12-10-18

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

DEC 10 2018

Merrimack Superior Court
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Concord NH 03302-2880

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NOTICE OF DECISION

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Case Name: **Spec Bowers v Town of New London ZBA**
Case Number: **217-2018-CV-00469**

Please be advised that on December 03, 2018 Judge McNamara made the following order relative to:

ORDER

See attached Order of December 3, 2018 by Justice Richard B. McNamara. Case remanded to the ZBA. Hearing on the Merits scheduled for December 19, 2018 is canceled.

December 06, 2018

Catherine J. Ruffle
Clerk of Court

(485)

C: Spec Bowers

The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

Spec Bowers

v.

Town of New London
Zoning Board of Adjustment

No. 217-2018-CV-00469

ORDER

Proceeding *pro se* the Petitioner, Spec Bowers, appeals the Town of New London Zoning Board of Adjustment's (the "ZBA") denial of his March 30, 2018, variance application. The ZBA seek dismissal on the basis that the Petitioner failed to preserve the arguments he advances on appeal. The Petitioner objects. Separately, the Petitioner moves for summary judgment on the grounds that the ZBA did not properly consider his request for rehearing. The ZBA objects. For the following reasons the ZBA's Motion to Dismiss is DENIED and the Petitioner's Motion for Summary Judgment is GRANTED.

I

The Petitioner owns Georges Mills Cottages, a residential complex consisting of numerous structures on the shores of Lake Sunapee. (C.R. at 3.) At some point, the complex's smallest cottage was lost to fire. (Id.) It is undisputed that the Petitioner had the right to rebuild the cottage to its pre-fire specifications without the need for relief from New London's zoning ordinances. (Id.) However, the Petitioner desired to make certain improvements and applied for a series of variances on March 30, 2018. (C.R. at Tab 1.)

Otter Pond

The ZBA considered and ultimately denied the Petitioner's application at a hearing on April 17, 2018. (C.R. at 14.) The ZBA published a written notice of decision the following day. (Id.) The Petitioner requested a rehearing on May 14, 2018. (C.R. at 19–21.) The ZBA opted to rehear the Petitioner's application on June 11, 2018. Following deliberations, the ZBA unanimously voted

> to deny the variance request for the reasons discussed, that primarily, the consensus is that the spirit of the ordinance was violated and that relates to three criteria, Public Interest, Spirit of the Ordinance, and Substantial Justice. Also some members felt that the hardship criteria has been met.

(C.R. at 38.) The ZBA first made draft minutes for the June 11th hearing available on June 18, 2018. (See C.R. at 39.)

Realizing its draft and unpublished written notice of its June 11th decision was not in accord with the hearing's minutes, however, the ZBA held a meeting on June 26, 2018, to "clarify the motion that denied the variance." (C.R. at 103.) At the June 26th meeting, the ZBA unanimously voted

> to deny the request for variance for the following reasons:
>
> - The variance requested is not in the public interest because it conflicts with the basic zoning objective of preventing building expansion in the waterfront buffer.
> - The variance requested also violates the spirit of the ordinance by allowing building expansion in the waterfront buffer.
> - Substantial justice is not an issue because the applicant has the right to rebuild the destroyed cottage as it was, so there is no loss to the Applicant.
> - There is no hardship because all waterfront properties in New London are burdened with the same waterfront buffer requirements.
> - On the issue of diminution of property values, no evidence was submitted to suggest diminution of property values.

(C.R. at 44 (emphasis is original).) On June 27, 2018, the ZBA issued a written notice of decision, wherein it explained that, "on June 11, 2018," it held a rehearing on the Petitioner's application and that the "ZBA reconvened in a public meeting on June 26, 2018 to clarify the decision." (C.R. at 15.) The June 27th notice of decision then summarized the ZBA's findings and decisions based on the evidence submitted to it. (Id.) The ZBA later made the draft minutes from the June 26th meeting available on July 2, 2018.

On July 6, 2018, the Petitioner filed a new rehearing request that principally challenged the ZBA's actions taken at the June 26th meeting and also "reserve[d] the right under RSA 677:2 to amend this Motion for Rehearing, including the grounds therefor, within 30 days after the date the decision was actually filed which was June 27, 2018." (C.R. at 23.)

On July 18, 2018, the ZBA voted to deny the Petitioner's July 6th rehearing request. (C.R. at 52.) Undeterred, the Petitioner submitted to the ZBA an "[a]mended" motion for rehearing on July 24, 2018, which reiterated that he had reserved 30 days to amend his July 6th rehearing application pursuant to RSA 677:2 and further explained that, "[w]ithout waiting for the end of [these] 30 days, the [ZBA] denied [his] request for hearing" and that he wished for the ZBA "to reconsider that denial with the information in [his] amendment." (C.R. at 24.)

At a meeting on August 7, 2018, the ZBA determined that — contrary to the Petitioner's contention — RSA 677:2 did not in fact grant the Petitioner the right to amend his July 6th motion for rehearing. The ZBA, therefore, unanimously voted to deny the amended rehearing motion because it was "not timely and cannot be heard." (C.R. at 58.)

The Petitioner subsequently appealed the ZBA's decision to this Court on August 10, 2018.

II

In its Motion to Dismiss, the ZBA contends that the Petitioner's Complaint advances theories never before presented to the ZBA save for in his allegedly untimely amended rehearing motion and, therefore, this case must be dismissed due to the Petitioner's failure to exhaust his administrative remedies. The Petitioner counters that the ZBA's interpretation and application of RSA 677:2 to the facts of this case is erroneous. Furthermore, in his Motion for Summary Judgment, the Petitioner argues that there is no genuine dispute that the ZBA's supposed error of law was its sole basis for denying his amended rehearing motion and, as a result, he is entitled to summary judgment remanding this matter to the ZBA so that it can properly consider his amended rehearing motion's challenges.

Pursuant to RSA 677:2,

> [w]ithin 30 days after any . . . decision of the zoning board of adjustment . . . any party to the . . . proceeding . . . may apply for a rehearing in respect to any matter determined in the . . . proceeding . . . , specifying in the motion for rehearing the ground therefor . . . . 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 . . . 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.

It is undisputed that within 5 business days of the June 11th hearing draft minutes were made available as required by RSA 676:3, II, which is cited in RSA 677:2 above. RSA 676:3, II stipulates, however, that along with its minutes, the ZBA must also

make available within 5 business days "the written decision" containing the ZBA's reasons it approved or disapproved of an application.

The Petitioner maintains that the ZBA failed to satisfy this additional requirement, considering the ZBA did not make available a written notice of decision outlining its reasons for denying his application until June 27th, the day after the ZBA convened on June 26th to "clarify" its June 11th conclusions. Conversely, the ZBA argues that its June 11th draft minutes "contained [its] decision" and thus complied with the law. (Reply to Obj. to Mot. to Dismiss ¶ 2.)

As a preliminary matter, whether a municipal board complied with statutory publication provisions presents "a question of law" and is, thus, appropriate for summary resolution. Bedford Residents Grp. v. Town of Bedford, Planning Bd., 130 N.H. 632, 639 (1988). Returning to the more relevant issue at hand, RSA 676:3 does not define "written decision" nor does it explicitly address whether written meeting minutes may or may not constitute a satisfactory written decision. Plainly, however, the statutory requirement that a ZBA timely make available its minutes and written decision is intended to afford an aggrieved party an informed opportunity to challenge the ZBA's actions by demanding that the ZBA memorialize its rationales in writing.

Here, the facts of this case demonstrate that the ZBA itself believed its June 11th minutes failed to do so to such a degree that, on its own accord, it opted to hold a meeting specifically to "clarify" its June 11th decision. Considering there are material differences between the ZBA's decision as reflected in the June 11th minutes and as encapsulated in the June 27th notice of decision,[1] the ZBA apparently acted prudently in

[1] For example, the June 11th minutes explained that "some members felt that the hardship criteria [element of the variance application] *has been met*," (C.R. at 38 (emphasis added)) while the June 27th notice of decision found that "[t]here is *no* hardship." (C.R. at 44 (emphasis added).)

this regard. Nevertheless, it remains that the June 11th minutes were not the final written product that the ZBA produced memorializing its reasons for denying the Petitioner's application on June 11th. Instead, it is the June 27th notice of decision that holds this distinction. Accordingly, the Court finds that the ZBA did not make available its "written decision" of its June 11th hearing within 5 business days, in violation of RSA 676:3, II.

Having so decided, the Court must next address whether the Petitioner was entitled to amend his July 6th rehearing motion on July 24th and whether the ZBA erred in finding the July 24th amendment untimely. The answer to both questions is yes. RSA 677:2 provides that, in the event a ZBA fails to make available its written decision within 5 business days, "the person applying for rehearing *shall have the right* to amend the motion for rehearing, including the grounds therefore, within 30 days after the date on which the written decision was actually filed." (Emphasis added). It is uncontestable that the Petitioner filed his amended rehearing motion within 30 days of the June 27th notice of decision and, therefore, that he acted in accordance with his rights granted to him due to the ZBA's RSA 676:3, II violation. Although the Court is unaware of any law expressly precluding a ZBA from ruling on a rehearing request within the 30 day window afforded an appellant to amend his or her motion, the Court is convinced that a ZBA's choice to do so should not have the effect of curtailing the 30 day period in which RSA 677:2 grants the applicant the "right" to amend his or her motion. Accordingly, despite the fact that the ZBA had already denied the Petitioner's July 6th rehearing request on July 18th, it erred when it refused to consider his July 24th amended rehearing motion on August 7th solely on the basis that the amendment was untimely.

III

In conclusion, the ZBA's Motion to Dismissed is DENIED because the Petitioner timely amended his motion for rehearing and, in so doing, preserved the arguments contained within it. Additionally, as there is no genuine dispute that the only basis for which the ZBA chose not to consider the Petitioner's amended rehearing motion was the ZBA's erroneous conclusion that the amendment was untimely, the Petitioner's Motion for Summary Judgment is GRANTED and this matter is REMANDED to the ZBA so that it can have the first opportunity to address the arguments the Petitioner raised in his amended rehearing motion.

SO ORDERED

12/3/18
DATE

Richard B. McNamara,
Presiding Justice