STATE OF NEW HAMPSHIRE

SUPREME COURT

2022 Term

Docket No. 2022-0309

CATHLEEN A. SHEA AND BRADLEY M. WEISS

V.

TOWN OF SUNAPEE

PLAINTIFFS'/APPELLANTS' BRIEF
for
CATHLEEN A. SHEA AND BRADLEY M. WEISS

Rule 7 Appeal of Decision of the Sullivan Superior Court

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Did the trial court unsustainably exercise its discretion in dismissing plaintiffs' zoning appeal and not finding good cause where plaintiffs did not file a second motion for rehearing even though the zoning board failed to provide a written decision for its first denial reached at a "Zoom" meeting until four months following the hearing and after the appeal was filed, and where the absence of the written decision deprived the plaintiffs of notice of the bases for the board's decisions denying the variance.

Plaintiffs' Motion for Reconsideration; Plaintiffs' Complaint.

STATUTES and ORDINANCES IN THE CASE

RSA 676:3 Issuance of Decision

I. The local land use board shall issue a final written decision which either approves or disapproves an application for a local permit and make a copy of the decision available to the applicant. If the application is not approved, the board shall provide the applicant with written reasons for the disapproval. If the application is approved with conditions, the board shall include in the written decision a detailed description of all conditions necessary to obtain final approval.

II. Whenever a local land use board votes to approve or disapprove an application or deny a motion for rehearing, the minutes of the meeting at which such vote is taken, including the written decision containing the reasons therefor and all conditions of approval, shall be placed on file in the board's office and shall be made available for public inspection within 5 business days of such vote. Boards in towns that do not have an office of the board that has regular business hours shall file copies of their decisions with the town clerk.
[Effective Until 8/23/2022]

RSA 677:2 Motion for Rehearing of Board of Adjustment

Within 30 days after any order or decision of the zoning board of adjustment ... any party to the action or proceedings, or any person directly affected thereby may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion for rehearing the ground therefor; and the board of adjustment, a board of appeals, or the local legislative body, may grant such rehearing if in its opinion good reason therefor is stated in the motion. This 30-day time period shall be counted in calendar days beginning with the date following the date upon which the board voted to approve or disapprove the application in accordance with RSA 21:35; provided however, that if the moving party shows that the minutes of the meeting at which such vote was taken, including the written decision, were not filed within 5 business days after the vote pursuant to RSA 676:3, II, the person applying for the rehearing shall have the right to amend the motion for rehearing, including the grounds therefor, within 30 days after the date on which the written decision was actually filed....

RSA 677:3 Rehearing by Board of Adjustment, Board of Appeals....

I. A motion for rehearing made under RSA 677:2 shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable. No appeal from any order or decision of the zoning board of adjustment, a board of appeals, or the local legislative body shall be taken unless the appellant shall have made application for rehearing as provided in RSA677:2; 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.

§ 677:4. Appeal From Decision on Motion for Rehearing

Any person aggrieved by any order or decision of the zoning board of adjustment or any decision of the local legislative body may apply, by petition, to the superior court within 30 days after the date upon which the board voted to deny the motion for rehearing; provided however, that if the petitioner shows that the minutes of the meeting at which such vote was taken, including the written decision, were not filed within 5 business days after the vote pursuant to RSA 676:3, II, the petitioner shall have the right to amend the petition within 30 days after the date on which the written decision was actually filed. The petition shall set forth that such decision or order is illegal or unreasonable, in whole or in part, and shall specify the grounds upon which the decision or order is claimed to be illegal or unreasonable....

STATEMENT OF THE CASE

On April 1, 2021, at a remote hearing held by "Zoom," the zoning board denied plaintiffs' request for a variance for a reduced side-yard setback for their home. Minutes of the meeting were approved on May 25, 2021. The written decision was not issued until August 3, 2021.

On April 27, 2021, plaintiffs filed a motion for rehearing which the zoning board granted on May 6, 2021. The rehearing was held on June 17th, at which time the board again denied the variance. The board issued its written decision on June 25, 2021. The approved minutes were not available until September 3, 2021.[1]

With no written decision from the April 1st denial having been issued by the zoning board, and lacking minutes from the June 17th denial, and without any audio/video recording of either meeting, on July 8th the plaintiffs filed their appeal of the variance denial to the trial court. The Town answered and subsequently asserted that the plaintiffs should have filed a second motion for rehearing, alleging that an additional ground was included in the second denial. The trial court granted the Town's motion and dismissed the zoning appeal. Following the court's denial of plaintiffs' motion for reconsideration, plaintiffs filed this appeal.

[1] All of the zoning board meetings and activity described herein occurred during the year of 2021. For convenience, many of the dates are referenced, for example, as April 1st or June 17th, without the repeated statement of the year 2021.

STATEMENT OF THE FACTS

Cathleen Shea and Brad Weiss are the owners of a small house in the community known as "White Shutters" in Sunapee. Appendix, pp. 28, 52 (referred to as "App. p._"). Believed to have been laid out in the 1930's, the community consists of a number of formerly summer cottages where residents walked down to a main lodge for meals. App. p. 28. Most all of the houses now serve as year round homes. *Id.* Plaintiffs' house, 544 square feet in size which includes the area of two decks, is on a 1/10th of an acre parcel on Jobs Creek Road, about 250 feet from Lake Sunapee. App. p. 8.

Plaintiffs' property is located in the Rural Residential zone which requires a minimum lot size of 1.5 acres. App. p. 39. Due to its small size, the lot is a non-conforming lot. The zoning ordinance requires a 15 foot side yard set-back. *Id.* The plaintiffs' house currently has a deck which extends to within 3 feet of the east side boundary. App. pp. 36, 54. Plaintiffs proposed to replace the deck and replace a portion of that area with an addition to the house which would extend to within 6 feet of the east side boundary. App. pp. 36, 53. As required by the Town, the plaintiffs applied for a variance to permit the house to be within 6 feet of the east side boundary line.

Due to Covid restrictions, the zoning board meeting on April 1, 2021, occurred by remote access by means of "Zoom." App. p. 75. The board Chair read the Governor's Emergency Order which authorized remote access by zoning board members who all appeared electronically. *Id.* Although the board members, the plaintiffs and the other participants on-line managed as best as they could using the Zoom video platform, at times the audio had an echo, was muffled, and had a scratchy tone which reduced the clarity of communication at the meeting. The Town's website contains the audio/video of the meeting at https://townhallstreams.com/stream.php?location_id=30&id=36728 .[2]

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[2] Access to that audio/video recording of the April 1 meeting was only recently provided to the plaintiffs. The Town's website has a link for the zoning board and its minutes but the meetings of April 1, 2021 and June 17, 2021 - the meetings relevant to

At the meeting, the plaintiffs, their landscaping expert and counsel, together with unanimous neighbor support, App. pp. 60 - 73, submitted evidence addressing the five variance criteria, including information about improved fire safety and improved landscaping. App. pp. 75 - 85. The board discussed all of the variance criteria with a focus on hardship and health and safety. App. p. 84. On a motion to approve the variance, the motion failed with three opposed and two in favor. App. p. 85. The board did not take a vote to deny the variance, but proceeded to its next agenda item for which it granted a variance to another resident for a 6.5 side-yard setback. App. pp. 85, 92.

Although neither minutes nor a written decision were available as set forth in RSA 676:3, on April 27, 2021, the plaintiffs filed a motion for rehearing within the 30-day deadline required by RSA 677:2. App. pp. 99 - 108. Explaining that all five variance criteria had been addressed and providing an additional fire expert's report on health and safety, they requested a rehearing. *Id*. At the zoning board's May 6th meeting, given the opportunity to address the rehearing request, the applicants explained that they "requested a rehearing ... due to two primary points. One has to do with the Spirit of the Ordinance and public interest." App. p. 120, lines 281-282. The zoning board granted the rehearing on May 6, 2021. App. pp. 119 - 122. At that time, however, neither the minutes of the April 1st meeting nor the written decision were available despite the requirement of RSA 676:3. Although the minutes of the April 1st meeting were subsequently approved on May 25, 2021, App. pp. 230 -231, the written decision had not yet been issued and would not be issued until on August 3, 2021, (App. p. 95), after plaintiffs had filed their appeal to the trial court. A copy of that written decision was never provided to the plaintiffs who only received it as part of the Certified Record.

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this appeal - were not included in the zoning board section of the Town's website. The recordings were on the website but not available under the Zoning Board section of the Town's website. App. pp. 195 - 210, 200, 204; Appellants' April 12, 2022, Motion for Reconsideration and exhibits thereto).

On June 17, 2021, the zoning board held the rehearing on the variance request. The plaintiffs, again, addressed all five variance criteria. Norman W. Skantze, an expert in fire safety appeared remotely by Zoom and provided testimony concerning his report that the 6-foot setback would not create a hazard but would, in fact, provide greater safety by replacing an old wooden house with a new home that would comply with current, and far more stringent, building code requirements. App. pp. 104 - 106; 151 - 152. Despite the evidence presented, the board voted three to two on a motion to deny the variance. App. p. 160.

Although the written decision by the board was signed on June 25, 2021, that decision from the June 17th meeting was never provided, either by mail or electronically, to the plaintiffs until they received the Certified Record as part of the trial court appeal. Additionally, the minutes of the June 17, 2021, meeting were not available and were only approved on September 3, 2021. App. pp. 232 - 233.

Following the June 17, 2021, zoning board denial, the plaintiffs were faced with a choice - appeal to superior court or file a second motion for rehearing. No written decision from the April 1st Zoom meeting existed. As for the June 17th meeting decision, the Record also shows that the decision as well as the minutes of that meeting included "substantial justice" as a basis for denial. App. p. 163. After receiving the Certified Record, plaintiffs reviewed the June 17th meeting minutes that were approved on September 3, 2021. Following the filing of the appeal to the trial court, the plaintiffs were provided a link to the Town's audio recording which confirmed that "substantial justice is not an issue." App. p. 160, line 479; Addendum to Brief, p. 28, Order on Reconsideration. The board also discussed that there was "no public benefit." App. p. 160, line 478. Since hardship, health and safety were the bases for the April 1st denial, and since those issues were again raised in the June 17th meeting, and without a written decision from the April 1st meeting and aware that the June 17th decision was inaccurate, the plaintiffs elected to proceed with the appeal to superior court.

SUMMARY OF THE ARGUMENT

The zoning board's April 1, 2021 denial of plaintiffs' variance request was based on hardship, health and safety. The zoning board's rehearing on June 17, 2021, also based its decision on hardship, and found that health and safety issues did not satisfy the "spirit of the ordinance" and "public interest" variance criteria. Only after the filing of their appeal on July 8th and subsequently receiving the Certified Record did the plaintiffs obtain the written April 1st decision, which was issued on August 3rd. The discussions by the board at both hearings covered the same issues, namely hardship, health and safety, and its decisions were the same, such that no new motion for rehearing was required.

The trial court unsustainably exercised its discretion in failing to find "good cause" and requiring that plaintiffs should have filed a second motion for rehearing following the June 17th decision. Good cause exists for the trial court to permit the plaintiffs to specify additional grounds, if such existed, where the zoning board failed to issue a written decision until four months following its vote, the board failed to timely approve and file minutes, the appellants stated the grounds in their rehearing request, the April 1st Zoom meeting provided inadequate notice of the bases of the denial to the plaintiffs, no audio/video of either meeting was available, and the zoning board restated the same grounds for both denials.

ARGUMENT

1. Standard of Review

> Generally, in ruling upon a motion to dismiss, the trial court must determine whether the allegations contained in the plaintiff's pleadings sufficiently establish a basis upon which relief may be granted. *Provencher v. Buzzell–Plourde Assoc.,* 142 N.H. 848, 852–53, 711 A.2d 251 (1998). In making this determination, the court would normally accept all facts pleaded by the plaintiff as true and view those facts in the light most favorable to the plaintiff. *Id.* at 853, 711 A.2d 251. However, when 'the motion to dismiss does not challenge the sufficiency of the plaintiff's legal claim but, instead, raises certain defenses, the trial court must look beyond the plaintiff's unsubstantiated allegations and determine, based on the facts, whether the plaintiff has sufficiently demonstrated his right to claim relief.' *Id.* (quotation omitted). An assertion that a claim should be dismissed because the trial court lacks jurisdiction to hear the claim due to the plaintiff's failure to exhaust its administrative remedies is one such defense. We will uphold a trial court's ruling in such a case unless its decision is not supported by the evidence or is legally erroneous. *Mt. Valley Mall Assocs. v. Municipality of Conway,* 144 N.H. 642, 647 (2000).

Atwater v. Town of Plainfield, 160 N.H. 503, 507 (2010).

> [W]hether a ruling made by a judge is a proper exercise of judicial discretion, we are really deciding whether the record establishes an objective basis sufficient to sustain the discretionary judgment made.

State v. Lambert, 147 N.H. 295, 296 (2001).

2. The Two Decisions by the Zoning Board Relied on the Same Zoning Criteria.

The trial court's Order on Motion for Reconsideration stated that the zoning board "denied [plaintiffs'] application again, but with an added reason." Addendum to Brief, p. 29. The Order then stated that the Notice of Decision from the April 1st hearing cited "insufficient evidence of unnecessary hardship and found that the variance would not be in keeping with the spirit of the ordinance," *Id*., whereas the June 17th decision also "relied on ... the lack of proof that it was not contrary to the public interest." Addendum to Brief, p. 30.

With the benefit of the zoning board decisions having been included in the Certified Record, the trial court reached this conclusion based on its review of the language of the April 1st Notice of Decision together with the language of the June 17th Notice of Decision, even though those decisions had not been previously available to the appellants. Additionally, the trial court did not consider that the April 1st Notice of Decision was not issued until August 3rd, more than four months after the April 1st board vote conducted by Zoom and a month and a half after the board's June 17th rehearing. Since no written decision had been issued for the board's April 1st vote at the time when the plaintiffs were required either to file for a second rehearing or file an appeal, it was unreasonable and an error for the trial court to assume that the plaintiffs had knowledge of the bases for the April 1st decision. Instead, a review of the Certified Record indicates that the bases of both zoning board's two decisions relied upon "hardship" and "health and safety" as reasons for the denials. Additionally, the appellants addressed both "Spirit of the Ordinance and public interest" at the zoning board's May 6th meeting in explaining their request for a rehearing. App. p. 120, line 282. A second motion for rehearing was not required because the second denial did not raise "any new issues." *McDonald v. Town of Effingham,* 152 NH 1018, 1023 (2005).

The minutes of the April 1st zoning board meeting are included in the Certified Record. App. pp. 75 - 93. Three applications by the plaintiffs were included on the agenda for the meeting, one being a variance request for a side yard setback reduction, a second for a variance for lot coverage, and the third was for a special exception for the height of a proposed house. App. p. 75. The board found that a variance for lot coverage was not required, App. p. 82, and the special exception was continued to a later hearing date. App. p. 86.

For the east side boundary setback variance request, the plaintiffs presented their application addressing the five variance criteria. App. pp. 75 - 82. The board's discussion is recorded in the minutes. App. p. 83 - 85.

> Chairman Simpson said that part of the reason for Zoning is for health and safety reasons. Fire access and distance from buildings and controlling fires is a safety issue and he thinks this neighborhood is over-dense if the Board considers that a health and safety criteria. He shares Vice Chair Claus' struggles as this may be a reasonable use but to get there will require a major land disturbance and that is why there is erosion control but the proposal is a more intense use of the lot because the deck will be replaced with a primary structure. He is cognizant that there is a drawing that shows the setbacks and a building could be constructed entirely within the setback and be bigger than this one. He struggles on the two issues as in some respects the proposal defies the spirit of the ordinance regarding the health and safety issues and there was a way to build a house on this property without requiring setback Variances.

App. p. 84.

With little further discussion, a board member thereafter made a motion to approve the side yard setback variance.

> Ms. Silverstein made a motion to approve Case ZBA: 21-08: Parcel ID: 0125-0011-0000: seeking a Variance from Article III, Section 3.10 to permit a 6 ft east setback where 15 ft is permitted for a pre-existing non-conforming lot, the current existing east setback is 3 ft; with the agreement that the landscaping plan will be included and maintained and that Section 4.33 will be in full compliance, and that the Shoreland Permit will comply

> with all conditions that are outlined by the State Shoreland Permit 2020-04046. Vice Chair Claus seconded the motion. 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). The motion failed with three opposed and two in favor.

App. p. 85.

When the motion to approve the variance did not pass, the board took no further action and the board did not offer a motion to deny the variance. The board then proceeded to hear and approve another resident's variance application for a 6.5 foot side yard setback. App. pp. 86, 92.

Following the April 1st hearing, the plaintiffs filed a request for rehearing. The plaintiffs had 30 days within which to make the request but, during that time, they were not provided, nor did they have access to, either the meeting minutes or a written decision from the meeting. The plaintiffs relied upon their recollections of the Zoom hearing in preparing their request for a rehearing. They knew that the board discussed hardship, but they also knew that health and safety were concerns. *See, e.g.* App. p. 84, line 345.

Plaintiffs' request for rehearing referred to all five variance criteria and focused on hardship as one of the variance criteria which the board discussed. App. p. 99. The rehearing request also addressed the board's "health and safety" concerns and appellants specifically noted at the May 6th zoning board meeting that their rehearing "has to do with "Spirit of the Ordinance and public interest." App. p. 120. Health and safety are considerations for both spirit of the ordinance and public interest. *Farrar v City of Keene*, 158 N.H. 684, 691 (2009). However, without the aid of either a written decision, meeting minutes, or an audio/video recording of the April 1st hearing, the plaintiffs could not confirm or determine whether the board was referring either to "public interest" or "spirit of the ordinance" or both. Plaintiffs' request for rehearing sought to address health and safety concerns by including a report from Norman W. Skantze, a fire safety expert, who

responded to the board's health and safety concerns in order to cover both of those variance criteria as noted in the May 6th meeting minutes. App. p. 120.

The zoning board granted a rehearing which was held on June 17th, 2021. The minutes of the June 17th rehearing are in the Certified Record. App. pp. 149 - 160. After plaintiffs' presentation and the discussion by the board, a motion was made to deny the variance.

> Mr. Lyons restated the motion for the Board to deny Case ZBA: 21-08; Parcel ID: 0125-0011-0000; seeking a variance from Article III, Section 3.10 to permit a 6 ft east side setback where 15 ft is permitted for a pre-existing non-conforming lot; the existing setback is 3 ft; Cathleen Shea and Bradley Weiss, 38 Jobs Creek Rd, Rural Residential Zone based on: the application is not in public interest; he is concerned about cumulative impact and the water view from the surface of the lake for the public at large; replacing larger structures from what are now fairly small and very well molded into the contours of the terrain; there is no public benefit; there is no hardship as there is nothing unique about the property; substantial justice is not an issue; and this is contrary to the spirit of the Ordinance because of the concern regarding the cumulative impact which will lead to overdevelopment and shorefront congestion.

App. p. 160.

When the written decision was issued on June 25, 2021, it stated as the bases for denial that

> granting the variance would be contrary to the public interest; concerns about cumulative impacts and waterfront appearance; that there is no hardship in this because the property is not unique in its area; there is no substantial justice; and the use is contrary to the purpose of the Ordinance which is to encourage the most appropriate use of the land, protect the natural resources, and preserve the vitality, atmosphere and varied economic forces in Town.

App. p. 163.

The written decision, itself, differs from the text of the minutes which were approved some two and a half months later. App. pp. 232 - 233. For instance, the minutes state that the "application is not in the public interest" even though that is not a variance

criterion. App. p. 160, lines 475-476. *Gray v. Seidel*, 143 N.H. 327, 329 (1999) ("avoid 'harm to the public interest'"). The decision also refers to "substantial justice" as a basis for denial although the Town and the trial court have both acknowledged that "substantial justice" was not a basis for denying the variance. Brief, p. 29, Order on Motion for Reconsideration. Eliminating those errors from the minutes and the decision, the remaining bases for the variance denial stated in the written decision from the June 17th meeting are "public interest," "hardship" and "contrary to the purpose of the Ordinance," all of which had been previously asserted by the appellants.

While the requirement that the variance not be contrary to the public interest is related to the requirement that it be consistent with the spirit of the ordinance, *see, e.g., Farrar,* at 692, the plaintiffs recognize that the two criteria are not identical or require the same findings. However, the considerations for both criteria "examine whether granting the variance would threaten the public health, safety or welfare." *Malachy Glen Assocs. v. Town of Chester*, 155 N.H. 102, 106 (2007). When the zoning board conducted its discussion at the April 1st meeting, it did not describe or identify with any specificity the variance criteria but the discussion referred to health and safety.

> Chairman Simpson said that part of the reason for Zoning is for health and safety reasons. Fire access and distance from buildings and controlling fires is a safety issue and he thinks this neighborhood is over-dense if the Board considers that a health and safety criteria.

App. p. 84, line 345.

Given the similar considerations that apply to both the "public interest" and "spirit of the ordinance" variance criteria, it was reasonable for the plaintiffs to understand that both criteria were bases for the board's April 1st decision. The absence of a written decision or minutes deprived the plaintiffs from confirming the actual bases for the decision. That said, the plaintiffs filed a request for rehearing that referenced all five criteria, focusing on hardship and "health and safety," App. p. 99, and discussed both public interest and spirit of the ordinance at the zoning board's May 6th meeting. App. p.

120, lines 281 - 282.

With the overlapping but, admittedly, not identical inquiries that accompany the "public interest" and "spirit of the ordinance" variance criteria, the decisions from April 1st and June 17th were based on the same facts and bases. While the June 17th decision specifically referred to those criteria, the April 1st decision addressed the same health and safety concerns. In both decisions the zoning board did not provide any specific facts from the hearing evidence which would have distinguished the board's basis in citing one criterion or the other. The two decision relied on the same bases and, thus, no second request for rehearing was required.

3. The Trial Court Unsustainably Exercised it Discretion in Failing to Find "Good Cause."

The statutory requirement for zoning board appeals requires that upon receiving an adverse ruling an applicant must file a motion for rehearing. This provides the board with an opportunity to correct any alleged errors in its decision. *McDonald, at* 173. In the present case, when the Sunapee zoning board issued its second denial of plaintiffs' variance application on June 17th, its written decision cited three of the variance criteria but relied on the same health and safety concerns that were mentioned at the April 1st hearing. The Town claims that the second decision included an additional ground, thus requiring a second request for rehearing. Although the plaintiffs dispute whether a new ground was added to the second denial, more importantly, the written decision from the first denial had not even been issued at the time that the second decision was issued in writing. See, RSA 677:2.

When the zoning board denied plaintiffs' variance request on June 17th, the plaintiffs were faced with a dilemma. With no written decision from the April 1st vote available from the board, appellants were relying on their notes and recollections from the April 1st Zoom meeting. They knew that the zoning board engaged in a discussion of hardship and how health and safety might be affected by granting the variance. As of

early July, 2021, however, the zoning board had still not issued a written decision for its April 1st vote. Although a written decision from the June 17th hearing was signed on June 25th, it, too, was never provided to the plaintiffs until they received the Certified Record, and thus they relied on their notes and recollections of the discussion and vote from that 17th meeting for which no minutes were yet available. Based on their notes and recollections, the plaintiffs understood that hardship and health and safety were again the concerns of the board.

The dilemma thus faced by the plaintiffs in early July 2021, was whether to request another rehearing or to appeal to superior court. Plaintiffs were well aware that if the zoning board added grounds to its June 17th decision, then a second motion for rehearing would have been required to address those new grounds. *McDonald*, at 1022. On the other hand, if plaintiffs were to have filed for a rehearing, the board could have ruled that no new grounds were cited in its second decision, especially where the first decision had not yet even been issued. The plaintiffs would have then lost their opportunity to appeal to the superior court. RSA 677:4. The failure by the Town to provide the plaintiffs the written decision from April 1st deprived them of the notice necessary to make an informed decision. Since no new issues arose at the June 17th rehearing, appealing to the superior court provided the required route.

Only after filing their appeal to the superior court and their receipt of the Certified Record in the last week of August 2021, did the plaintiffs receive a copy of the written decision for the April 1st denial. Once they reviewed that decision, they learned that the decision was dated on August 3, 2021, nearly one month after filing their appeal to the trial court, and that it contained only two grounds for the variance denial. No findings of fact were included, only the board's ruling. The plaintiffs were also never provided a copy of the June 17th decision until their receipt of the Certified Record.

Good cause arises from several factors that operated to the disadvantage of the plaintiffs.

- The April 1st meeting was conducted entirely by remote means. The board chair acknowledged the Governor's Emergency Order which allowed all of the members of the zoning board to "appear" at the meeting by Zoom. While such Zoom meetings were common throughout the state during this pandemic period, the internet connections by the board members were always dependent upon the quality of the internet service. In the case of the Town of Sunapee and for the individual zoning board members living in different areas of the town, those connections varied and often involved interruptions and poor quality. *See, supra*, audio/video web-site link. Board members got "dropped" and then rejoined, echo and distortion interfered with voices and discussions, and dialogue among board members was dependent upon a "moderator" allowing a board member to speak. That Zoom process hampered the plaintiffs and members of the public who wished to speak or ask questions. The limitations presented by the audio/visual Zoom hearing affected the plaintiffs ability not only to hear the board's discussions but also to question the board concerning its actions at the April 1st meeting. Unlike the "temporary unavailability of minutes of the testimony" where the "plaintiffs attended the hearing ... and the nature of the evidence must have been ascertainable" as occurred in *DiPietro v. City of Nashua*, 109 N.H. 174 (1968), the plaintiffs in the present case were not physically present, the zoning board was not physically present, and the ability to ascertain the evidence and the comments by the zoning board was hindered by the very nature of the remote Zoom internet connection.

- The plaintiffs were required to decide - file an appeal or file for a rehearing - without the benefit of a written decision from the April 1st hearing. They were well aware that without a written decision, they had no confirmation of the bases for the board's decision. The plaintiffs recognized this dilemma. Although they understood that the "board's decision denied the variance application on the same grounds as it had

previously and no further motion for rehearing was required" (Complaint, App. p. 167, par. 11), given the lack of a written decision from the April 1st meeting, they added to 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" citing RSA 677:3,I, and *McDonald, at* 176. *Id.* This ensured that to the extent it might be required, the request was being made to amend their Complaint as permitted by RSA 677:4.

- The plaintiffs did not have the minutes from the June 17th zoning board meeting which the board did not approve until early September. Access to those minutes or the audio/video would have assisted the plaintiffs in eliminating the errors in the written decision by determining which were, in fact, the correct bases for the board's decision.
- The operation of the zoning board due to the Covid pandemic restrictions not only hindered the participation and understanding by the plaintiffs, their safety and landscaping experts and supporting witness, but also impeded the deliberations, conduct and conversations by the board members.

Good cause exists under the circumstances of this case to allow the plaintiffs zoning appeal to proceed. The limits of the remote attendance by board members and the communications by Zoom hindered the ability of the board members and the plaintiffs to accurately hear and record the back-and-forth discussions by the board. The failure of the zoning board to issue a written decision until four months following their April vote deprived the plaintiffs from knowing the bases for the board's denial. The board's discussion of health and safety with regard to the related subjects of public interest and spirit of the ordinance over Zoom was at times unclear and ambiguous. These conditions warranted the trial court to find good cause to allow the appeal to proceed and deny the Town's motion to dismiss.

> The expression "good cause shown" is not common in the statute law of the state. The only use of it that has been found which has been construed by

> the court is in the statute relating to costs. "In all actions or petitions in the Supreme Court, costs may, on motion and good cause shown, be limited," it is said, in substance, that whatever would make it appear just and reasonable that costs should be limited would be good cause for so doing. In ... construing a rule authorizing the court to limit costs "for good cause shown," it is said: "No nearer and closer definition can be given than that there will be good cause whenever it is fair and just between the parties that it should be so." Considering the manifest reason of the provision, the probable legislative purpose, and the definition of the term already given by this court and others, it appears probable that it was intended that permission to file the waiver after the year should be given whenever it would be reasonable and just to do so; in other words, when justice required it.

Jaques v. Chandler, 73 N.H. 376, 381 (1905).

> Whether "good cause" exists in this context is a question of fact. Ordinarily, we defer to the trial court's factual findings, and will uphold them unless they lack evidentiary support or are legally erroneous. However, because the superior court in this case relied only upon a paper record and we have before us the same paper record, "we give less than ordinary deference to the trial court's factual findings." As we have explained in other related contexts, "good cause" is a broader standard than a standard requiring proof of "accident, mistake or misfortune and not neglect." While the standard requiring proof of accident, mistake or misfortune and not neglect bars relief "from all consequences of human neglect," the good cause standard does not. Good cause is equivalent to what is "reasonable and just." [citations omitted].

In re D.O., 173 N.H. 48, 60 (2020).

What is reasonable and just? The circumstances of the hearings, the delay in providing a decision, and the absence of notice from the town to the plaintiffs demonstrate that the trial court unsustainably exercised its discretion is not finding good cause.

The limitations of the Zoom meeting combined with the failure by the town to provide a written decision, timely minutes or an audio/video recording of the meetings are circumstances that make it reasonable and just to permit plaintiffs appeal to proceed. The

muffled voices over an internet network by Zoom clouded the board's discussions and limited the hearing by the internet-remote participants. Neither the zoning board nor the plaintiffs were in the same room for the April 1st hearing. The board's failure to issue a written decision until August 3rd, some 6 weeks after the second hearing prevented the plaintiffs from knowing the bases of that decision. Other than the board's repeated emphasis on health and safety, the June written decisions did not include any facts or specific findings to alert the plaintiffs that it was any different from the April decision. The zoning board's failure to provide minutes within the required period of time only further hindered the plaintiffs knowledge of the bases for the board's decision. Some of these conditions may have been due to the restrictions and compromises on the zoning process imposed by the Covid-related circumstances. However, the result deprived the plaintiffs of a fair and reasonable basis on which to know and respond to the zoning board's decision. It is reasonable and just to permit the plaintiffs to proceed with their zoning appeal on the merits.

The trial court unreasonably exercised its discretion in failing to find good cause under RSA 677:3, I. In the present case, the plaintiffs can "demonstrate that the court's ruling was clearly untenable or unreasonable to the prejudice of [their] case." *State v. Lambert*, 147 N.H. 295, 297 (2001).

When the trial court stated that the June 17th decision included a basis for denial that had not been included in the April 1st decision, the court compared the decisions contained in Certified Record, the April 1st decision (App. p. 95) and the June 17th decision App. p. 163. However, the trial court failed to consider that the April 1st decision is dated August 3, 2021, and was issued more than six weeks after the June 17th vote. The plaintiffs never had the April 1st decision either following the April zoning board hearing or prior to the time that they filed their appeal. *See*, RSA 677:2. For the trial court to ascribe to the plaintiffs knowledge of the contents of the April 1st decision following the June 17th vote, is untenable and unreasonable, and an assumption by the trial court not

supported by the record. Lacking the written decision, the plaintiffs did not know and could not have known the bases of the April 1st decision at the time they filed their appeal.

The circumstances of the hearings during the Covid period and the failures by the zoning board to provide the decision and minutes to the plaintiffs qualify as "good cause" for which the trial court should have allowed the plaintiffs to proceed on the merits with their zoning appeal.

CONCLUSION

The trial court erred in granting the motion to dismiss where the zoning board's first denial of a side-yard setback relied upon the same reasoning as its denial following a rehearing. The zoning board found no additional facts and made no new rulings in denying the variance a second time. No second motion for rehearing was required.

If a second request for a rehearing were required, the trial court unsustainably exercised its discretion in not allowing plaintiffs either to amend their complaint as requested or in not finding "good cause" where the remote, internet-based Zoom meeting provided an inadequate opportunity for the plaintiffs to understand or record the actions by the board. The failure of the zoning board to issue its written decision for four months, being also some six weeks following the board's rehearing denial, further deprived the plaintiffs from the notice they were entitled to have about the reasons and bases for the board's decision.

The trial court's order dismissing the zoning appeal should be reversed and the matter remanded for a hearing on the merits.

REQUEST FOR ORAL ARGUMENT

The plaintiffs, Cathleen A. Shea and Bradley M. Weiss, request that Barry C. Schuster, Esq., be allowed to present their oral argument before the Court.

I further certify, pursuant to Rule 16(3)(i), that the appealed decisions are in writing and appended to the brief.

Respectfully submitted:
Cathleen A. Shea and Bradley M. Weiss
By their Attorneys:

August 26, 2022

By: /s/ Barry C. Schuster
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CERTIFICATION OF SERVICE

I, Barry C. Schuster, certify that on this 26th day of August, 2022, I filed the foregoing Brief with the New Hampshire Supreme Court by using the NH e-filing system and caused a true copy of the foregoing Brief to be served on Laura Spector-Morgan, Esq., counsel for the Town of Sunapee, by means of the court's electronic filing system.

/s/ Barry C. Schuster
Barry C. Schuster, Esq. #2280

CERTIFICATE OF COMPLIANCE

I, Barry C. Schuster, hereby certify that Plaintiffs-Appellants' brief complies with the word limitation prescribed by Rule 16(11) of the Supreme Court Rules, contains 6,051 words, excluding parts of the brief exempted by Sup. Ct. R. 16(11). This brief also complies with the typeface and type style requirements of Sup. Ct. R. 16(11), and has been prepared in font size 13, type style Times New Roman, with a line space setting of 1.5.

August 26, 2022

/s/ Barry C. Schuster
Barry C. Schuster, Esq. #2280

ADDENDUM CONTENTS

The State of New Hampshire

JUDICIAL BRANCH

SULLIVAN COUNTY SUPERIOR COURT

NO. 220-2021-CV-65

CATHLEEN A. SHEA and BRADLEY M. WEISS

v.

TOWN OF SUNAPEE

ORDER

If a zoning board of adjustment denies an application for a zoning variance, the unsuccessful applicant must request the board rehear the matter before appealing the denial to the court. RSA 677:3. The question presented here is whether a rehearing must be requested where the board holds a rehearing and affirms its denial of the application, but on grounds in addition to those stated in the initial ruling. The Town of Sunapee moves for dismissal, arguing the court lacks subject matter jurisdiction because "new issues were raised by the board in its second denial," and "a second request for rehearing" was a prerequisite to filing the appeal.

Plaintiffs Cathleen Shea and Bradley Weiss applied to the Sunapee Zoning Board of Adjustment for a variance from a town zoning ordinance. In order to succeed, they had to convince the board that the variance met five criteria: "(1) the variance will not be contrary to the public interest; (2) special conditions exist such that literal enforcement of the provisions of the ordinance will result in unnecessary hardship; (3) the variance is consistent with the spirit of the ordinance; (4) substantial justice is done; and (5) granting the variance will not diminish the value of surrounding properties." *Daniels v. Town of Londonderry*, 157 N.H. 519, 526 (2008).

The board denied the application after a hearing. Members who voted in the negative cited insufficient evidence of unnecessary hardship or that the variance would be in keeping with the spirit of the ordinance. Certified Record (CR) 75. Shea and Weiss filed a timely motion for rehearing, which the board granted. (See CR 105-07). It reconsidered the matter at a hearing on

June 17, 2021, but affirmed its denial of the variance. This time, its members relied not only on the hardship and spirit of the ordinance factors, but found in addition that the variance would be contrary to the public interest and would not work substantial justice. (CR 142). See Notice of Decision, June 25, 2021 (CR 144). Weiss and Shea did not seek a further rehearing and filed the present appeal on July 8, 2021.

The question is whether the omission to request another rehearing precludes the court from exercising subject matter jurisdiction. In *Dziama v. City of Portsmouth*, 140 N.H. 542 (1995), the Supreme Court held that "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" following rehearing. *Id*. at 545. Here, the board held a rehearing and added grounds for its denial. *Dziama*, therefore, required the plaintiffs to file for a rehearing to give the board an opportunity to review the new grounds on which it relied. "[F]ailure to timely move for rehearing divests the superior court of subject matter jurisdiction." *Cardinal Development Corp. v. Town of Winchester Zoning Bd. of Adjustment*, 157 N.H. 710, 712 (2008).

The plaintiffs counter that the board's discussion at the rehearing did not disclose the grounds for denial. In addition, they say they did not receive the notice of decision stating the grounds and note the minutes of the rehearing were not finalized until much later. Nevertheless, RSA 677:2 requires a motion for rehearing be made "within thirty days after the ZBA's vote to approve or disapprove the application." *Bosonetto v. Town of Richmond*, 163 N.H. 736, 743 (2012) (internal quotation marks omitted). The plaintiffs do not say they were unaware the board denied the application on rehearing or that the board blocked their efforts to learn why. Under these circumstances, a second motion for rehearing was required. Its absence means the court does not have subject matter jurisdiction over the appeal.

The motion to dismiss (doc. no. 7) is GRANTED.

SO ORDERED.

APRIL 3, 2022

BRIAN T. TUCKER
SUPERIOR COURT JUDGE

Clerk's Notice of Decision
Document Sent to Parties
on 04/07/2022

The State of New Hampshire

JUDICIAL BRANCH

SULLIVAN COUNTY SUPERIOR COURT

NO. 220-2021-CV-65

CATHLEEN A. SHEA and BRADLEY M. WEISS

V.

TOWN OF SUNAPEE

ORDER ON MOTION FOR RECONSIDERATION

Plaintiffs Cathleen Shea and Bradley Weiss move for reconsideration of an order dismissing their appeal from the Sunapee zoning board's rejection of their request for a variance. After the board denied the variance, it granted the plaintiffs' a rehearing. On rehearing it denied the application again, but with an added reason. The plaintiffs did not seek a rehearing based on the board's modified rationale, and I found this omission deprived the court of subject matter jurisdiction. See *Dziama v. City of Portsmouth*, 140 N.H. 542 (1995).

As recounted in the order of dismissal, the board denied the variance application at the conclusion of a hearing on April 1, 2021. Members who voted in the negative cited insufficient evidence of unnecessary hardship and found the variance would not be in keeping with the spirit of the ordinance. Certified Record (CR) 75; Notice of Decision, Aug. 3, 2021 (CR 84). The plaintiffs filed a timely motion for rehearing in which they recognized the board relied on these two factors. See Motion for Rehearing, p. 1 (CR 86) ("In its decision, the Board made passing reference to the 'spirit of the ordinance' but primarily focused on the 'hardship' criterion. The decision is in error because the application does observe the spirit of the ordinance and satisfies the hardship criterion.") [1]

[1] In citing and addressing only two criteria for denial, the motion for rehearing undermines the contention in paragraph 8 of the motion for reconsideration that the plaintiffs understood the board denied the application on three grounds.

The board granted a rehearing (see CR 105-07) and reconsidered the matter on June 17, 2021. It affirmed the denial, but this time the motion to deny the variance relied on not only the absence of evidence of hardship and consistency with the spirit of the ordinance, but also the lack of proof that it was not contrary to the public interest. See Meeting Minutes, June 17, 2021 at CR 142.

The plaintiffs raise a point that does not affect the dismissal. The order granting the Town's motion to dismiss cites the "substantial justice" factor as a ground for denying the variance on rehearing. The plaintiffs make the point that the motion to deny the variance on rehearing cited the absence of evidence of substantial justice, but when the motion was restated a few moments later the moving member said "substantial justice is not an issue." Compare CR 142, line 461 with CR 142, line 479. The June 25, 2021 Notice of Decision on the rehearing lists "substantial justice" as one of the unmet criteria, however.[2]

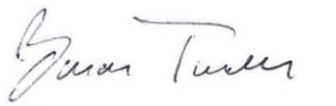
On reconsideration, I will assume the board found the plaintiffs satisfied the substantial justice factor. Still, in addition to the unnecessary hardship and spirit of the ordinance elements the board found lacking in its first ruling, on rehearing it added "contrary to the public interest" as a ground for denial. The factor is mentioned in the oral motion for denial and in the motion as restated, as well as in the written notice of decision. Based on *Dziama*, this added basis required another motion for rehearing. The plaintiffs did not seek one and filed the present appeal on July 8, 2021. The omission deprives the court of subject matter jurisdiction.

The plaintiffs contend there is no discernable difference between the spirit of the ordinance and public interest factors, so a further rehearing was not required. The Supreme Court has "never held that a zoning board's findings on these two statutory criteria must be the same," however. *Foley v. Town of Enfield*, No. 2017-0294, 2018 WL 665148, at *2 (N.H. Feb. 2, 2018) (nonprecedential disposition). A finding that the plaintiffs failed to meet one criterion was not dispositive of whether they met the other.

[2] The dates of the Notices of Decision are correct. In August 2021, the board released its written decision from the April 2021 hearing. It issued the written decision from the rehearing in June 2021.

Other grounds mentioned in the motion were addressed in the previous order or do not affect the decision. The motion for reconsideration (doc. no. 11) is DENIED.

SO ORDERED.



MAY 12, 2022

BRIAN T. TUCKER
SUPERIOR COURT JUDGE

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on 05/16/2022