STATE OF NEW HAMPSHIRE

SUPREME COURT

THE NEW LONDON HOSPITAL ASSOCIATION, INC.

v.

TOWN OF NEWPORT

No. 2019-0616

APPEAL FROM THE SULLIVAN COUNTY SUPERIOR COURT PURSUANT TO SUPREME COURT RULE 7

REPLY BRIEF OF THE APPELLANT, THE NEW LONDON HOSPITAL ASSOCIATION, INC.

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May 21, 2020
Oral Argument by: Matthew Johnson

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

I. The Superior Court Has Authority to Decide the Merits of NLH's Exemption Application Pursuant to RSA 72:34-a.

The Town of Newport's primary argument, distilled to its core, is that the selectmen, by their own actions, control the scope of appellate review of exemption cases. This argument is both legally and factually incorrect. The Town of Newport's Brief[1] ignores two essential facts: (1) NLH timely submitted the 2016 BTLA A-12 to the Town pursuant to RSA 72:23, VI[2] on May 23, 2016, and (2) NLH timely appealed the selectmen's denial of its application to the superior court before September 1, 2017[3], "which may order an exemption . . . if a tax has been assessed." RSA 72:34-a. Under 72:34-a, the superior court may order an exemption "[w]henever the selectmen or assessors refuse to grant an applicant an exemption . . . to which the applicant may be entitled under the provisions of RSA 72:23, 23-d, 23-e . . . ." The two condition precedents under 72:34-a were met in this case: the Town selectmen refused to grant an exemption to which NLH may be entitled, and NLH appealed in writing on or

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1 Hereinafter "Town" and "Town's Brief".

2 Apx. at 18, 204.

3 Apx. at 193, 217-232.

before September 1 "following the date of notice of tax[.]" RSA 72:34-a. Thus, the superior court is permitted to order an exemption based on the merits of NLH's application, including considering whether accident, mistake, or misfortune caused NLH to file the BTLA A-9 on May 19, 2016, instead of April 15, 2016.

The Town argues that 72:23-c, I, prohibited the selectmen from ever "receiving" NLH's application within the meaning of that statute. RSA 72:23-c, I, states:

> Every . . . charitable organization . . . shall annually, on or before April 15, file a list of all real estate and personal property owned by them on which exemption from taxation is claimed, upon a form [the BTLA A-9] . . . If any such organization or corporation shall willfully neglect or refuse to file such list upon request therefor, the selectmen may deny the exemption. If any organization, otherwise qualified to receive an exemption, shall satisfy the selectmen or assessors that they were prevented by accident, mistake or misfortune from filing an application on or before April 15, the officials may receive the application at a later date and grant an exemption thereunder for that year; but not such application shall be received or exemption granted after the local tax rate has been approved for that year.

It is clear from RSA 72:23-c, I, that the selectmen have the ability to receive a late application, up until the local tax rate has been approved for that year.[4]

RSA 72:23-c does create deadlines, as the Town correctly argues; however, nothing in its plain language forecloses the superior court review contemplated by RSA 72:34-a. RSA 72:23-c is not the statute that creates the exemption (that is RSA 72:23); rather, it creates parameters by which the selectmen can receive and rule on applications, including allowing them to receive late-filed applications, provided it is before the local tax rate is approved for that year. See RSA 72:23-c, I.

Notably, RSA 72:34-a refers to RSA 72:23, and does not mention RSA 72:23-c. That is because, as argued in NLH's opening brief[5], the superior court conducts a de novo review of whether the entity is entitled to an exemption based on the language of RSA 72:23, V, through an analysis of the four ElderTrust factors. ElderTrust of Fla. v. Town of Epsom, 154 N.H. 693, 697-98 (2007). This Court has never held, and nor does the Town urge, that the superior court in an exemption

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[4] The 2016 Newport tax rate was set on November 10, 2016. Apx. at 57, 96. That is over five months after NLH's exemption application was complete, in that the Town had NLH's BTLA A-9 and BTLA A-12, by May 23, 2016. Apx. at 18, prior to the June 1 deadline required by RSA 72:23, VI.

[5] Hereinafter "Opening Brief".

case is foreclosed from hearing evidence outside that which was presented to the selectmen when they initially ruled on the exemption application. Otherwise, selectmen could fail to request the information necessary to properly find a charity exempt, deny it on that basis, and always be affirmed on appeal if review is limited to only what they requested. A slight variation of that scenario is what the Town is asking the Court to approve in this case. Despite significant evidence demonstrating that NLH simply mistakenly filed the BTLA A-9 one month late[6], the selectmen never inquired or apparently considered whether that was due to accident, mistake, or misfortune that befell NLH.

The Town argues that RSA 72:23-c, I, places the burden on the taxpayer to satisfy the selectmen that the delay was due to accident, mistake, or misfortune, before an application can be "received". Yet, the Town sent NLH a letter on September 7, 2016, stating the selectmen had "moved to deny" its 2016 application for exemption. Apx. at 29, 57, 89. In the Town's view, if NLH had written on its BTLA A-9 "late due to mistake", this would be an entirely different case and the superior court could consider evidence of accident, mistake or misfortune because the selectmen might have done so. The Town's argument exalts form over substance

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6 See Opening Brief, pp. 15-20; 37-40; Apx. at 43-49; 53-57.

and improperly constricts appellate review only to what the selectmen considered below, which simply is not the standard of review in exemption cases. See 319 Vaughan Street Center, LLC v. City of Portsmouth, 218-2014-CV-00924 (Delker, J.) (Rockingham Super. Ct., Oct. 5, 2015), Apx. at 106-08.

Additionally, extending the Town's reading of RSA 72:23-c, I, a step further: if the taxpayer failed to "satisfy" the selectmen that the late filing was due to accident, mistake, or misfortune – meaning they offered an explanation, but it was inadequate – by the Town's reading of RSA 72:23-c, the selectmen still could not "receive" the application and superior court review would be foreclosed. This interpretation, followed by the superior court, contradicts the plain language of RSA 72:34-a. The distinction drawn by the Town is arbitrary, without statutory foundation, and wholly inconsistent with the policy goals behind the statutory exemption scheme.

"[T]he legislative purpose to encourage charitable institutions is not to be thwarted by a strained, over-technical and unnecessary construction." Marist Bros. of N.H. v. Town of Effingham, 171 N.H. 305, 310 (2018); Opening Brief at p. 30; see also Apx. at 123-30. Yet, this is exactly the interpretation proposed by the Town.

a. The Town Provides No Basis to Affirm Summary Judgment.

The Town argues that "the selectmen could not excuse the late A-9 simply because NLH has alleged that it otherwise diligently pursued the exemption." Town's Brief, p.15. This argument demonstrates the improperly strict interpretation the Town gives RSA 72:23-c. NLH's diligent pursuit of the exemption (e.g., submitting the 2016 BTLA A-12 early, meeting with the Town, producing documents upon request, see Apx. at 54-57) is evidence that it did not "willfully neglect or refuse" to file the BTLA A-9, but rather was prevented due to accident, mistake or misfortune. See RSA 72:23-c, I. By the plain language of RSA 72:23-c, the selectmen have the power to receive a late application if they are satisfied – without any specification as to the way in which they must be satisfied – that the late filing was due to accident, mistake, or misfortune. RSA 72:23-c, I. They also have the power to request "such . . . information as shall be reasonably required to make determinations of exemption of property under this chapter." RSA 72:23-c, II. Thus, contrary to the Town's after-the-fact justification, the Town could excuse the late filing. In fact, that is what it did. The selectmen "moved to deny" NLH's application on the merits because of their unsubstantiated view that "the level of charity care provided by the hospital is very small and it is a fee for service

operation." Apx. at 29, 57, 86. If NLH's application could not be "received" or the late filing excused, there would have been no reason for the Town to rule in part on the merits.

The Town then asserts that "NLH argues that it was entitled to deferential *de novo* review of facts about its late filing of the A-9 due to accident, mistake or misfortune[.]" Town's Brief, p.19. This misconstrues NLH's argument. NLH argues that in ruling on a summary judgment motion, the superior court was required to view the facts in the light most favorable to NLH as the non-moving party when deciding whether NLH's one-month-late filing was due to accident, mistake or misfortune, or whether NLH had "waived" the ability to so argue through its conduct. However, the superior court never reached the issue; it refused to consider any evidence of accident, mistake, or misfortune, let alone view that evidence in the light most favorable to NLH.

The Town attempts to justify the superior court's finding of waiver against NLH by relating it to a finding of failure to preserve. Town's Brief, pp. 20-21. Whether the superior court divested itself of jurisdiction based on a factual finding of waiver, or on preservation grounds, the decision was error because its review is not limited to a particular record when deciding an RSA 72:34-a appeal. However, the superior court read into RSA 72:23-c a requirement of preservation that is unsupported by the statute or case law. If preservation were

required, then the Town likewise should be foreclosed from asserting any defenses to NLH's superior court petition that were not asserted by the selectmen as a basis for the denial of NLH's petition.

The Town next accuses NLH of making assumptions about other entities from which it affirmatively sought documents related to charitable tax exemption filings. Town's Brief, pp. 23-24, fn2. It makes representations unsupported by affidavit or the record, which should be disregarded. See id. The larger point is this: the Town was not harmed by the one-month late filing of NLH's BTLA A-9. Its purported inability to receive NLH's application is a construct of its own making – not one required by RSA 72:23-c. NLH's application was complete with the May 23, 2016 filing of its BTLA A-12. The selectmen could have found based on NLH's conduct that the delay was accidental, and "received" the application. Where the selectmen had this power, the superior court must have as much power, if not more, to grant the exemption pursuant to RSA 72:34-a.

Lastly, the Town argues that NLH cannot satisfy the accident, mistake, or misfortune standard. Town's Brief, pp. 24-30. The length of argument dedicated to the issue demonstrates that a genuine dispute of material fact exists as to whether accident, mistake, or misfortune occurred. "The question whether accident, mistake or misfortune occurred is

for the trier of fact . . . ." Lakeview Homeowners Ass'n v. Moulton Constr., 141 N.H. 789, 791 (1997); see also Ryan v. Perini Power Constructors, 126 N.H. 171, 173 (1985). Despite recognizing this, the superior court refused to consider any evidence bearing on the issue, instead finding that "[s]ince NHLA did not present the board [of selectmen] with circumstances that justified the delay, it waived that issue for purposes of appeal." Add. at 58-59.

In so holding, the Town and the superior court read provisions into RSA 72:23-c and 72:34-a that do not exist and are contrary to the legislative purpose of these statutes: to encourage charitable institutions. Marist Bros. of N.H., 171 N.H. at 310; see also Sanbornville United Methodist Church v. Town of Wakefield, 2018 N.H. Tax LEXIS 12, *6-7 (N.H. BTLA Feb. 23, 2018) (Apx. at 126) ("A tax exemption statute is construed not with rigorous strictness but to give full effect to the legislative intent of the statute. . . . The parameters established by the legislature to qualify for this exemption include consideration as to whether accident, mistake or misfortune resulted in the late filing of the A-9 Form.")(internal quotation and citation omitted).

Adopting the Town's reading of RSA 72:23-c would prohibit appellate review in any circumstance where the selectmen are not "satisfied" that accident, mistake or misfortune prevented the filing -- because they would never

"receive" the application at all. Town's Brief, pp. 22-23 ("satisfaction is a mandatory condition precedent for receipt of a late-filed form") (emphasis added). This Court must now decide whether appellate review hinges on whether the selectmen are "satisfied" – or, as NLH asserts, whether an entity seeking a charitable tax exemption can raise evidence of accident, mistake or misfortune on appeal in proving that it qualifies for the exemption.

The superior court's review pursuant to RSA 72:34-a is to determine whether the taxpayer satisfies its substantive burden of establishing the ElderTrust factors under 72:23, V; not whether the taxpayer presented sufficient evidence to the selectmen in the first instance to qualify for the exemption. See, e.g., Marist Bros. of N.H., 171 N.H. at 309-311 ("In evaluating whether an institution should be granted an exemption under RSA 72:23, V, we apply the four-factor test articulated in ElderTrust[.]"). The superior court improperly limited its review only to the issues presented to the selectmen, and foreclosed NLH from an exemption based on a one-month delay that was entirely cured before the statutory deadline of June 1[7]. Under these facts, this Court should reverse the decision to grant summary judgment and remand

[7] RSA 72:23, VI.

for a determination on the merits of NLH's charitable tax exemption for the Newport Health Center.

II. NLH Should Have Been Permitted to Amend its Complaint.

The Town argues the superior court correctly exercised discretion in denying NLH's Motion to Amend its Complaint because NLH sought to add "an unrelated, new cause of action and did not cure a defect in the complaint." Town's Brief, p. 34. The Town argues NLH's declaratory equal protection claim "would change the scope of discovery" and "calls for entirely different evidence and relief". Town's Brief, p. 36. This argument is hyperbole. NLH's equal protection claim asserts that the Town, with knowledge that NLH intended to pursue the exemption, intentionally excluded NLH when sending reminders to all other entities that it knew would be applying for the exemption in the 2016 Tax Year. See Apx. at 192-232 (Motion to Amend Complaint). This evidence is directly related to and supports NLH's argument that accident, mistake, and misfortune caused it to file the BTLA A-9 one month late; had it received the reminder like other entities – including Valley Regional Hospital, an entity very similar to NLH – it would have filed the BTLA A-9 timely. Apx. at 56.

Further, the Town ignores the fact that it already responded to discovery requests from NLH in the context of the exemption case that bear upon the equal protection claim. Apx. at 200-215. Both claims asserted by NLH involve the same two parties, the same period of time, and the same subject: Newport's refusal to acknowledge NLH's charitable status or treat it the same as other charitable exemption applicants in the 2016 Tax Year. See Apx. at 217-232 (Proposed First Amended Complaint). The claims are so interrelated that there is no reasonable basis to deny the amendment.

Next, the Town argues that the viability of NLH's claim is somehow divorced from whether injustice would result from being unable to assert it. Town's Brief, pp. 37-38. Contrary to the Town's assertion, the superior court considered neither the viability of NLH's claim, nor whether injustice would result from refusing to allow NLH to amend its Complaint. See Add. at 60-62.

The Town argues that no injustice resulted to NLH because res judicata would not bar NLH's claim; yet for res judicata purposes, this Court has defined "cause of action" to refer to "all theories on which relief could be claimed on the basis of the factual transaction in question." Kalil v. Town of Dummer Zoning Bd. Of Adjustment, 159 N.H. 725, 730 (2010). If, as the Town argues, it could not claim res judicata

if faced with NLH's equal protection claim, it is nevertheless prejudicial to require NLH to litigate an entirely new case based on the same exact period of time, where an aspect of relief NLH claimed related directly to its petition for a charitable tax exemption. See Apx. at 230-231. NLH should have been permitted to amend its complaint for the first time in light of newly discovered evidence, rather than file a separate complaint requiring separate service of process, filings fees, structuring order, discovery schedule, depositions, and trial. This is because the evidence NLH seeks to introduce relates so closely in time and fact to its 2016 charitable exemption application and whether accident, mistake or misfortune caused it to file the BTLA A-9 one month late. Requiring NLH to commence parallel litigation would waste the parties' and the court system's scarce resources for no purpose.

Finally, the Town claims that NLH's equal protection claim is not viable because "NLH is part of a large class of taxpayers that has never previously been granted a charitable exemption by Newport." Id. at 39. However, the Town has also acknowledged that "[a]ll entities seeking tax exemption stand in the same position", because charitable exemption applicants must re-apply annually and demonstrate they meet the requirements. Apx. at 180, 247-48; RSA 72:23, V; RSA 72:23-c, I. In other words, all prospective applicants,

including NLH, are similarly situated irrespective of whether those applicants received an exemption the prior year. As argued below, NLH states viable claims under the State and Federal constitutions. Apx. at 248-51. In denying NLH the opportunity to litigate its claims, the superior court unsustainably exercised its discretion to the prejudice of NLH. The decision should be reversed and this case remanded.

REQUEST FOR ORAL ARGUMENT

NLH respectfully requests fifteen minutes of oral argument before the full Court. Matthew Johnson, Esquire, will present oral argument for the appellant, NLH.

Respectfully submitted,

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By its Attorneys,

DEVINE, MILLIMET & BRANCH, PROFESSIONAL ASSOCIATION

Dated: May 21, 2020

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CERTIFICATION OF COMPLIANCE

I hereby certify that this brief complies with the 3,000 word limit established by Rule 16(11). This brief contains 2,993 words in the indicated sections of Rule 16(11), exclusive of pages containing the table of contents, table of authorities, and any addendum.

I have forwarded copies of the foregoing brief to Adele Fulton, Esq.; Matthew C. Decker, Esq.; Jamie Hage, Esq.; and Katherine Hedges, Esq. via the Court's electronic filing system's electronic services.

/s/ Matthew R. Johnson
Matthew R. Johnson, Esq.