THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2022-0309

Cathleen A. Shea and Bradley M. Weiss

v.

Town of Sunapee

BRIEF OF THE APPELLEE/RESPONDENT, TOWN OF SUNAPEE

Appeal Pursuant to Supreme Court Rule 7

From the Final Order of the Superior Court of Sullivan County in

Docket No. 220-2021-CV-65

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To Be Argued By:

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II. Can RSA 677:3 be used to allow plaintiffs to avoid the jurisdictional prerequisite of filing a second motion for rehearing where the Zoning Board of Adjustment, on rehearing, added a new basis for denial of their requested variance?

STATEMENT OF CASE AND FACTS

By application dated March 3, 2021, plaintiffs applied for a variance to allow a newly constructed home to be 6 feet from the property line where 15 feet are required. See *Appendix to Plaintiffs'/Appellants' Brief* ("App.") at 23-25. On April 1, 2021, the Sunapee Zoning Board of Adjustment voted to deny the requested variance on the grounds that there was no hardship and that it would be contrary to the spirit of the ordinance. See App. at 85 and 95.

On April 27, 2021, plaintiffs sought a rehearing from the Sunapee Zoning Board of Adjustment. See App. at 99-102. That request was granted, and a rehearing was held on June 17, 2021. See App. at 122. Following the rehearing, the Sunapee Zoning Board of Adjustment again voted to deny the variance, this time based not only on the unnecessary hardship and spirt of the ordinance criteria, but also because granting the variance would be contrary to the public interest. See App. at 160 and 163.

Thereafter, plaintiffs filed their appeal with the superior court, without first submitting a second request for rehearing to the Zoning Board of Adjustment. Because a second motion for rehearing is a jurisdictional prerequisite to filing an appeal with superior court, the town moved to dismiss the appeal, see App. at 180-182; which was properly granted. The trial court also denied the subsequent motion for reconsideration, and this appeal followed.

SUMMARY OF ARGUMENT

Whether plaintiffs were required to file a second motion for rehearing to perfect their appeal to superior court is an issue of statutory construction, which this Court reviews *de novo*. See McDonald v. Town of Effingham Zoning Bd. of Adjustment, 152 N.H. 171, 174 (2005)(citing and quoting Pelletier v. City of Manchester, 150 N.H. 687, 689 (2004) and quoting State v. Warren, 147 N.H. 567, 568 (2002)).

A second motion for rehearing was required before plaintiffs could appeal to the superior court. On April 1, 2021, the Sunapee Zoning Board of Adjustment denied a motion to approve a variance to allow plaintiffs to construct a house within 6 feet of the side property line, where a setback of 15 feet is required, because plaintiffs had not demonstrated that there was unnecessary hardship, or that granting the variance would not be contrary to the spirit of the ordinance. See App. at 85.

Plaintiffs argue that they were unable to determine what the bases for denial were at the April 1 meeting, and therefore unable to determine whether a second motion for rehearing was required in July, because the April meeting, which was conducted via Zoom due to the pandemic, was muffled and often inaudible (a claim never before raised in this matter), because the minutes of the meeting were not approved until May 25, 2021, and because the notice of decision not was issued until August 3, 2021.

Plaintiffs' claims regarding the quality of the Zoom meeting have been waived, and are not, in fact, accurate. The recording is quite clear, as were the reasons for denial. Both plaintiffs and their attorney attended this virtual meeting, and presumably heard the motion and vote, which is in no way difficult to hear on the recording.

Moreover, the minutes of the meeting reflect the two reasons for denial. Although those minutes were not "approved" until May 25, 2021, nothing in the

law requires boards to approve minutes. The law requires that draft minutes be on file with the town within five business days of the board's meeting, see RSA 91-A:2; and plaintiffs do not claim that draft minutes were not available within that time period, or that they requested these draft minutes and were denied them. Plaintiffs offer no explanation as to why the minutes could not have been reviewed prior to filing their appeal with the superior court.

Plaintiffs also allege that without the written notice of decision, they could not have known on what bases the variance was denied. The notice of decision, though not issued in a timely manner, was entirely consistent with the oral motion and vote made at the meeting, and gives no more information or insight as to the board's reasons for denial than did the motion at the meeting, or the minutes of the meeting.

Not only should plaintiffs have known the bases for the April denial well before a second request for rehearing was due, they in fact did know. Plaintiffs file a motion for rehearing with the zoning board on April 27, 2021, in which they stated:

> In its decision, the Board made passing reference to the "spirit of the ordinance" but primarily focused on the "hardship" criterion. This decision is in error because the application does observe the spirit of the ordinance and satisfies the hardship criterion.

App. at 86. Clearly, then, plaintiffs understood the reasons for denial on April 27. No reason is offered for why their understanding of those reasons became muddied later.

This Court should therefore find that plaintiffs had all the information they required to understand the bases of the April 1 denial long before they needed to determine whether a second motion for rehearing was necessary.

Plaintiffs also knew or should have known the bases of the June 17, 2021 zoning board decision before they filed their appeal with the superior court. On

June 17, 2021, after holding a rehearing, the board again voted to deny the requested variance. The motion cited the public interest, hardship, and spirit of the ordinance criteria as the bases for denial. See App. at 160. Despite the inclusion of the public interest criteria as a basis for denial, plaintiffs did not file a second motion for rehearing with the zoning board; instead appealing directly to superior court, which dismissed the appeal for lack of jurisdiction.

Plaintiffs claim that they did not know that there was a new basis for denial, that they could not have been expected to know that there was a new basis for denial, and that there was not actually a new basis for denial.

Regarding the claim that they did not know, plaintiffs' attorney attended both zoning board hearings. He heard both motions, and apparently recognized this potential issue when he filed the *Complaint* in this matter, which preemptively requested relief pursuant to RSA 677:3 "[t]o the extent that the board may claim that any new issues arose." App. at 167. Plaintiffs were perfectly free to file both an appeal and a motion for rehearing to protect their interests if they were unclear as to whether the zoning board had denied the variance in June for the same or different reasons. They chose not to do so.

Regarding the claim that they could not have been expected to know that the boards' decisions were based on different criteria, again, plaintiffs could have, at any time, requested the draft minutes of either or both of the meetings, they could have reviewed the recordings of the meetings, or they could have reviewed the very motion for rehearing that they had filed with the zoning board in April, which correctly stated the grounds for the April decision.

Regarding the claim that there was not actually a new basis for denial, the board's April denial was based on hardship and spirit of the ordinance, while the June denial was based on public interest, hardship, and spirit of the ordinance. While the public interest and spirit of the ordinance criteria are related, they are not identical. See, e.g., Foley v. Town of Enfield, Case No. 2017-0294 (3JX Feb.

2, 2018), and as the trial court noted in its order on reconsideration, "[a] finding that the plaintiffs failed to meet one criterion was not dispositive of whether they met the other."

This conclusion is also supported by the actual language used by Mr. Simpson in April. Mr. Simpson is the member of the board who cited spirit of the ordinance as a basis for denial. His justification for identifying that criteria was the congestion in the area. This appears to have been a reference to this Court's plurality holding in Bacon v. Town of Enfield, 150 N.H. 468 (2003). Nothing about Mr. Simpson's comments suggest that he also meant to include failure to comply with the public interest as a basis for denial. Therefore, when the board added the public interest criteria to the list of reasons for denial, the decision was, in fact, different.

Plaintiffs attempt to avoid this conclusion by arguing that the board relied upon same "facts and circumstances" in both denials, and therefore there were no new grounds for denial. The same facts and circumstances may support a board's decision that multiple variance criteria are not met; however, it is not those factual findings which are determinative of whether a second motion for rehearing is required. Instead, this Court has held that RSA 677:3 requires the aggrieved party to file a new motion for rehearing when the second denial is based on different or additional reasons. Dziama v. City of Portsmouth, 140 N.H. 542, 545 (1995). Because a new, independent ground for denial was added by the board after rehearing, a second motion for rehearing was required in this case.

RSA 677:3 cannot be used to save plaintiffs' appeal. Plaintiffs argue that the superior court abused its discretion in not finding there was "good reason" to allow them to amend their appeal, pursuant to RSA 677:3. That statute, however, is inapposite here. Plaintiffs did not seek to add additional grounds to an appeal that were not raised in their motion for rehearing. Instead, they are seeking to

avoid the jurisdictional prerequisite to file a second motion for rehearing *at all*. RSA 677:3 therefore offers them no relief in this situation.

Plaintiffs ignore this issue in their brief, instead arguing that there was "good cause" to allow them to not file the second motion for rehearing. Even if RSA 677:3 could be applied in this case, however, "good cause" is not defined in the statute, and therefore this Court interprets it "in context by considering the statute as a whole." MacPherson v. Weiner, 158 N.H. 6, 10 (2008). The purpose of RSA 677:3 is to give the zoning board the first opportunity to correct any mistakes it may have made. See, e.g., Blagbrough Family Trust v. Town of Wilton, 153 N.H. 234, 239 (2006)(quoting Dziama, supra, at 544). Therefore, it is only when a second motion for rehearing would not have offered the zoning board that opportunity that it is not required. See, e.g., McDonald v. Town of Effingham, 152 N.H. 1018, 1023 (2005). None of plaintiffs' complaints have any bearing on whether there is good cause for them to avoid the statutory requirement that a second motion for rehearing be filed in this case.

Plaintiffs' claims that they did not know and could not have known that the board's second decision was based on an additional variance criteria are simply not credible in light of the record. A second request for rehearing was required prior to filing the present appeal, and no procedural errors on the part of the town relieve plaintiffs of their obligation to file one. Because plaintiffs failed to file a second motion for rehearing prior to filing the present appeal, the superior court had no jurisdiction over the appeal, and properly dismissed it. The trial court likewise property refused to find that RSA 677:3 permitted plaintiffs to avoid the need to file a second motion for rehearing. This Court should affirm those decisions.

ARGUMENT

I. STANDARD OF REVIEW

Whether plaintiffs were required to file a second motion for rehearing to perfect their appeal to superior court is controlled by statute. This Court reviews the superior court's interpretation of the applicable statutes *de novo*. It is the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole, and "construe[s] that language according to its plain and ordinary meaning," being mindful, however, that "where the literal reading of a statutory term would compel an absurd result," the Court will examine other indicia of legislative intent. See McDonald v. Town of Effingham Zoning Bd. of Adjustment, 152 N.H. 171, 174 (2005)(citing and quoting Pelletier v. City of Manchester, 150 N.H. 687, 689 (2004) and quoting State v. Warren, 147 N.H. 567, 568 (2002)).

II. A SECOND MOTION FOR REHEARING WAS REQUIRED BEFORE PLAINTIFFS COULD APPEAL TO THE SUPERIOR COURT

A. The Plaintiffs Knew or Should Have Known the Bases of the April 1, 2021 Zoning Board Decision Before Filing Their Appeal with the Superior Court

As this Court knows well, in order to receive a variance to permit a use otherwise prohibited by a zoning ordinance, an applicant has the burden of demonstrating to the town's zoning board of adjustment that five criteria are met. See, e.g., Robinson v. Town of Hudson, 149 N.H. 255, 256-57 (2003). Those five criteria are set forth in RSA 677:33 and are:

(A) The variance will not be contrary to the public interest;

(B) The spirit of the ordinance is observed;

(C) Substantial justice is done;

(D) The values of surrounding properties are not diminished; and

(E) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

On April 1, 2021, the Sunapee Zoning Board of Adjustment denied a motion to approve a variance to allow plaintiffs to construct a house within 6 feet of the side property line, where a setback of 15 feet is required. See App. at 85. Although no motion to deny followed, all three of the dissenting members cited a failure to demonstrate unnecessary hardship as the basis for their votes, and one board member also stated that he believed the spirit of the ordinance was not met. See id. Plaintiffs and their attorney were present at that meeting, which was held via Zoom, given the COVID-19 pandemic. See CR at 75.

Plaintiffs argue that they were unable to determine what the bases for denial were at the April 1 meeting, and therefore unable to determine whether a second motion for rehearing was required in July, because, they claim, the Zoom platform by which the meeting was being conducted (as permitted by Emergency Order 2020-04) resulted in a muffled and often inaudible meeting (a claim never before raised in this matter), because the minutes of the meeting were not approved until May 25, 2021, and because the notice of decision was not issued until August 3, 2021. They conclude, therefore, that they should be excused from complying with the jurisdictional prerequisite to file a second motion for rehearing prior to filing an appeal with the superior court.

Plaintiffs have provided this Court with a link to the video[1] of the meeting; however, they have not presented the Court with a transcript of that hearing.

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[1]Plaintiffs repeatedly claim in their Brief that they were not provided with the recordings of the meetings. See, e.g., Brief at 7, 11, 15, 21, and 22. To the contrary, and as plaintiffs admit in Footnote 2 of their Brief, those recordings were *at all times available* on the town's web site. Although for some reason they were not found if one searched under the "Zoning Board of Adjustment" heading, they were available if one searched by date. This information was provided to plaintiffs' counsel on April 13, 2022, and was also shared with the Court in the town's objection to the Motion for Reconsideration. See App. at 213, 223, and 226.

Though they claim *for the first time on appeal* that the recording of the meeting had an echo, was muffled and had a scratchy tone which reduced the clarity of communications at the meeting, see Plaintiff'/Appellants' Brief ("Brief") at 9; in fact, the recording is quite clear, as were the reasons for denial. As referenced in the meeting minutes, Ms. Silverman made the motion to approve the requested variance. See App. at 85. After that motion, the following exchange occurred beginning approximately 2 hours and 12 minutes into the hearing:

Chairman Simpson:	If you vote against it I would like to hear some criteria that you think that they have not met. So Jamie, we'll start with you, it's your motion.
Jamie Silverstein:	I am going to vote in support.
Chairman Simpson:	Ok. Jim?
Jim Lyons:	I am going to vote against it. I don't think the hardship criteria has been met.
Chairman Simpson:	David?
David Munn:	I vote in the positive.
Chairman Simpson:	Ok. Jeff?
Jeff Claus:	I vote against for the hardship criteria.
Chairman Simpson:	Ok. I also vote against it based upon I'm not sure I agree that there's a hardship here and also because of the congestion in the area, I think these buildings are a lot closer than the setback requirements and I have concerns that it will, it doesn't comply with the spirit of the ordinance, its unfortunate it's the nature of that neighborhood, but that's my vote.

Both plaintiffs and their attorney attended this virtual meeting, and presumably heard the above exchange, which is in no way muffled, echoed,

scratchy, or difficult to hear on the recording. Moreover, this exchange is entirely consistent with the minutes of the meeting, which reflect:

> A roll call vote was taken: Ms. Silverstein voted yes; Mr. Lyons voted no (hardship); Mr. Munn voted yes; Vice Chair Claus voted no (hardship); Chairman Simpson voted no (hardship and spirit of the ordinance).

App. at 85. There can be no argument, then, that the board's bases for denial were unclear on April 1, 2021.

Plaintiffs attempt to make hay of the fact that the minutes the April meeting were not "approved" until May 25, 2021. In fact, absolutely nothing in the law requires boards to approve minutes. Instead, the law requires that draft minutes be on file with the town within five business days of the board's meeting. See RSA 91-A:2. Despite several opportunities to do so, plaintiffs have made no claim that the relevant draft minutes were not available in the time required by the statute, or that plaintiffs requested these draft minutes and were denied them. Therefore, the fact that the minutes may not have been approved until May is nothing more than a red herring. Even if the approval of the minutes were relevant, the minutes were approved approximately 6 weeks before plaintiffs' deadline to file a second motion for rehearing with the zoning board. Plaintiffs offer no explanation as to why the minutes could not have been reviewed prior to filing their appeal with the superior court.

Finally, plaintiffs allege that without the written notice of decision, they could not have known on what bases the variance was denied. It is true that the notice of decision was not issued in a timely manner; however, when it was ultimately issued, it was entirely consistent with the oral motion and vote made at the meeting. It says:

> You are hereby notified that the application . . . has been DENIED due to the fact that the Spirit of the Ordinance is not observed and

> that the hardship criteria is not met because this property is similar to other properties in the area.

App. at 84. This notice of decision gives no more information or insight as to the board's reasons for denial than did the motion at the meeting, which plaintiffs and their attorney attended; or the minutes of the meeting, which plaintiffs had access to well before the deadline to file their second motion for rehearing. The trial court's citation to and reliance upon the notices of decision was therefore appropriate, and not something that could only be achieved with the benefit of hindsight, as plaintiffs argue in their Brief.

In fact, plaintiffs filed a timely request for rehearing with the zoning board on April 27, 2021. In that request, they stated:

> In its decision, the Board made passing reference to the "spirit of the ordinance" but primarily focused on the "hardship" criterion. This decision is in error because the application does observe the spirit of the ordinance and satisfies the hardship criterion.

App. at 86. Plaintiffs' claim now that they could not have deciphered the board's decisions for denial merely from memory is simply not credible. Clearly they understood the reasons for denial on April 27. No reason is offered for why their understanding of those reasons became muddied later.

Plaintiffs knew or reasonably should have known the bases for the zoning board's April 1, 2021 denial on or about April 1, 2021. They attended the meeting where the decision was made, they had access to the video recording of the meeting on the website, they have presented no reason why they did not or could not have reviewed the draft minutes, and they accurately stated the bases for denial in their April 27, 2021 motion for rehearing filed with the zoning board. This Court should therefore find that plaintiffs had all the information they required to understand the bases of the April 1 denial long before they needed to determine whether a second motion for rehearing was necessary.

B. The Plaintiffs Knew or Should Have Known the Bases of the June 17, 2021 Zoning Board Decision Before Filing Their Appeal with the Superior Court

The zoning board granted the plaintiffs' request for rehearing. Prior to the rehearing, on June 2, 2021, plaintiffs submitted further argument regarding their application, which addressed all of the variance criteria again. See App. at 135. This was appropriate, given that a rehearing is a hearing *de novo*. See, e.g., Fisher v. Boscawen, 121 N.H. 438 (1981). However, plaintiffs' inclusion of all criteria in their written submission and/or their arguments before the zoning board upon rehearing does not alter or expand the bases for the zoning board's April 1 denial, as plaintiffs suggest in their Brief.

On June 17, 2021, the board reheard the variance request. It again voted to deny that request. The motion to deny the variance at the June meeting initially cited the public interest, hardship, substantial justice and spirit of the ordinance criteria as the bases for denial. See App. at 160. The motion was later clarified by the board member who made it to remove the reference to the substantial justice criterium, leaving public interest, hardship and spirit of the ordinance as the bases for denial. See id. Plaintiffs' attorney attended this meeting in person.

Despite the inclusion of the public interest criteria as a basis for denial, plaintiffs did not file a second motion for rehearing with the zoning board, as required by RSA 677:3 and Dziama v. City of Portsmouth, 140 N.H. 542, 545 (1995). Rather they appealed directly to superior court, which dismissed the appeal for lack of jurisdiction. Plaintiffs claim that they did not know that there was a new basis for denial, that they could not have been expected to know that there was a new basis for denial, and that there was not actually a new basis for denial.

Regarding the claim that they did not know, plaintiffs' attorney attended both zoning board hearings. He heard both motions, and apparently recognized this potential issue when he filed the *Complaint* in this matter, which preemptively requested relief pursuant to RSA 677:3 "[t]o the extent that the board may claim that any new issues arose." App. at 167. Contrary to the claims in the Brief that plaintiffs were presented with some sort of Hobson's Choice to either appeal to the superior court or file a second motion for rehearing, there was no such dilemma. Plaintiffs were perfectly free to file both an appeal and a motion for rehearing to protect their interests if they were unclear as to whether the zoning board had denied the variance in June for the same or different reasons. To date, including in the Brief, no explanation is given for why plaintiffs did not take this simple step.

Regarding the claim that they could not have been expected to know that the boards' decisions were based on different criteria, again, plaintiffs attempt to rely on the lack of "approved" minutes, and the lack of a notice of decision from the April 1 hearing; claiming they had only their notes and recollections of the April meeting to rely upon in determining the basis of the April denial. However, plaintiffs could have, at any time, requested the draft minutes of either or both of the meetings, which would have demonstrated the need for a second motion for rehearing. They could have reviewed the recordings of the meetings, which, as discussed above, were at all times available on the town's web site. Or they could have reviewed the very motion for rehearing that they had filed with the zoning board in April, which correctly stated:

> "In its decision, the Board made passing reference to the "spirit of the ordinance" but primarily focused on the "hardship" criterion. This decision is in error because the application does observe the spirit of the ordinance and satisfies the hardship criterion."

App. at 86.

Regarding the claim that there was not actually a new basis for denial, again, the board's April denial was based on hardship and spirit of the ordinance, while the June denial was based on public interest, hardship, and spirit of the ordinance. Though the public interest and spirit of the ordinance criteria are related, they are not identical. See, e.g., Foley v. Town of Enfield, Case No. 2017-0294 (3JX Feb. 2, 2018). As the trial court noted in its order on reconsideration, "[a] finding that the plaintiffs failed to meet one criterion was not dispositive of whether they met the other."

This conclusion is also supported by the actual language used by Mr. Simpson in April. Mr. Simpson is the member of the board who cited spirit of the ordinance as a basis for denial. His justification for identifying that criteria was the congestion in the area.[2] This appears to have been a reference to this Court's holding in Bacon v. Town of Enfield, 150 N.H. 468 (2003) in which a plurality of this Court upheld the denial of a variance to permit construction of a boiler shed within the waterfront setback on the ground that it failed to comply with the spirit of the ordinance because of the potential congestion that could be created if many such variances were granted. Nothing about Mr. Simpson's comments suggest that he also meant to include failure to comply with the public interest as a basis for denial. Therefore, when the board added the public interest criteria to the list of reasons for denial, the decision was, in fact, different.

Plaintiffs attempt to avoid this conclusion by arguing that the board relied upon same "facts and circumstances" in both denials, and therefore there were no new grounds for denial. RSA 674:33 establishes five separate criteria which must be met in order to obtain a variance. Each of these criteria stands on its own, and failure to meet any one of them is grounds for denial of the variance.

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[2] A tax map showing the location of the property (Lot 11), as well as photographs of the area were included in the Certified Record. See App. at 11-14.

See, e.g., Olszak v. Town of New Hampton, 139 N.H. 723, 725 (1995)(citing Grey Rocks Land Trust v. Town of Hebron, 136 N.H. 239, 242 (1992)). Though the same facts and circumstances may support a board's decision that multiple variance criteria are not met, it is not those factual findings which are determinative of whether a second motion for rehearing is required. Instead, this Court has held:

> RSA 677:3 requires the aggrieved party to file a new motion for rehearing that raises any new issues that are thrust upon the appealing party under such circumstances. To hold otherwise would deny the board an opportunity to correct its errors and would limit the court to consideration of the errors alleged in the original rehearing motion.

Dziama v. City of Portsmouth, 140 N.H. 542, 545 (1995)(citing RSA 677:3, I and Fisher v. Town of Boscawen, 121 N.H. at 440)). Because a new, independent ground for denial was added by the board after rehearing, a second motion for rehearing was required in this case.

Plaintiffs were required to file a second motion for rehearing after the zoning board reheard and again denied their variance request, because the second denial was based upon an additional criterium than was the first. Though plaintiffs try to blame their failure on the town's alleged procedural errors, they knew, or at least should have known, that the second decision differed from the first, and therefore that a second motion for rehearing was required. In fact, plaintiffs were obviously aware of this issue when they filed their *Complaint* and asked for forgiveness for not filing the required second motion for rehearing. Plaintiffs' failure deprived the superior court of jurisdiction over their appeal, and the court therefore properly dismissed the appeal and denied the motion for reconsideration. This Court should affirm that decision.

III. RSA 677:3 CANNOT BE USED TO SAVE PLAINTIFFS' APPEAL

Plaintiffs argue that the superior court abused its discretion in not finding there was "good cause" to allow them to amend their appeal, pursuant to RSA 677:3. RSA 677:3 states, in relevant part:

> No appeal from any order or decision of the zoning board of adjustment . . . shall be taken unless the appellant shall have made application for rehearing as provided in RSA 677:2; and, *when such application shall have been made, no ground not set forth in the application shall be urged, relied on, or given any consideration by a court unless the court for good cause shown shall allow the appellant to specify additional grounds.*

(emphasis added).

That statute, however, is inapposite here. Plaintiffs did not seek to add additional grounds to an appeal that were not raised in their motion for rehearing. Instead, they are seeking to avoid the jurisdictional prerequisite to file a second motion for rehearing *at all*. RSA 677:3 therefore offers them no relief in this situation.

Plaintiffs ignore this issue in their Brief, instead arguing that there was "good cause" to allow them to not file the second motion for rehearing. Even if RSA 677:3 could be applied in this case, however, the "good cause" plaintiffs cite does not entitle them to relief.

First, plaintiffs claim, again for the first time on appeal, that the Zoom platform of the April meeting "affected the plaintiffs [sic] ability not only to hear the board's discussions but also to question the board concerning its actions at the April 1st meeting." Brief at 20. This issue was not raised below, nor is it identified in the Notice of Appeal. It has therefore been waived. See, e.g., State v. Atkins, 145 N.H. 256, 259 (2000)(citing State v. Jackson, 144 N.H. 115, 118 (1999)). Even if it were not waived, as discussed above: 1) the Zoom meeting appears to have been entirely audible and understandable at all times; 2) the

draft minutes of the April 1 meeting were available for plaintiffs to review and were approved well before the second motion for rehearing was due; and 3) plaintiffs correctly cited the April 1 bases for denial in their April 27 motion for rehearing filed with the board.

Second, plaintiffs argued they "were required to decide–file an appeal or file for a rehearing–without the benefit of a written decision from the April 1st hearing." Again, plaintiffs were not required to make a choice–they could have filed both an appeal and a second motion for rehearing. Further, the written decision added nothing to the record in terms of the bases for the board's April 1 denial. The motion made by the board and minutes both accurately reflect the two bases for denial. Plaintiffs' attempt to avoid the jurisdictional requirement that they file a second motion for rehearing cannot be cured with a plea in their Complaint that "to the extent that the board may claim that any new issues arose, the plaintiffs seek for good cause to have such issues consolidated in this zoning appeal." App. at 167.

Third, plaintiffs argue that the board did not approve the minutes from the June 17 meeting until September, and that access to those minutes or the videos would have assisted them. As explained above, however, there has been no claim that the draft minutes of the June 17 meeting were not available in a timely manner, and there is no legal requirement that minutes be approved. Moreover, the videos were available at all times on the town's web site. Finally, plaintiffs and their attorney attended the June 17 meeting (plaintiffs' counsel in person) and heard the motion.

Plaintiffs' fourth claim of "good cause" repeats their first claim that conducting the April 1 meeting via Zoom due to the Covid pandemic impaired their participation in and understanding of the meeting, and also impaired deliberations. Not only has this issue been waived because it was not earlier

raised, and not only is this contention false based on a review of the video, it does not supply good cause for failing to file a second motion for rehearing.

"Good cause" is not defined in the statute, and therefore this Court interprets it "in context by considering the statute as a whole." MacPherson v. Weiner, 158 N.H. 6, 10 (2008). The purpose of RSA 677:3 is to give the zoning board the first opportunity to correct any mistakes it may have made. See, e.g., Blagbrough Family Trust v. Town of Wilton, 153 N.H. 234, 239 (2006)(quoting Dziama, supra, at 544). Therefore, it is only when a second motion for rehearing would not have offered the zoning board that opportunity that it is not required. See, e.g., McDonald v. Town of Effingham, 152 N.H. 1018, 1023 (2005)(no second motion for rehearing required where new ground for denial of variance added in *denying* request for rehearing). None of plaintiffs' claims, and particularly plaintiffs' complaints about the zoning board's use of the Zoom platform to hold the hearing, have any bearing on whether there is good cause for them to avoid the statutory requirement that a second motion for rehearing be filed in this case to allow the zoning board to address any alleged errors.

RSA 677:3 does not apply in this situation, because plaintiffs are not seeking to add grounds to the appeal that they failed to raise in their motion for rehearing before the zoning board. Instead, they are looking for relief from their failure to file the second motion for rehearing at all. Even if the statute were applicable, there is no good cause to allow them the relief they seek. This Court should affirm the superior court's decision so finding.

CONCLUSION

Plaintiffs' claims that they did not know and could not have known that the board's second decision was based on an additional variance criteria are simply not credible in light of the record. A second request for rehearing was required prior to filing the present appeal, and no procedural errors on the part of the town relieve plaintiffs of their obligation to file one. Because plaintiffs failed to file a second motion for rehearing prior to filing the present appeal, the superior court had no jurisdiction over the appeal, and properly dismissed it. The trial court likewise property refused to find that RSA 677:3 permitted plaintiffs to avoid the need to file a second motion for rehearing. This Court should affirm those decisions.

REQUEST FOR ORAL ARGUMENT

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

CERTIFICATIONS

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

This document complies with the 9,500 word limit established by the Court's rules. It contains 6,498 words, inclusive of pages containing the table of contents, tables of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters.

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

Respectfully submitted,

TOWN OF SUNAPEE

By Its Attorneys

MITCHELL MUNICIPAL GROUP P.A.

Date: October 7, 2022

By: */s/ Laura Spector-Morgan*

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