

**THE STATE OF NEW HAMPSHIRE**

**SULLIVAN, SS.**

**SUPERIOR COURT**

Bradley M. Weiss, et al.

v.

Town of Sunapee

Docket No. 220-2021-CV-00065

**ORDER ON MOTION FOR SUBMISSION OF EVIDENCE**

This matter concerns the decision of the Zoning Board (the “ZBA”) of the Town of Sunapee (the “Town”) to deny the Plaintiffs, Bradley Weiss and Cathleen Shea, a variance to replace a deck on their home with an extension of the home’s living space. See Doc. 1 (Compl.). The Plaintiffs’ appeal to superior court was dismissed for lack of subject matter jurisdiction (Tucker, J.) by Order dated April 3, 2022. See Doc. 10. The Plaintiffs appealed the dismissal to the New Hampshire Supreme Court, which reversed the superior court’s ruling and remanded the matter for further proceedings, including whether for good cause shown the Plaintiffs should be allowed to specify additional grounds for the appeal not before the ZBA. See Weiss v. Town of Sunapee, No. 2022-0309, 2023 WL 5418884, at \*1 (N.H. Aug. 23, 2023). The Plaintiffs now move to submit additional evidence that was not before the ZBA in the original proceedings and not included in the Certified Record. See Doc. 21 (Mot. Submission Ev.). The ZBA objects. See Doc. 22 (Obj.). The Court held a hearing on the motion on December 26, 2023. Upon consideration of the parties’ arguments at the hearing and in the pleadings, the exhibits presented at the hearing, and the relevant law, the Court GRANTS the Plaintiffs’ motion only to the extent that it will consider a transcript of the ZBA’s open

meetings on the matter and the videorecording of those hearings provided at the motion hearing. See Ex. 1 (Links to ZBA Video Streams). In all other respects the Plaintiffs' motion is DENIED

## **BACKGROUND**

By way of brief background, the Plaintiffs own a cottage on a 1/10-acre lot in Sunapee (the "Property"), located in a zoned development known as "White Shutters." See Doc. 21 ¶¶ 1-2. As relevant here, in March 2021, the Plaintiffs applied for a variance to replace the cottage with a year-round home, the construction of which would include replacing a deck around the cottage that extended to within three feet of the easterly boundary of the Property with an extension of the house that would extend to within six feet of that boundary. Doc. 1 ¶¶ 4-5. The ZBA held a hearing on April 1, 2021—which, because of the COVID-19 pandemic, was conducted via Zoom—at which it denied the variance on grounds that the application failed to satisfy the criteria for "hardship," "spirit of the ordinance," and "public interest." Doc. 21 ¶ 6. The Plaintiffs' motion for rehearing was granted, and the ZBA conducted another hearing on June 17, 2021. Doc 1 ¶ 8. The ZBA again denied the variance, citing the same grounds as in its first denial. Doc. 21 ¶ 6; Doc. 1 ¶¶ 9-10.

On August 23, 2023, the Plaintiffs appealed the ZBA's decision to the Court. In their Complaint, the Plaintiffs stated that "[t]he [ZBA's] decision denied the variance application on the same grounds as it had previously and no further motion for rehearing was required [citation omitted]. To the extent that the [ZBA] may claim that any new issues arose, the [P]laintiffs seek for good cause to have such issues consolidated in this zoning appeal [citing RSA 677:3, I]." Doc. 1 ¶ 11. The Town moved

to dismiss for lack of subject matter jurisdiction, arguing that because new issues had been raised by the ZBA in its second denial, a second rehearing before the ZBA was a necessary prerequisite to any appeal to superior court. See Doc. 7 (Mot. Dismiss) ¶¶ 5-8. The Court (Tucker, J.) agreed and dismissed the Complaint. See Doc. 10. On appeal, the New Hampshire Supreme Court found that the Plaintiffs had perfected their appeal to superior court by timely moving for rehearing on the two grounds—“unnecessary hardship” and “spirit of the ordinance”—set forth in the ZBA’s decision, reversed the dismissal and remanded the matter back to the Court. See Weiss, No. 2022-0309, 2023 WL 5418884, at \*3-\*4. The supreme court noted that, pursuant to RSA 677:3, the Court’s review was limited to the grounds set forth in the first motion for rehearing, unless for good cause shown the Court allowed the Plaintiffs to specify additional grounds. See id., at \*4 (citing RSA 677:3, I).

The supreme court issued its opinion on August 23, 2023. On October 18, the Plaintiffs filed the instant motion. See Doc. 21. Stating that “[a]mong the issues raised in the appeal at the Supreme Court were the conduct of the [ZBA] hearings by zoom, the inability of experts to testify in person, and the delays, likely caused by Covid restrictions,” the Plaintiffs claim that they were “unable to present the in-person testimony of [their] experts” at the ZBA proceedings. Id. ¶¶ 9-10. Specifically, the Plaintiffs contend, Norman Skantze, their fire safety expert, was unable due to technical problems with the Zoom call to respond fully to questions from ZBA members; and Mara

Robinson, a landscape architect, did not testify at all.<sup>1</sup> Doc. 21 ¶¶ 12-14. The Plaintiffs, citing RSA 677:13, now seek to introduce additional testimony from Mr. Skantze and Ms. Robinson, arguing that the anticipated testimony would be “concise, not delay the hearing on the merits, and would assist the Court in evaluating the zoning appeal.” Doc. 21 ¶ 19. The Town objects, arguing, among other things, (1) that the Certified Record contains letters to the ZBA from both Mr. Skantze and Ms. Robinson, see Doc. 22 ¶ 5; (2) that the minutes of the June 17, 2021, hearing reflect that Mr. Skantze not only testified but engaged in a lengthy question-and-answer exchange with ZBA members, see id. ¶ 8; that the Plaintiffs made no attempt to introduce the testimony Ms. Robinson at the June 17, 2021, hearing and raised no claim in any prior stage of this appeal that he or Ms. Robinson were precluded from testifying, see id. ¶¶ 7, 9. In brief, the Town contends that the record before the Court is “neither incomplete nor non-existent,” and the Plaintiffs should therefore not be permitted to introduce further evidence at this late date. Id. ¶ 10.

### ANALYSIS

As a preliminary matter, the Court notes that while the instant motion concerns the introduction of new information into the record for the Court’s review, it does not involve the introduction of any grounds for appeal not set forth in the Plaintiffs’ application for rehearing, so it does not implicate the provisions of RSA 677:3, I or the

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<sup>1</sup> In their motion, the Plaintiffs do not state why or to what extent Ms. Robinson was unable to contribute, but only avers that “the experts’ full testimony before the zoning board was prevented due to limitations imposed by the Covid restrictions and the poor quality of the Zoom conferencing.” Doc. 21 ¶ 18. The Town notes that Ms. Robinson never appeared either by video or in person, and observes, correctly, that “no reason is given for her absence in either the record or the present Motion.” Doc. 22 ¶ 7.

substance of the Supreme Court's order of remand.<sup>2</sup> See Weiss, No. 2022-0309, 2023 WL 5418884. Instead, before the Court is only the narrow question of whether to allow the Plaintiffs to supplement the record with evidence that was not before the ZBA when it made the decisions relevant to this appeal.

In addressing this question, the Court first notes that the superior court's review of a zoning board decision is, by design of the legislature, a deferential record review. "Any person aggrieved by any order or decision of the zoning board of adjustment . . . 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[.]" RSA 677:4. In such an appeal, "the burden of proof shall be upon the party seeking to set aside any order or decision of the [ZBA] . . . to show that the order or decision is unlawful or unreasonable." RSA 677:6 (2016). "The trial court does not sit as a 'super zoning board.'" Rochester City Council v. Rochester Zoning Bd. of Adjustment, 171 N.H. 271, 275 (2018) (cleaned up). When reviewing a decision of the ZBA, the "factual findings of [the ZBA] are deemed prima facie lawful and reasonable, and [its] decision will not be set aside . . . absent errors of law unless [the court] is persuaded by the balance of probabilities, on the evidence before it, that the [ZBA's] decision is unlawful or unreasonable." Roberts v. Town of Windham, 165 N.H. 186, 189–90 (2013). In its review, the Court does not "determine whether it agrees with the [ZBA's] findings, but . . . whether there is evidence upon which they could have been reasonably based." Lone Pine Hunters' Club v. Town of Hollis, 149 N.H. 668, 670 (2003). If any of the

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<sup>2</sup> At the hearing the Town waived its objection to the Plaintiffs' introduction of additional grounds of appeal. The Court notes this waiver, but otherwise finds the question immaterial to its ruling on the instant motion.

ZBA's reasons "support its decision, then [the plaintiff's] appeal must fail." Bayson Props., Inc. v. City of Lebanon, 150 N.H. 167, 173 (2003).

In applying this deferential standard, the Court is granted some discretion to consider additional evidence. RSA 677:10 contemplates the Court's consideration of evidence additional to that evidence "transferred by the [ZBA] or local legislative body," regardless of "any technical rule which might . . . render[] the evidence inadmissible" in an ordinary trial. RSA 677:13 provides that "[t]he [C]ourt may take evidence or appoint a referee to take such evidence as it may direct[.]" The Court's discretion to consider additional evidence in a ZBA appeal, however, is not unlimited:

The purpose of the statutory provisions for the receipt of such additional evidence is not to afford the appealing party a trial de novo . . . but rather 'to assist the court in evaluating the action of the [ZBA] where the record was incomplete . . . even though . . . the evidence itself was not presented at the hearing before the [ZBA].

Sweeney v. City of Dover, 108 N.H. 307, 309 (1967).

Upon review of the materials presented at the hearing, the Court finds that the Plaintiffs have not carried the burden of demonstrating that the record is incomplete without the testimony they seek to introduce. The Plaintiffs argues, for instance, that at the April 1, 2021, hearing, Mr. Skantze was "prevented" by the restrictions of the Zoom format from responding to questions from ZBA members, and that if he had been able to participate fully he would have explained that the Plaintiffs' existing cottage was a fire hazard and that the proposed new construction would meet both the purposes of the zoning ordinance and the public interest. See Doc. 21 ¶ 13. Upon review of the recording of that hearing, however, the Court can see that the meeting—at which staff were present in the room but most of the participants attended by Zoom—was well-

attended and orderly, that presenters had no visible problems presenting photographs and other documents, and that Mr. Skantze appeared to have no difficulty hearing or responding to questions from the ZBA. See Pl.'s Ex. 1.

The June 17, 2021, meeting was a hybrid meeting, at which participants had the option of appearing either in-person or by zoom. See id. At that meeting, Mr. Skantze appeared by Zoom, but again the Court can see no particular hindrance to Mr. Skantze's ability to present or to hear and answer questions from the ZBA. Id. Ms. Robinson did not appear at either meeting by Zoom or in person, but no evidence suggests she was in any way prohibited or inhibited from participating. Regardless, the parties agree that both Mr. Skantze and Ms. Robinson also submitted written letters to the ZBA, which are part of the Certified Record. See Doc. 22 ¶ 5 (citing C.R. at 91-95, 117).

On the record before it, the Court concludes that the Plaintiffs were not prevented from introducing the testimony of Mr. Skantze and Ms. Robinson, and the Court is not persuaded that the record is incomplete without the additional testimony the Plaintiffs now seek to introduce. Sweeney, 108 N.H. at 309. The Court agrees with the Town that the Plaintiffs, except for a passing reference in their Supreme Court brief, failed to raise any claim regarding the purported preclusion of their expert's testimony in their appeal to the ZBA or in any prior filing in the instant suit. See Doc. 22 ¶ 9. This fact weighs in the Court's analysis, but is not dispositive. More importantly, the Court finds the experts' public testimony, as supplemented by the written letters submitted by the experts that are already part of the Certified Record, sufficient to aid the Court in making the only evidentiary determination it is tasked to make in a ZBA appeal—"whether there

is evidence upon which [the ZBA's determinations] could have been reasonably based.”  
Lone Pine Hunters' Club, 149 N.H. at 670. The Court therefore finds no need to  
consider additional testimony to assist in its evaluation of the actions of the ZBA. See  
Sweeney, 108 N.H. at 309.

Notwithstanding the above, at the hearing on the instant motion, counsel for the  
Town did not object to the Court's consideration of video recordings of those hearings  
as presented in Pl.'s Ex. 2. Counsel for the Town also stated that the Town would not  
object to the submission of transcripts of both the April 1 and June 17, 2021, ZBA  
meetings, which are not currently in the Certified Record. As the Court does find that  
consideration of these materials may aid in its determination, the Court will allow the  
Plaintiffs to add them to the Certified Record.

### CONCLUSION

For the reasons stated in this order, the Plaintiffs' motion is GRANTED to the  
extent that the Certified Record (1) shall be supplemented with video recordings of the  
April 1 and June 17, 2021, ZBA hearings; and (2) may be supplemented by transcripts  
of those hearings if the Plaintiffs want to submit them. The motion is otherwise  
DENIED. Within 14 days of the Notice of Decision on this Order, the Plaintiffs shall  
furnish the Town and the Court with video recordings of the meetings in a format the  
Court can access through Odyssey. Within 30 days of the Notice of Decision on this  
Order, the Plaintiffs may submit transcripts of two ZBA meetings.

SO ORDERED.

January 2, 2024

Date

Clerk's Notice of Decision  
Document Sent to Parties  
on 01/03/2024

  
Judge Martin P. Honigberg