

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

DOCKET NO. 2020-0316

TOWN OF LINCOLN

v.

JOSEPH CHENARD

Appeal Pursuant to Supreme Court Rule 7
From the Final Decree of the Superior Court of Grafton County in
Docket No. 215-2018-CV-00167

**BRIEF OF THE CROSS-APPELLANT,
TOWN OF LINCOLN**

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*To Be Argued By:
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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... 3

ISSUES PRESENTED 4

STATEMENT OF THE CASE AND STATEMENT OF FACTS 4

SUMMARY OF ARGUMENT..... 6

STANDARD OF REVIEW..... 7

ARGUMENT 9

I. THE TRIAL COURT’S JUNK YARD RULING IS SUPPORTED BY EVIDENCE, IS LEGALLY SUSTAINABLE, AND SHOULD BE UPHELD. 9

 A. The trial court properly applied RSA 236:111..... 9

II. BECAUSE THE TOWN WAS THE PREVAILING PARTY, THE TRIAL COURT UNSUSTAINABLY DENIED THE TOWN’S REQUEST FOR ATTORNEY’S FEES, WHICH ARE MANDATORY PURSUANT TO RSA 676:17, II..... 12

 A. Enjoinder is enforcement and the Town is entitled to reimbursement of its costs and reasonable attorney’s fees. .. 12

 B. “Plain and ordinary meaning” analysis supports an award of attorney’s fees pursuant to RSA 676:17, II..... 13

CONCLUSION 16

STATEMENT CONCERNING ORAL ARGUMENT 16

CERTIFICATION OF WORD COUNT..... 17

CERTIFICATE OF SERVICE..... 17

APPENDIX 18

TABLE OF AUTHORITIES

Cases

<u>Bennett v. Town of Hampstead</u> , 157 N.H. 477, 486 (2008)	8, 11
<u>In re Lisa H.</u> , 134 N.H. 188, 195 (1991)	11
<u>In re McArdle</u> , 162 N.H. 482 (2011).....	8
<u>Jesurum v. WBTS CC Ltd. P’ship</u> , 169 N.H. 469, 476 (2016).....	7, 8, 12
<u>Kenison v. Dubois</u> , 152 N.H. 448, 451 (2005).....	8
<u>New Hampshire Dep’t of Envtl. Servs. v. Marino</u> ,.....	
155 N.H. 709, 717 (2007).....	11
<u>Sleeper v. Hoban Family P’ship</u> , 157 N.H. 530 (2008)	7, 10, 11
<u>Town of Atkinson v. Malborn Realty Trust</u> , 164 N.H. 62 (2012)	13

Statutes

RSA 149-M	9
RSA 236:107	9
RSA 236:110	9
RSA 236:111	9, 12
RSA 236:112	passim
RSA 236:114	5, 15
RSA 236:115	15
RSA 236:125	10
RSA 236:128	9
RSA 236:90	9, 12
RSA 236:96	9
RSA 676:17, II.....	passim

ISSUES PRESENTED

1. Whether the trial court, which conducted a view in this case, correctly ruled that the property owner was making a nonpermitted junk yard use of his properties and that the junk yard use must end.
2. Whether the trial court erred by not awarding the prevailing Town its costs and reasonable attorney's fees pursuant to RSA 676:17, II. (See Town's Petition for Injunctive Relief, paragraph 19, the Town's Request for Findings of Fact and Rulings of Law, paragraph 42, and the Town's Motion to Reconsider attached hereto.)

STATEMENT OF THE CASE AND STATEMENT OF FACTS

This is a case in which the Town of Lincoln (the "Town") – after trying to work with the property owner, Joseph Chenard ("Chenard"), for years – petitioned the trial court to enjoin Chenard's nonpermitted junk yard.¹

The Town has a zoning ordinance which it refers to as its Land Use Plan Ordinance ("zoning ordinance"). Chenard's junk yard is located in the Town's General Use zoning district. The Town's zoning ordinance requires a special exception for junk yard use in its General Use zoning district. See Final Decree at page 1, contained in Chenard's Appendix at page 18

¹ Town Manager Alfred "Butch" Burbank testified as follows:
"As a kid born and raised in Hampton, NH on a farm, there's people who collect stuff, and it's never an issue, my family included. However, I think the statute in my opinion was designed to... when it gets to excess and it starts affecting your neighbors... That's what I use as a guide when I'm looking, and I'm really pretty generous at times, and I believe – I believe that the issues that this Town has been dealing with Mr. Chenard for a decade, he's taken it to excess... I believe it's a reason that that statute was put in place." Transcript of Hearing on the Merits at pages 94-95 (hereinafter "Hearing Transcript at ____.")

(hereinafter “Final Decree at ____, Chenard’s Appendix at ____.”) In this case, the trial court found that Chenard “has never received a special exception for Junk Yard use of his Properties.” See Order on Motions to Reconsider at page 2, contained in Chenard’s Appendix at page 31 (hereinafter “Order on Motions to Reconsider at ____, Chenard’s Appendix at ____.”)

After the trial court’s view of Chenard’s properties, several witnesses testified on November 8, 2019 and March 4, 2020. The trial court issued a decision on April 13, 2020 ruling that Chenard’s properties constituted a junk yard, Chenard did not have permission from the Town for a junk yard, and Chenard must remove the junk yard. Final Decree at 9, Chenard’s Appendix at 26.

In ruling for the Town on the junk yard issue, the trial court concluded as follows: “the respondent is operating or maintaining a junkyard in violation of RSA 236:114 and [] his Properties are therefore a nuisance.” Id.

Despite ordering that Chenard must end his junk yard use, the trial court declined to award attorney’s fees to the Town, initially on the basis that the Town had not been seeking to enforce its zoning ordinance and, therefore, the Town was not entitled to avail itself of the mandatory attorney’s fees provision of RSA 676:17, II. Final Decree at 8-9, Chenard’s Appendix at 25-26. Both parties filed motions for reconsideration.²

The trial court denied Chenard’s motion for reconsideration. Order on Motions to Reconsider at 1, Chenard’s Appendix at 31. The trial court

² Chenard’s Appendix only contains his own Motion for Reconsideration. The Town’s Motion for Reconsideration is included in the Appendix attached hereto.

granted the Town's motion for reconsideration, agreeing to reconsider its decision related to attorney's fees. However, the trial court again denied the Town's request for an award of attorney's fees for a new reason. The trial court determined that the Town was in fact seeking to enforce its zoning ordinance and "was entitled to an award of attorney's fees under RSA 676:17, II, if it met its burden of proving that [Chenard] violated the Town zoning ordinance." Order on Motions to Reconsider at 2, Chenard's Appendix at 32. The trial court ruled that although Chenard's properties constituted a junk yard, "under the provisions of the Town zoning ordinance, [Chenard] is not using his Properties as a "Junk Yard," because the Town's Zoning Ordinance does not define that term. Order on Motions to Reconsider at 3, Chenard's Appendix at 33.

Chenard appealed the junk yard decision. The Town cross-appealed the attorney's fees decision.

SUMMARY OF ARGUMENT

The trial court agreed with the Town that Chenard was using his properties as an illegal, unpermitted junk yard. This determination is supported by ample evidence (including the trial court's view) and is not legally erroneous.

The trial court granted relief to the Town in the form of an order that Chenard must end the use of his properties as a junk yard. The trial court found that (i) Chenard's properties are located in a zoning district where junk yard use is allowed only by special exception, and (ii) Chenard "never

received a special exception for Junk Yard use of his Properties.” Order on Motions to Reconsider at 2, Chenard’s Appendix at 32.

The Town brought a legal action to enjoin a use of property that was in violation of state law and its local ordinance. The use in question was enjoined. RSA 676:17, II applies, and the Town is entitled to a mandatory award of costs and attorney’s fees. The trial court’s factual findings and rulings regarding Chenard’s junk yard use should be upheld. The trial court’s ruling denying the Town’s request for costs and attorney’s fees should be reversed.

STANDARD OF REVIEW

The standard of review that applies to a trial court’s decision rendered after a trial on the merits is that this Honorable Court “uphold[s] the trial court’s factual findings and rulings unless they lack evidentiary support or are legally erroneous.” Jesurum v. WBTSCC Ltd. P’ship, 169 N.H. 469, 476 (2016) (internal citation omitted). This Honorable Court does not “decide whether [it] would have ruled differently than the trial court, but rather, whether a reasonable person could have reached the same decision as the trial court based upon the same evidence.” Id. This Honorable Court defers “to the trial court’s judgment on such issues as resolving conflicts in the testimony, measuring the credibility of witnesses, and determining the weight to be given evidence.” Id.

Relevant to the applicable standard of review is that a trial court’s view constitutes evidence. See Sleeper v. Hoban Family P’ship, 157 N.H. 530, 537 (2008). Additionally, “[i]n the absence of specific findings... a

court is presumed to have made all findings necessary to support its decision.” Bennett v. Town of Hampstead, 157 N.H. 477, 486 (2008) (citations omitted). Review of a trial court’s application of the law to the facts is *de novo*. See Jesurum, *supra*. Review of a trial court’s interpretation of a statute is also *de novo*. See In re: McArdle, 162 N.H. 482, 484 (2011), citing Kenison v. Dubois, 152 N.H. 448, 451 (2005).

Finally, the standard of review to be applied to a trial court’s decision on an award of attorney’s fees has been set forth as follows:

A prevailing party may be awarded attorney’s fees when that recovery is authorized by statute, an agreement between the parties, or an established judicial exception to the general rule that precludes recovery of such fees. We will not overturn a trial court’s award of attorney’s fees unless it is an unsustainable exercise of discretion. In applying this standard, we keep in mind the substantial deference given to the trial court’s decision on attorney’s fees, and uphold the decision if the record provides some support for it.

Bennett v. Town of Hampstead, 157 N.H. 477, 483 (2008) (internal quotations and citations omitted). Because the trial court’s decision regarding attorney’s fees in this case involves interpretation of statutes, all such applicable statutory interpretations should be reviewed *de novo*. See In re: McArdle, *supra*.

ARGUMENT

I. THE TRIAL COURT’S JUNK YARD RULING IS SUPPORTED BY EVIDENCE, IS LEGALLY SUSTAINABLE, AND SHOULD BE UPHELD.

A. The trial court properly applied RSA 236:111.

The trial court’s analysis of the applicable state statutes was detailed, well reasoned, and should be affirmed.

The trial court correctly noted that junkyards in NH are governed by “two statutory subdivisions that are relevant to the proceedings.” Final Decree at 3, Chenard’s Appendix at 20. The trial court explained the difference between these two statutory subdivisions as follows:

“First, RSA 236:90 *et seq.* governs the regulation of junkyards located ‘less than 1,000 feet from the nearest edge of the right-of-way lines and visible from the main traveled way of the interstate system.’ RSA 236:96. Second, RSA 236:111 *et seq.* governs ‘all junkyards, as defined by RSA 236:112, I, including those approved under RSA 149-M and those subject to regulation under RSA 236:110...’ [i]f the provisions of [RSA 236:90-110] ... appear to conflict with the provisions of RSA 236:111-129 then the provisions of [RSA 236:110] shall take precedence.”

Final Decree at 4, Chenard’s Appendix at 21. Finally, the trial court noted that “[t]he Commissioner of Transportation may bring an action to enjoin a violation of RSA 236:90 *et seq.*, whereas a ‘governing body, elected or appointed officers or other appointed agents of a town, city or unincorporated place, or a private person’ may bring an action to enjoin a violation of RSA 236:111 *et seq.* See RSA 236:107 and RSA 236:128.” Id.

It is against this statutory backdrop that we analyze Chenard’s argument.

In his July 20, 2018 Motion to Dismiss, Chenard initially argued that his junkyard was a permissible grandfathered use and “an inherent part of his business.”³ Then, when he realized that he could not prevail on that argument, Chenard came up with a new one – that the definition of junkyard required a business operation and he is not operating a business. The trial court rejected this argument as well, correctly concluding that “under RSA 236:112, an alleged junkyard need not be an establishment or place of business, but may be any ‘place’ used for the purposes enumerated in that statute.” Final Decree at 5, Chenard’s Appendix at 22.

Chenard also complained about the fact that he owns several different lots with junk on them. Chenard’s Brief, p.14. In fact, Chenard’s junk yard is spread out over four separate parcels owned by Chenard. These parcels were clearly identified by the Town’s witnesses (further explained below), and these parcels were personally observed by the trial judge when he conducted a site visit at the beginning of the trial on November 8, 2019. Final Decree at 1, Chenard’s Appendix at 19.

“During its view of the Properties, the court observed old or used scrap metal including numerous machines or automotive parts, tires, wheels, cables and wiring, woodstoves, snowplows, construction debris, steel drums, plastic barrels, and other detritus.” Final Decree at 2, Chenard’s Appendix at 19. The Court’s view is evidence. See Sleeper v. Hoban Family P’ship, 157 N.H. 530, 537 (2008). The trial judge saw what

³ The trial court addressed Chenard’s “grandfathering” argument by citing the grandfather clause in RSA 236:125, and noting that this statute requires a license, which Defendant does not have. Therefore, the trial court concluded that “the respondent has failed to prove the applicability of this clause to his use of the properties as a junkyard.” Final Decree at 7, Chenard’s Appendix at 24.

he needed to see to find that Chenard's property clearly constitutes a junkyard. The trial court's findings "are within its sound discretion, particularly when a view has been taken." Id., citing New Hampshire Dep't of Env'tl. Servs. v. Marino, 155 N.H. 709, 717 (2007).

Lincoln's Town Planner, Carole Bont testified. Ms. Bont identified Chenard's various lots on the Town's tax map. Hearing Transcript at 9-14. Several exhibits were introduced into evidence through Ms. Bont showing the Chenard junkyard properties. Id.

Ron Beard, the Town's Fire Chief, Health Officer, and Code Enforcement Officer, also testified. Mr. Beard reiterated that "the Town is basically alleging two junkyards on property owned by Mr. Chenard, one on his house lot and one on the three lots across Route 3." Hearing Transcript at 25. The house lot, and the three lots across Route 3, are shown on Plaintiff's Exhibit 1, which can be seen in the Appendix attached hereto. Mr. Beard also introduced 16 pictures of the junk on the "house lot" and 13 pictures of the junk spread across the contiguous "Route 3 lots." Hearing Transcript at 25-26.

As to the issue raised by Chenard regarding particular junk yard items on particular junk yard lots, it is well established that "[i]n the absence of specific findings... a court is presumed to have made all findings necessary to support its decision." Bennett v. Town of Hampstead, 157 N.H. 477, 486 (2008), citing In re Lisa H., 134 N.H. 188, 195 (1991). The trial judge personally observed each of the junk yard properties – the house lot and the three contiguous lots across the street. Final Decree at 2, Chenard's Appendix at 18. Whether or not he had tenants on any of these 3

lots is irrelevant. Chenard admitted that he owned all 4 lots and that the junk was his. Hearing Transcript at 55, 113-116.

Finally, Chenard attempts to evade responsibility for his junkyards by claiming that the trial court's decision was erroneous because the properties are adjacent to the State of New Hampshire interstate system. Chenard's Brief at 15. The trial court correctly found this argument to be unpersuasive by concluding that:

“Whereas RSA 236:90 *et seq.* governs junkyards located within 1,000 feet and in view of the interstate system, RSA 236:111 *et seq.* explicitly governs all junkyards defined in RSA 236:112, I, including all junkyards regulated under RSA 236:90 *et seq.*... the effect of RSA 236:111 *et seq.* is to confer authority upon local governing bodies to regulate all junkyards within their municipalities.”

Final Decree at 6, Chenard's Appendix at 23. All necessary factual findings were made with evidentiary support and the trial court's junk yard ruling should be upheld. See Jesurum v. WBTSCC Ltd. P'ship, 169 N.H. 469 (2016).

II. BECAUSE THE TOWN WAS THE PREVAILING PARTY, THE TRIAL COURT UNSUSTAINABLY DENIED THE TOWN'S REQUEST FOR ATTORNEY'S FEES, WHICH ARE MANDATORY PURSUANT TO RSA 676:17, II.

A. Enjoinder is enforcement and the Town is entitled to reimbursement of its costs and reasonable attorney's fees.

In this case, the trial court ruled that Chenard's properties constituted a junk yard and are therefore a nuisance. Final Decree at 8, Chenard's Appendix at 25. The trial court gave Chenard until August 10, 2020 to end the junk yard use and abate the nuisance. Additionally, the trial court

expressly authorized the Town to impose a penalty of up to \$50.00 per day for every day after August 10, 2020 that the nuisance continues. Final Decree at 9, Chenard's Appendix at 26.

In arriving at its decision, the trial court found that Chenard never obtained a special exception for a junk yard, which is required in Lincoln for a junk yard in the General Use District. Order on Motions to Reconsider at 2-3, Chenard's Appendix at 32-33. The Town went to court to end a land use that, without a special exception, is not permitted in the zoning district where Chenard's properties are located. The trial court ruled that the use has to end. It is the Town's position that if a municipality initiates a legal action to end a use that is not permitted under the Town's zoning ordinance, and the trial court enjoins that very use, then enjoinder is the necessary enforcement to trigger the mandatory costs and attorney's fees provision of RSA 676:17, II.

Here, given that enjoinder is enforcement, the Town has prevailed in enforcing its zoning ordinance through a legal action. As such, it is entitled to an award of "its costs and reasonable attorney's fees actually expended." RSA 676:17, II. The award of costs and fees pursuant to RSA 676:17, II is mandatory. See Town of Atkinson v. Malborn Realty Trust, 164 N.H. 62, 70 (2012).

B. "Plain and ordinary meaning" analysis supports an award of attorney's fees pursuant to RSA 676:17, II.

The trial court found that "the Town applies the definition of 'junk yard' contained in RSA 236:12 [sic] to determine whether a landowner's use of his property constitutes a junkyard under the Town zoning ordinance." Order on Motions to Reconsider at 2-3, Chenard's Appendix at

32-33. The trial court went beyond this finding to interpret the Town's zoning ordinance and give the term "junk yard" what the trial court found to be its "plain and ordinary meaning." The trial court cited to Webster's dictionary and concluded, contrary to the Town's application of the state's definition, that under the Town's zoning ordinance, a junk yard "must be devoted, at least to some extent, to the selling or reselling of junk." Order on Motions to Reconsider at 3-4, Chenard's Appendix at 33-34.

The trial court concluded that although Chenard is illegally using his property as a statutorily defined junk yard, Chenard is not using his property as a junk yard pursuant to the trial court's interpretation of the Town's ordinance using the dictionary definition of the term.

The dictionary definition cited by the trial court defines junkyard as "a yard used to keep usu[ally] resalable junk." Order on Motions to Reconsider at 3, Chenard's Appendix at 33. There are several reasons why it was erroneous for the trial court to conclude that, under the Town's ordinance, a junk yard must engage in some selling or reselling of junk.

Inclusion of the word "usually" demonstrates that a junk yard does not always have to keep junk that is "resalable." This is supported by the current online definition of junk yard. Merriam-Webster's online dictionary defines junk yard as follows: "a yard used to store **sometimes** resalable junk." Junkyard definition, MERRIAM-WEBSTER.COM (Emphasis added.)

The ordinary meaning of junk yard, as defined by Merriam-Webster, does not require that a junk yard be devoted, to any extent, "to the selling or reselling of junk." This is also bolstered by the statutory definition that was relied upon by the Town and accepted by the trial court as the controlling

definition for purposes of determining whether a junk yard violation was present on Chenard's lots.

The applicable portion of RSA 236:112 is subsection I, which states that a "Junk yard:"

means a place used for storing and keeping, or storing and selling, trading, or otherwise transferring old or scrap copper, brass, rope, rags, batteries, paper, trash, rubber debris, waste, or junked, dismantled, or wrecked motor vehicles, or parts thereof, iron, steel, or other old or scrap ferrous or nonferrous material. As used in this subdivision, the term includes, but is not limited to, the following types of junk yards...

In the context of RSA 236:112, use of the conjunction "or" indicates that "storing and keeping"; "storing and selling, trading, or otherwise transferring" are two distinct alternatives, such that one alternative is that a "Junk yard" is a place for storing and keeping junk. This definition does not require that a junk yard actually sell anything.

Lastly, the trial court ruled that Chenard's junk yard was in violation of RSA 236:114, which is in the local enforcement subpart of Chapter 236. The local enforcement subpart also contains RSA 236:115. In pertinent part, RSA 236:115 provides that:

Application for the license and the certificate of approved location shall be made in writing to the local governing body of the municipality where it is proposed to locate the junk yard or automotive recycling yard. In municipalities having a zoning ordinance and a zoning board of adjustment, the application [for the junk yard license and certificate of approved location] must be accompanied by a certificate from the board of adjustment that the proposed location is not within an established district restricted against such uses or otherwise contrary to the prohibitions of the zoning ordinance.

This statutory grant of authority to municipalities to disallow junk yards in certain zoning districts – such as the Town’s General Use zoning district in this case – is further practical support of the Town’s position that seeking to end Chenard’s junk yard use of his property in the Town’s General Use zoning district without the required special exception was a “legal action...to enforce...any local ordinance, code or regulation...” RSA 676:17, II.

Because the term junk yard as defined by RSA 236:112 does not require the selling or reselling of junk, and because enjoinder is enforcement, the Town is entitled to a mandatory recovery of its costs and reasonable attorney’s fees. See RSA 676:17, II.

CONCLUSION

For all of the reasons set forth above, the Town of Lincoln respectfully requests that this Honorable Court AFFIRM the trial court’s rulings that (i) Chenard is operating or maintaining a junkyard, (ii) Chenard’s properties constitute a nuisance, (iii) Chenard must end his junk yard use, and (iv) the Town may impose a civil penalty of up to \$50.00 per day for every day that the nuisance continues; and further the Town requests that this Honorable Court REVERSE the trial court’s denial of an award to the Town of costs and reasonable attorney’s fees.

STATEMENT CONCERNING ORAL ARGUMENT

To the extent that this Court finds it necessary to receive oral argument, the Town of Lincoln requests 15 minutes for oral argument.

CERTIFICATION OF WORD COUNT

I hereby certify that this Brief is in compliance with Rule 16(11) and 26(7) and is within the 9,500-word limit. This brief contains 4,069 words.

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of January, 2021, I have served, by e-filing, the foregoing Brief on Bruce J. Marshall, Esquire and Kathryn M. Bradley, Esquire, counsel for Chenard.

Respectfully submitted,
TOWN OF LINCOLN
By Its Attorneys,
HASTINGS MALIA P.A.

Dated: January 29, 2021

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NEW HAMPSHIRE SUPREME COURT

Docket No. 2020-0316

TOWN'S APPENDIX VOL. I

TABLE OF CONTENTS

<u>Description</u>	<u>Page Number</u>
Town of Lincoln's Motion to Reconsider (April 20, 2020)	2
Town of Lincoln's Exhibit 1 (Tax Map 107)	7

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS.

SUPERIOR COURT

TOWN OF LINCOLN

v.

JOSEPH CHENARD

Case No.: 215-2018-CV-00167

TOWN OF LINCOLN'S MOTION TO RECONSIDER

NOW COMES the Plaintiff, Town of Lincoln (the "Town"), by and through its attorneys, Hastings Malia P.A., and respectfully moves that this Honorable Court reconsider its denial of the Town's request for costs and attorney's fees, and in support thereof states as follows:

I. INTRODUCTION

1. In pertinent part, Superior Court Rule 12(e) states:

To preserve issues for an appeal to the Supreme Court, an appellant must have given the court the opportunity to consider such issues; thus, to the extent that the court, in its decision, addresses matters not previously raised in the case, a party must identify any alleged errors concerning those matters in a motion under this rule to preserve such issues for appeal.

2. This Honorable Court denied the Town's request for attorney's fees because it made the determination that "the Town's petition does not seek to enforce the zoning ordinance." Final Decree at p. 8. The Town hereby identifies the "points of law or fact that the court has overlooked or misapprehended" in arriving at its conclusion to deny the Town's request for costs and attorney's fees. See Rule 12(e).

II. BASIS FOR RECONSIDERATION

RSA 676:17, II Does Not Limit the Town's Entitlement to an Award of Costs and Reasonable Attorney's Fees to Only Certain Particular Means of Enforcing its Local Ordinance.

3. In pertinent part, RSA 676:17, II states as follows:

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.

(Emphasis added.)

4. The Town's action was brought to enforce its local ordinance. See ¶¶ 4 and 18 of Petition for Injunctive Relief for Junkyard Violation. ("The Town alleges that the...Lots are...in violation of the Town's Land Use Plan Ordinance.") ("The Defendant has not obtained a Special Exception, and therefore he is operating a junkyard in violation of the Town's Land Use Plan Ordinance.")

5. As RSA 676:17, II makes clear, the Town is *not* restricted to one method of enforcing its local ordinance.

6. The Town had to bring a legal action to enforce its Land Use Plan Ordinance. It simply chose to enforce its ordinance by, among other things, specifically seeking a mandatory injunction pursuant to RSA 236:128, I.

7. Because (1) the Town brought "*any* legal action" to enforce its local ordinance "by injunctive relief as provided by RSA 676:15 or otherwise", and (2) the Town was the prevailing party; the Town "*shall* recover its costs and reasonable attorney's fees..."

New Hampshire's Established Practice of Emphasizing Substance and Merits Over Procedure and Form Supports an Award of Costs and Reasonable Attorney's Fees.

8. It is well established that "[p]rocedure and form will yield to substance and emphasis will be placed on the simple merits of the controversy rather than the form of the pleadings in which they may be presented." Hackett v. Bos. & M. R. R., 95 N.H. 45, 46-7 (1948), citing Walker and Walker, 63 N.H. 321 (1885), Lewellyn v. Follansbee, 94 N.H. 111, 114 (1946), Eastman v. Waisman, 94 N.H. 253, 254 (1947).

9. Here, as indicated at pp. 2-3 of this Honorable Court’s Final Decree, “the Town argues that because the Properties meet the statutory definition of a junkyard, the respondent is required to obtain a special exception under the Town zoning ordinance for junkyard use of the Properties [and] [b]ecause the respondent has not received a special exception . . . his use of the Properties violates the Town zoning ordinance...”

10. The “simple merits” of the case are: (1) the Properties violate RSA 236:114 *and* the Town’s local ordinance, (2) The Town is entitled to an injunction to curtail the violations *and* enforce its ordinance, and (3) The Town is entitled to an award of costs and reasonable attorney’s fees because it had to file “any” legal action to seek the relief to which it was entitled.

11. The particular, technical form of the Town’s Petition should yield to what is the evident substance of the controversy. See Hackett v. Bos & M. R. R., supra.

The Town Did Seek to Enforce its Ordinance.

12. Even with a more form-based reading of the Town’s Petition, the Town should be found entitled to the relief sought: ¶ 15 of the Town’s Petition—the first paragraph of Count III—“repeats and realleges the allegations set forth in paragraph 1 through 14 above as if fully set forth herein.”

13. As such, all prior allegations regarding the impermissibility of the junkyard and the Town’s entitlement to an injunction to stop the impermissible use are a part of Count III.

14. Consequently, the Town is entitled to an award of costs and reasonable attorney’s fees for the reasons stated herein.

Because the Town is Entitled to the Relief Sought, This Court Must Decide the Issue of Whether The Respondent’s Use of His Properties Constitutes a Violation of the Town Ordinance.

15. As a technical procedural matter, in order that this Honorable Court may reconsider its April 13, 2020 Final Decree and award the Town its costs and reasonable attorney’s fees, it must reach the issue of the respondent’s violation of the Town’s ordinance.

16. This does not require significant, additional analysis.

17. The Court has already indicated that the facts that “respondent has not obtained a license to operate a junkyard business at his Properties, and he has never received a special exception for Junk Yard use of his Properties”, Final Decree at 2, “do not appear to be in dispute.” Final Order at 3.

18. Because this Honorable Court has ruled “that the respondent is operating or maintaining a junkyard...”, Final Order at 9, and “‘Junk Yards’ are allowed by special exception only,” Final Order at 1; it follows that the respondent is in violation of the Town’s ordinance.

III. CONCLUSION


For the reasons cited herein, the respondent is in violation of the Town’s ordinance. The Town had to bring “any legal action” to enforce its ordinance. The Town is the prevailing party. As such, the Town “shall recover its costs and reasonable attorney’s fees actually expended in pursuing the legal action” RSA 676:17, II.

WHEREFORE, the Town of Lincoln respectfully requests that this Honorable Court:

- A. Grant this Motion to Reconsider;
- B. Rule that the Respondent’s use of his Properties constitutes a violation of the Town zoning ordinance;
- C. Award the Town its costs and reasonable attorney’s fees; and
- D. Grant such other and further relief as the Court deems just and equitable.

Respectfully Submitted,
TOWN OF LINCOLN
By its attorneys,
HASTINGS MALIA P.A.


Dated: April 20, 2020


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was mailed and e-mailed to Bruce J. Marshall, Esquire, counsel for Joseph Chenard, on the above date via first class mail.

Dated: April 20, 2020


Peter J. Malia, Jr., Esq.



THIS MAP IS FOR ASSESSMENT PURPOSES. IT IS NOT VALID FOR LEGAL DESCRIPTION OR CONVEYANCE.
 THE HORIZONTAL DATUM IS THE NEW HAMPSHIRE STATE PLANE COORDINATE SYSTEM, MAD 83.
 PHOTOGRAPHY DATE: APRIL 20, 2008
 COMPLETION DATE: SEPTEMBER 30, 2008

PRODUCED IN 2008 BY
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AREA SURVEYED: Ac
 AREA CALCULATED: Ac
 RECORD DESCRIPTION: HWY
 MATCH LINE: M.L.
 WATER: WATER

LEGEND
 EIGHTY PROPERTY: [Symbol]
 SUBORDINARY LOT NO.: [Symbol]
 BOUNDARY FROM RECORD: [Symbol]
 PART OF MAP/ACCESS: [Symbol]
 EIGHTY OVERLAP: [Symbol]
 45% SLOPE: [Symbol]

SCALE 1" = 100'
 FEET: 0 50 100
 METERS: 0 20 40
 REVISED TO:

PROPERTY MAPS
LINCOLN
 NEW HAMPSHIRE

INDEX DIAGRAM
 105 408
 106 115

MAP NO.
107