the government chooses to call the exercise. *United States v. Haymond*, 139 S. Ct. 2369, 2379 (2019); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Alleyne v. United States*, 570 U.S. 99, 108 (2013); *Blakely v. Washington*, 542 U.S. 296, 309 (2004). A “prosecution” of an individual has, from the beginning of the republic, simply referred to “the manner of [his] formal accusation.” 4 W. Blackstone, *Commentaries on the Laws of England* 298 (1769). And the concept of a “crime” was a broad one linked to punishment, amounting to those “acts to which the law affixes ... punishment,” or, stated differently, those “element[s] in the wrong upon which the punishment is based.” 1 J. Bishop, *Criminal Procedure* §§ 80, 84, pp. 51–53 (2d ed. 1872); *see also* J. Archbold, *Pleading and Evidence in Criminal Cases* (5th Am. ed. 1846) (discussing a crime as including any fact that “annexes a higher degree of punishment”); *Blakely*, 542 U.S. at 309; *Apprendi*, 530 U.S. at 481. Even without the formal service of a summons, the Violation Notice is the commencement of enforcement proceedings because it accused the Appellant of a violation upon which a punishment would be based. The Violation Notice was prosecutorial - using the manner of the formal accusation. The ZBA, standing in the shoes of the Zoning Administrator, further prosecuted the accusation by finding facts – the elements of the wrong -- that the Town seeks to use as a predicate for the punishment of injunctive relief and/or fines.

This is not theoretical. In the *Alpha Delta* case, the landowner received a violation notice similar to the Appellant's and followed the Town's instructions to its detriment.<sup>61</sup> The ZBA held an adjudicatory fact-finding hearing and determined the landowner’s use of its property was a violation of the Ordinance. The ZBA, believing its decision was a binding conviction, ordered penalties to attach: the ZBA voted “to DENY the appeal of

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<sup>61</sup> *See* Alpha Delta “Notice of Zoning Violation” at App. 79.

the [landowner], *subject to the condition that fines for non-compliance not be levied until this Board's decision becomes final.*"<sup>62</sup>

On appeal, the Courts treated the ZBA's factual findings as *prima facie* lawful pursuant to RSA 677:6, giving the ZBA the deference of a primary fact finder with original jurisdiction, and both the Superior and Supreme Court affirmed that ZBA decision that the landowner's use of its property constituted a violation.<sup>63</sup> 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.<sup>64</sup> The landowner, found guilty by the ZBA, was barred from challenging the ZBA's finding of a violation by the doctrines of *res judicata* and collateral estoppel.

Unlike enforcement, interpretation does not convict, does not deprive a landowner of its property, and does not form the basis for fines. An interpretation does not remove the Town's obligation to *prove* all elements of a violation in court. The ZBA's decision may not, as Hanover believes, become the predicate upon which fines and injunctions issue without *de novo* fact finding to establish the violations. The determination of whether a violation of the law exists is the sole and exclusive province of the courts.

This Court should reject the Town's assertion that what is at issue here is the "construction, interpretation or application of the terms of the ordinance," RSA 676:5, II(b). The Appellant is not challenging the Zoning Administrator's "construction, interpretation, or application" of the Ordinance, but rather is challenging the Zoning Administrator's enforcement action by denying the Violation Notice itself.<sup>65</sup> Appellant's dispute of the Violation Notice is not a matter that the legislature has empowered the zoning board of adjustment to hear.

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<sup>62</sup> See Alpha Delta ZBA Decision, p. 6, June 4, 2015 at App. 85.

<sup>63</sup> See *Corporation of Alpha Delta v. Town of Hanover et al.* App. 86.

<sup>64</sup> See Petition for Injunctive Relief and Fines, together with Court Decision. App. 87.

<sup>65</sup> App. 109-122 and App.123 *et seq.*

### III. HANOVER'S ORDINANCE REQUIRING A LANDOWNER TO APPEAL ITS NOTICE OF VIOLATION TO THE ZBA FRUSTRATES A CLEAR AND UNAMBIGUOUS STATUTORY SCHEME AND IS THUS PRE-EMPTED BY STATUTE

Section 1005.2(C)(1) of the Ordinance, which designates an appeal of a notice of violation to the ZBA as the exclusive remedy to challenge the accusation, frustrates a clear and unambiguous statutory scheme and is implicitly preempted by statute. “The preemption doctrine flows from the principle that municipal legislation is invalid if it is repugnant to, or inconsistent with, State law.” *Town of Carroll v. Rines*, 164 N.H. 523, 528 (2013). “Preemption may be express or implied.” *Id.* Implied preemption may be found when the comprehensiveness and detail of the State statutory scheme evinces legislative intent to supersede local regulation. *Id.* State law also impliedly preempts local law when there is an actual conflict between the two. *Id.* A conflict exists when a municipal ordinance or regulation permits that which a State statute prohibits or vice versa. *Id.* Moreover, even when a local ordinance does not expressly conflict with a State statute, it will be preempted when it frustrates the statute's purpose. *Id.* Because preemption “is essentially a matter of statutory interpretation and construction,” *Bond v. Martineau*, 164 N.H. 210, 213 (2012), whether a State statute preempts local regulation is a question of law, which the Court reviews *de novo*. *Rines*, 164 N.H. at 528.

The Town's Ordinance is impliedly preempted because, in requiring a violation notice to be tried on the merits before the ZBA, the ordinance frustrates the purpose of RSA 502-A:11-a, RSA 491:7, RSA 676:17-b and RSA 676:17(V). The legislature, expressly provided redress of zoning violations through the courts when it enacted RSA 502-A:11-a. Furthermore, the legislature clearly knew that it was *excluding* appeals to the ZBA for all enforcement actions when it enacted RSA 676:5(II)(b). A municipality may not confer powers upon the board not granted by the enabling statute and such grant is *ultra vires* and void. *Dembiec*, 167 N.H. at 134 *citing Board of Water Comm'rs, Laconia Water Works v. Mooney*, 139 N.H. 621, 625 (1995).

The legislature provided the accused its Constitutional rights of due process rights through the courts. Hanover's Ordinance provides no such protection, frustrating a clearly articulated and well-reasoned regulatory scheme. Thus, to the extent that the Ordinance gives authority to the ZBA to hear appeals to adjudicate the merits of zoning violations, it is preempted by RSA 676:17(V), RSA 491:7, RSA 502-A:11-a and the New Hampshire State Constitution at Part One, Articles 14, 15, 20, 35 and 37, and Part Two, Article 4 or is an *ultra vires* exercise of power.

### **CONCLUSION AND PRAYER FOR RELIEF**

Zoning Boards of Adjustment are not empowered to adjudicate alleged zoning violations. Such power exists solely in the courts through their grants of original jurisdiction, and RSA 676:17(V) directs municipalities to these courts when they desire to enforce against landowners. In the instant matter, Hanover has usurped the judicial power reserved to the courts.

For the reasons stated in this brief, the Appellant respectfully requests that this Honorable Court reverse the Superior Court's decision, find that the ZBA lacks subject matter jurisdiction to adjudicate the merits of the Violation Notice and void the ZBA's actions *ab initio*. In the alternative, Appellant respectfully requests that this Honorable Court find that the Violation Notice was a discretionary decision to commence formal or informal enforcement proceedings and remand the case back to the Superior Court with instructions to identify all findings and rulings that exceeded any legitimate interpretive scope of the ZBA's authority, and void those excessive elements of the ZBA's ruling *ab initio*.

## **CERTIFICATIONS**

The undersigned certifies that the appealed decision is in writing and is appended to this brief in the Appendix.

The undersigned certifies that the foregoing 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 9473 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: June 9, 2020

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