NOTICE: This opinion is subject to motions for rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Reporter, Supreme Court of New Hampshire, One Charles Doe Drive, Concord, New Hampshire 03301, of any editorial errors in order that corrections may be made before the opinion goes to press. Errors may be reported by E-mail at the following address: reporter@courts.state.nh.us. Opinions are available on the Internet by 9:00 a.m. on the morning of their release. The direct address of the court's home page is: http://www.courts.state.nh.us/supreme.

THE SUPREME COURT OF NEW HAMPSHIRE

Cheshire
No. 2011-311

MERRIAM FARM, INC.

v.

TOWN OF SURRY

Argued: June 14, 2012
Opinion Issued: July 18, 2012

Bernstein, Shur, Sawyer & Nelson, P.A., of Manchester (Gregory E. Michael and Christopher G. Aslin on the brief, and Mr. Aslin orally), for the petitioner.

Bradley & Faulkner, P.C., of Keene (Gary J. Kinyon on the brief and orally), for the respondent.

DALIANIS, C.J. The petitioner, Merriam Farm, Inc. (Merriam Farm), appeals a decision of the Superior Court (Arnold, J.) that upheld the denial of Merriam Farm's application for a building permit by the zoning board of adjustment (ZBA) of the respondent, Town of Surry (Town). We affirm.

The following facts are drawn from the record. Merriam Farm owns a three-acre parcel of land in Surry (the Property). Under the Town's zoning ordinance, 200 feet of frontage on a public street is required to build on the

Property. According to the ordinance, a "public street" is a class V or better highway. See RSA 229:5 (2009) (setting forth highway classification system). The Property has frontage on a class VI highway.

In April 2009, Merriam Farm applied to the Town's selectboard for a building permit to construct a single-family home on the Property. The selectboard denied Merriam Farm's application because the Property lacked frontage on a class V or better highway. Merriam Farm appealed the selectboard's decision to the ZBA. The ZBA directed the selectboard to reconsider its denial of Merriam Farm's application for a building permit and to consult with the planning board before doing so. After consulting with the planning board, the selectboard again voted unanimously to deny Merriam Farm's building permit application. The selectboard denied Merriam Farm's subsequent motion for rehearing, and Merriam Farm appealed the selectboard's decision to the ZBA pursuant to RSA 674:41, II (2008).

The ZBA voted to deny Merriam Farm's appeal in part because Merriam Farm bought the Property in 2002, and the road on which the Property has frontage was closed in 1971 "subject to gates and bars for the purpose of preventing development in this area." The ZBA also decided not to grant Merriam Farm a "reasonable exception" to the provisions of RSA 674:41 (2008). Like the Town's ordinance, RSA 674:41 also requires frontage on a class V or better highway before a building may be erected on a lot, except under certain circumstances. See 15 P. Loughlin, New Hampshire Practice: Land Use Planning and Zoning § 29.19, at 528-32 (4th ed. 2010). RSA 674:41, II allows an applicant to appeal the denial of a building permit and allows a zoning board to "make reasonable exception" to the requirements of RSA 674:41. Merriam Farm unsuccessfully moved for rehearing, and then appealed the ZBA's decision to the superior court, which upheld it. This appeal followed.

Judicial review in zoning cases is limited. Brandt Dev. Co. of N.H. v. City of Somersworth, 162 N.H. 553, 555 (2011). Factual findings of the ZBA are deemed prima facie lawful and reasonable, and the superior court will not set aside the ZBA's decision absent errors of law unless it is persuaded by the balance of probabilities, on the evidence before it, that the decision is unlawful or unreasonable. RSA 677:6 (2008); Brandt Dev. Co. of N.H., 162 N.H. at 555. We will uphold the superior court's decision unless the evidence does not support it or it is legally erroneous. Brandt Dev. Co. of N.H., 162 N.H. at 555. The interpretation and application of a statute or ordinance is a question of law, which we review de novo. Id.

Merriam Farm first argues that RSA 674:41, I(c) required the selectboard to consult with the planning board before denying Merriam Farm's building permit application. Under RSA 674:41, I(c), a building may be built on a lot having frontage on a class VI highway only if: (1) "[t]he local governing body

after review and comment by the planning board has voted to authorize the issuance of building permits for the erection of buildings on said class VI highway or a portion thereof"; (2) "[t]he municipality neither assumes responsibility for maintenance of said class VI highway nor liability for any damages resulting from the use thereof"; and (3) before the building permit is issued, "the applicant . . . produce[s] evidence that notice of the limits of municipal responsibility and liability has been recorded in the county registry of deeds." See Vachon v. Town of New Durham Z.B.A., 131 N.H. 623, 628 (1989).

Merriam Farm argues that because the selectboard did not consult with the planning board initially, the selectboard violated RSA 674:41, I(c). We need not address the merits of this argument, however, because this alleged error was corrected. After Merriam Farm appealed the selectboard's decision to the ZBA, the ZBA, in effect, vacated the decision and instructed the selectboard to reconsider its decision after consulting with the planning board. The selectboard complied with this instruction, thereby remedying the alleged error.

Merriam Farm next asserts that to obtain relief from either the Town's ordinance or RSA 674:41, it had to meet only the "practical difficulty" standard set forth in RSA 674:41, II, and that both the trial court and the ZBA misapplied this standard. RSA 674:41, II allows an applicant to appeal the denial of a building permit "[w]henever the enforcement of the provisions of [RSA 674:41] would entail practical difficulty or unnecessary hardship."

Merriam Farm argues that "practical difficulty" and "unnecessary hardship" are two different standards. To Merriam Farm, "unnecessary hardship" is the same standard that governs variance requests, see RSA 674:33, I(b)(5) (Supp. 2011), while "practical difficulty" is a less rigorous standard. Merriam Farm asserts that "a practical difficulty exists when dimensional requirements under a zoning ordinance render property unusable for an otherwise permitted use." See Duncan v. Village of Middlefield, 491 N.E.2d 692, 695 (Ohio 1986). "Because the Property has substantial frontage on a public way that is safe and adequate for access to the Property," Merriam Farm reasons that applying the frontage requirement to its "otherwise permitted residential use of the Property constitutes a practical difficulty."

Because neither party has argued otherwise, we assume, without deciding, that RSA 674:41, II governs Merriam Farm's application both for a reasonable exception from RSA 674:41's requirements and for relief from the Town's ordinance. But see Goslin v. Town of Farmington, 132 N.H. 48, 50 (1989) (landowner sought variance under RSA 674:33 from ordinance requiring subdivisions to have frontage on class V or better highway or on private road built to town standards). Determining the meaning of the phrase "practical difficulty or unnecessary hardship," as used in RSA 674:41, II, requires us to

engage in statutory interpretation, which is a question of law that we review de novo. See Brandt Dev. Co. of N.H., 162 N.H. at 555. We are the final arbiter of the intent of the legislature as expressed in the words of the statute considered as a whole. Appeal of Wilson, 161 N.H. 659, 662 (2011). We first examine the language of the statute and ascribe the plain and ordinary meanings to the words used. Id. We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language the legislature did not see fit to include. Id. Furthermore, we interpret statutes in the context of the overall statutory scheme and not in isolation. Id. "In so doing, we are better able to discern the legislature's intent, and therefore better able to understand the statutory language in light of the policy sought to be advanced by the entire statutory scheme." Id. (quotation omitted).

RSA 674:41 does not define the phrase "practical difficulty or unnecessary hardship." However, the term "unnecessary hardship" is defined in RSA 674:33, I(b)(5), which applies to variance requests and is part of the same statutory scheme as RSA 674:41. "Courts across the country have taken differing approaches when construing language similar or identical to" the "practical difficulty or unnecessary hardship" language in RSA 674:41, II. In re Stadsvold, 754 N.W.2d 323, 330 (Minn. 2008), superseded on other grounds by statute as stated in Mutsch v. County of Hubbard, Nos. A11-725, A11-726, 2012 WL 1470152, at *4 n.3 (Minn. Ct. App. Apr. 30, 2012). "Generally, this dual standard has been treated in one of two ways." Matthew v. Smith, 707 S.W.2d 411, 416 (Mo. 1986) (en banc). "On the one hand, many courts view the two terms as interchangeable." Id. (citing cases). In New Jersey, for instance, courts have held that "[a]lthough the language would seem to indicate two different standards, difficulties or hardship, the two in large measure are overlapping and complementary." Chirichello v. Zoning Bd. of Adjustment, Etc., 397 A.2d 646, 650 (N.J. 1979); see 165 Augusta St. v. Collins, 87 A.2d 889, 891 (N.J. 1952). "On the other hand, a number of jurisdictions follow the approach of New York, the jurisdiction where the language originated, and hold that 'practical difficulties' is a slightly lesser standard than 'unnecessary hardship . . . .'" Matthew, 707 S.W.2d at 416 (citing cases). These jurisdictions apply the "practical difficulty" standard to the granting of an area variance, and the "unnecessary hardship" standard to the granting of a use variance. Id.; see Boccia v. City of Portsmouth, 151 N.H. 85, 91 (2004), superseded by Laws 2009, 307:5-:6; see also 3 E. Ziegler, Jr., Rathkopf's The Law of Zoning and Planning § 58:15 (2012) (citing cases).

We believe that the New Jersey approach best comports with our legislature's intent given the entire statutory scheme, of which RSA 674:41, II is a part, and the legislature's decision to adopt a uniform "unnecessary hardship" standard for both area and use variances, see RSA 674:33, I(b)(5).

Before 2004, there was no distinction between area and use variances; to obtain either type of variance, an applicant had to establish "unnecessary hardship." See Ouimette v. City of Somersworth, 119 N.H. 292, 295 (1979) (declining, in dicta, to adopt a "practical difficulty" test for area variances because our general zoning statute requires showing unnecessary hardship for either type of variance); see also Boccia, 151 N.H. at 91. Then, in Boccia, in 2004, we established a separate unnecessary hardship test for area variances. Boccia, 151 N.H. at 92. Relying upon Matthew, 707 S.W.2d at 413, we defined an area variance as one authorizing "deviations from restrictions which relate to a permitted use, rather than limitations on the use itself." Boccia, 151 N.H. at 90 (quotation omitted). After Boccia was decided, one unnecessary hardship test applied to use variances, see Simplex Technologies v. Town of Newington, 145 N.H. 727, 731-32 (2001), and another, less stringent, unnecessary hardship test applied to area variances, see Boccia, 151 N.H. at 92. See Harrington v. Town of Warner, 152 N.H. 74, 77-78 (2005).

In Laws 2009, chapter 307, the legislature eliminated the distinction between use and area variances, and established a uniform unnecessary hardship standard for both. Laws 2009, 307:5-:6; Brandt Dev. Co. of N.H., 162 N.H. at 558 n.1; see RSA 674:33, I(b)(5)(B). The purpose of this legislation "was to eliminate the separate unnecessary hardship standard for area variances that we adopted in Boccia." Harborside Assocs. v. Parade Residence Hotel, 162 N.H. 508, 513 (2011) (quotations omitted); see Laws 2009, 307:5.

Therefore, although the use of the disjunctive in RSA 674:41, II "would seem to indicate two different standards," Chirichello, 397 A.2d at 650, given the entire statutory scheme and the legislature's intent to treat use and area variances alike, we conclude that the terms "practical difficulty" and "unnecessary hardship," as used in RSA 674:41, II, are interchangeable. Consistent with the legislature's intent, we hold that both terms refer to the unnecessary hardship test set forth in RSA 674:33, I(b)(5) (Supp. 2011). Of course, if the legislature did not intend this interpretation of RSA 674:41, II, it is free to amend the statute as it sees fit. See, e.g., In re Alex C., 161 N.H. 231, 241 (2010).

Accordingly, contrary to its assertions, Merriam Farm had to show unnecessary hardship as defined in RSA 674:33, I(b)(5) in order to obtain either a reasonable exception from RSA 674:41's requirements or relief from the Town's ordinance. Because Merriam Farm does not argue that it met the unnecessary hardship requirement set forth in RSA 674:33, I(b)(5), we reject its argument that the ZBA misapplied RSA 674:41, II.

Merriam Farm next contends that the ZBA erred because it "made no particularized findings with regard to the actual property at issue." We do not share Merriam Farm's interpretation of the ZBA's decision. The ZBA's decision

included findings that "a house without access to a maintained town road is cut off from emergency vehicles and town services," and that this "will constitute a 'hardship' to future purchasers." Additionally, the decision was accompanied by specific findings of facts, including findings that the road upon which the Property has frontage "is closed subject to gates and bars by town vote on March 9, 1971," and that Merriam Farm "bought [the] property in 2002." (Quotation omitted.)

In effect, Merriam Farm argues that the ZBA's decision lacked findings specific to the Property because the ZBA did not find credible Merriam Farm's evidence that the road is "already safe for travel" and can be improved to "facilitate emergency vehicle access." The ZBA, however, was not required to accept Merriam Farm's evidence, even if, as Merriam Farm argues, it was uncontroverted. See Harborside Assocs., 162 N.H. at 519-20; see also Continental Paving v. Town of Litchfield, 158 N.H. 570, 575 (2009) (zoning board need not accept conclusions of experts).

Merriam Farm next contends that applying the Town's ordinance to the Property results in an unconstitutional "taking" by inverse condemnation in violation of Part I, Article 12 of the State Constitution. See N.H. CONST. pt. I, art. 12. Merriam Farm asserts that "the ZBA's unreasonable denial of [its] appeal unlawfully . . . prohibit[ed] [Merriam Farm] from making reasonable use of its property" and left it "with no reasonable way to put the Property to an economically viable permitted use." See Burrows v. City of Keene, 121 N.H. 590, 598 (1981). The Town argues that Merriam Farm did not preserve this argument for our review. Merriam Farm agrees that preservation is required, but contends that its motion for rehearing to the ZBA preserved its takings claim for judicial review.

RSA 677:3, I (2008) provides, in pertinent 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 . . . 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.

"The statutory scheme is based upon the principle that the local board should have the first opportunity to pass upon any alleged errors in its decisions so that the court may have the benefit of the board's judgment in hearing the appeal." Robinson v. Town of Hudson, 154 N.H. 563, 567 (2006) (quotation omitted). Thus, a motion for rehearing must put the zoning board on notice of an alleged error in order to satisfy the requirements of RSA 677:3. Id. at 568.

If a timely motion for rehearing fails to set forth particular alleged errors with respect to the ZBA's decision on the merits, the party may not raise those grounds in a later appeal unless the court for good cause shown orders otherwise. Id.

We conclude that Merriam Farm's motion for rehearing did not put the ZBA on notice of Merriam Farm's takings claim. In its motion for rehearing to the ZBA, Merriam Farm argued the following, among other things:

> [Part I, Articles 2 and 12 of the] New Hampshire Constitution guarantee[ ] to all persons the right to acquire, possess, and protect property. These guarantees limit all grants of power to the State that deprive individuals of the reasonable use of their land.
>
> . . . [T]he New Hampshire Supreme Court [has] noted that in order to protect the constitutional rights of the landowner, zoning ordinances must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the regulation. As directed by the court, municipalities must temper the balance between private property rights and the Zoning Board's right to restrict the Applicant's property use. The Zoning Board arbitrarily applied the Ordinance to the property in an effort to prevent development.

(Citations and quotation omitted.) The first four sentences of this paragraph set forth general principles of law and are nearly verbatim quotes from Simplex Technologies, 145 N.H. at 731. Simplex, however, did not involve a takings claim. See Simplex, 145 N.H. 727. Only the last sentence of the paragraph constitutes an argument, which is that the ZBA "arbitrarily applied" the ordinance to the Property for an impermissible purpose – "to prevent development."

The ZBA could not have been expected to infer from the citation to Part I, Articles 2 and 12 and the phrase "prevent[ing] development" that Merriam Farm was asserting a takings claim. Arguing that a zoning board "arbitrarily" applied the ordinance to the Property "to prevent development" does not assert that the ZBA's decision substantially deprived Merriam Farm of the economically viable use of its land and, therefore, constitutes a "taking." See Burrows, 121 N.H. at 598. It would have been relatively simple for Merriam Farm to articulate clearly its position that the ordinance, as applied to the Property, was an "arbitrary or unreasonable restriction[,] which substantially deprive[d] [Merriam Farm] of the economically viable use of [its] land." Id. (quotation omitted); see Robinson, 154 N.H. at 568. Instead, Merriam Farm "impermissibly raised this argument for the first time on appeal to the superior court." Robinson, 154 N.H. at 568. Because Merriam Farm did not raise its

takings claim in its motion for rehearing, its argument is not preserved for our review. See id. (petitioner's motion for rehearing did not preserve argument that certain condition imposed upon variance was impermissibly vague when motion argued that "condition impose[d] a substantial but unspecified contingent penalty against the lot owner" (quotation omitted.))

Affirmed.

CONBOY and LYNN, JJ., concurred.