THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Supreme Court Case No. – 2023-0153

Newfound Serenity LLC

v.

Town of Hebron, NH

RULE 7 APPEAL OF ORDERS OF THE

GRAFTON COUNTY SUPERIOR COURT

Reply Brief of Newfound Serenity LLC

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August 10, 2023

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TABLE OF CASES REFERENCED

Case Name	**Reply Brief Pages**
Win-Tasch Corporation v. Town of Merrimack, 120 N.H. 6 (1980)	8, 13 -15
Richmond Company v. City of Concord, 149 NH 312 (2003)	8, 13, 14

TABLE OF STATUTES REFERENCED

Statutes Referenced	**Reply Brief Pages**
RSA 677:15	8, 9, 15
RSA 677:4	6, 7, 8, 9, 15
RSA 679:7	6, 8, 9, 11, 15
RSA 679:9	6

TEXT OF RELEVANT STATUTES

Section 679:9

679:9 Hearing Procedure; Standard of Review. –

I. Appeals to the board shall be consistent with appeals to the superior court pursuant to RSA 677:4 through RSA 677:16. Appeals shall be on the certified record, and except in such cases as justice may warrant, in the sole discretion of the board, no additional evidence will be introduced. Consistent with the contested case provisions of RSA 541-A, the rules of evidence shall not strictly apply. In addition to the provisions of RSA 91-A, the board shall record the proceedings of any hearing before it and shall make such recording available to the public for inspection and recording from the date of the hearing to a date which is 15 working days after the board has made a final decision on the matter which is the subject of the hearing, or, if an appeal is made from such decision, the date upon which the matter has been finally adjudicated, whichever date is later.

II. The board shall not reverse or modify a decision except for errors of law or if the board is persuaded by the balance of probabilities, on the evidence before it, that said decision is unreasonable.

Source. 2019, 346:260, eff. July 1, 2020.

Statement to the Court

The Town's Memorandum of Law (MoL), in several instances, makes unfounded and exaggerated remarks toward Newfound Serenity. These include, for example: "multiple procedural missteps;" "the wrong argument, at the wrong place, at the wrong time;" and "if Newfound misunderstood the law, it was free to secure legal representation, and chose not to do so." These remarks were unwarranted and are not related to their legal arguments on appeal. Although not an attorney: we have approval from this Court to represent ourselves pro se; my profession is based upon ethics and integrity; and my experience as a professional civil engineer includes local land use planning and development, floodplains, environmental planning and permitting at the state and federal level, etc. Furthermore, we did retain an attorney as noted in our Brief (at 32). Newfound Serenity has conducted itself professionally and has complied with all rules of the Superior and Supreme Courts. If the Town is frustrated by its appearance with this Court, it had four different opportunities to resolve this matter through mediation and chose not to engage.

It is our position, that the Town has made these remarks in an attempt to bias the Court due to our pro se appellant status. We therefore request that these remarks be struck from the Town's MoL.

A. Statement of the Facts

Timeliness

- The HAB June 17, 2022 Order states: "….the board lacks jurisdiction to hear the instant appeal." (Apx. at 17)
- The last sentence of RSA 679:7, I states: "At any time during an appeal to the board, **if the board determines that it does not have jurisdiction to hear the appeal (emphasis added),** the appellant shall have 30 days to file an appeal with the superior court." (Brief at 17)
- RSA 679:9 I. states: "Appeals to the board shall be consistent with appeals to **the superior court pursuant to RSA 677:4 (emphasis added)** through RSA 677:16. Appeals shall…."
- RSA 677:4 states: "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;(emphasis added)** …."
- Newfound Serenity hand-delivered a timely appeal to the ZBA on May 6, 2022, a timely Request for a Re-Hearing with the ZBA, and was notified on October 11, 2022 of our denial for rehearing with the ZBA. (Add. at 38). Five months lapsed during the ZBA appeal process due to conflicting schedules of ZBA Board members, a hearing continuation as ruled by the ZBA, as well as illnesses related to Covid -19.

- Newfound Serenity submitted a timely appeal to the Superior Court on October 27, 2022 in accordance with RSA 677:4.

Sua Sponte of the HAB?

- The Town submitted two separate and simultaneous motions to the HAB. They included: a Motion to Find Applicant in Default (which also included timeliness) dated May 17, 2022 and a Motion to Dismiss for Lack of Subject Matter Jurisdiction (challenging if an RV Park for commercial purposes is "housing") dated May 17, 2022.
- The HAB was in possession of the Town's Motions approximately 8 days prior to the HAB's Order dated May 25, 2022 that scheduled the June 14, 2022 Hearing on Pending Motions.
- Also on May 25, 2022, the HAB issued a "Notice of Prehearing Conference & Hearing" which included a "Hearing on the Merits" scheduled for July 7, 2022 (it is unlikely the HAB would have scheduled a Hearing on the Merits on the same day had timeliness been *sua sponte*).
- The HAB's June 17, 2022 Order (Apx. at 14 -17) has no indication that the HAB may have acted *sua sponte* on the matter of timeliness.

Appeal of ZBA Decisions

- Item 5. of the Superior Court Complaint states: "The ZBA did not perform its duty and was unreasonable in its denial to re-hear our case on 10/11/22. Our application presented new arguments

highlighting their errors related to wetland buffers, jurisdiction and permissive zoning, and ignored our offer to address their stated concerns to delineate the "rental spaces" and thereby conform to their interpretation of the zoning." (Apx. at 3)

Claim for Damages

- Newfound Serenity's Complaint filed with Superior Court (Apx. at 3), Item 3 identifies "Claim amount: $95,740.00." Item 4 states: "By denying our Site Plan Application, the Planning Board acted unlawfully, unreasonably, **did not act in good faith, and did not perform its duties to provide fair consideration and assist the Plaintiff in achieving an approvable project thus causing unnecessary harm and expense to the Plaintiff. See Richmond v. City of Concord, City of Dover v. Kimball and Win-Tasch v. Merrimack." (emphasis added).** (Brief at 19 and 20)

B. Argument:

a. Timeliness

The Statement of Facts makes clear that our appeals to the ZBA and the Superior Court were timely in accordance with RSA 677:4. The Town argues that we were untimely in our claim to the Superior Court as we exceeded the 30 days stipulated by RSA 679:7, I. The argument is ironic given their earlier statement that we were too early in our HAB submittal in violation of RSA 677:15, I-a). (MoL at 2). I.e., had we submitted to the Superior Court within 30

days of the HAB Order (by mid-July), we would have been in violation of 677:15, I-a as the ZBA proceedings did not conclude until mid-October.

We argue that the intent and presumption of RSA 679:7 I. is that the local administrative appeals process through the ZBA would have already been fulfilled and the 30 days is intended to be an extension of time following the HAB decision only under those circumstances. Again, we are in compliance with RSA 677:4.

The Town **acknowledges** our right to appeal to the Superior Court when in states: "Alternatively, if the HAB lacked jurisdiction to hear the appeal, RSA 679:7 I also provides that Newfound could have re-filed with the Superior Court within 30 days. Newfound chose not to do this,…." (MoL at 7). This is a **very curious argument by the Town** given their efforts to date to have our case dismissed on the grounds of *Res Judicata*. <u>However, this is in fact exactly what we did as described above in accordance with 677:4.</u>

b. *Sua Sponte* of the HAB?

The Statement of Facts highlights that the Town simultaneously submitted two separate motions dated May 17, 2022 to the HAB. The Town continues their attempt to blur the truth on this matter having already described their two motions as one combined motion (Apx at 8, item 4.). We sought to clarify this matter with the Superior Court (Apx. at 18 and 19). Furthermore, the Town's Motion to Dismiss for Lack of Subject Matter Jurisdiction makes no mention of timeliness. (Apx. at 23 – 26).

In their Memorandum of Law (at 3 and 4) the Town now argues that the HAB acted *sua sponte* when it raised a question reqarding timeliness. This is an unsubstantiated claim and the Statement of Facts argues otherwise. What we know to be true is that the HAB was in receipt of both Motions simultaneously (both are dated May 17, 2022) approximately 8 days prior to the May 25th Notice of Hearing on Pending Motions.

We also know (Brief at 24) that the HAB considered subject matter jurisdiction as their "primary" jurisdictional issue and timeliness as their "secondary jurisdictional issue."

The Town then argues (MoL at 8), "The HAB, after exercising jurisdiction to make a determination on the issue of timeliness, ruled that the appeal was not timely filed." With the recital of facts noted above and the legislative requirement for the HAB to establish its jurisdiction (Brief at 22 – 26), the HAB could not "exercise" its jurisdiction when its subject matter jurisdiction over an RV Park was challenged by the Town and has not been and was never established. Jurisdiction cannot be conveyed where none exists.

c. What did we ask the Superior Court?

The Town states in several locations that we have asked the Superior Court to assert its authority over the HAB and/or its Order. (MoL at 6 and 8). These are false claims – we never made any such requests. Our motions to the Superior Court (which this Court may review at Apx. 18 – 32) make no such request, directly or implied, to

assert its authority over the HAB. Instead, we presented arguments to support the Superior Court's jurisdiction particularly as it related to answering questions surrounding *Res Judicata* (which is appropriate since it would be their responsibility to make that determination). See Questions 1 and 2 (Brief at 6).

d. Waiver of Rights

The Town did not represent our position accurately in their MoL (at 9). First, the issue <u>was</u> raised before the Superior Court (Brief at 18). The issue here is with acknowledgment, consequences and "any and all" circumstance not with ignorance of the law. Clearly we are correct in stating that our rights could not have been waived in any and all circumstance since the legislative language provides a clear avenue to submit to the Superior Court (Brief at 21, 29 -32) – see RSA 679:7 I. The intent of the law is that a waiver of rights to submit to the Superior Court only exists if the HAB conducts a Hearing on the Merits, which we know it did not since that Hearing was scheduled for July 7, 2022 and cancelled.

e. Appeal of ZBA Decisions

The Town argues (MoL at 6): "Therefore, the Superior Court's potential review of the ZBA decision would be moot, because the HAB dismissal would still be effective notwithstanding the outcome of the Superior Court review of the ZBA decision."

Yet this cannot be the case as the ZBA claims were never submitted to the HAB which the Superior Court recognizes in its

Order (Add. at 41) when it states: “the Court agrees with the respondents that, even though the ZBA is co-defendant to this appeals and was not in the appeal to the Housing Appeals Board,…..”

Did the Superior Court err or act prematurely (without first having reviewed the Certified Record) in its determination that the ZBA related claims (Apx. at 3, 5, and 6, items 5., 6., and 9) were moot ?

The ZBA claims are independent of the HAB and the Planning Board proceedings. The Superior Court’s denial to hear those claims would have to be on the grounds of Res Judicata, and that has not been established by the Superior Court.

f. Claim for Damages

The Town states: “Newfound asserts they have suffered damages because the Planning Board denial of the site plan was unlawful and unreasonable. A claim for damages is not a cause of action unto itself – damages are a consequence of some other violation of a legal duty. Where there has not been a finding of a wrongful act, and there remains no avenue for the decision of the Town’s planning board to be challenged or overturned, there can be no cause for damages.” (MoL at 10). <u>This is not a complete portrayal by the Town</u> of our claim to the Superior Court, which as noted in the Statement of Facts, “ the Planning Board acted unlawfully, unreasonably, **did not act in good faith, and did not perform its duties to provide fair consideration and assist the**

Plaintiff in achieving an approvable project thus causing unnecessary harm and expense to the Plaintiff. See Richmond v. City of Concord, City of Dover v. Kimball and Win-Tasch v. Merrimack." (emphasis added). (Brief at 19/20 and Apx. at 3, item 4).

Item 7. of the Superior Court Complaint also states: "The Planning Board acted unreasonably and **did not act in good faith (emphasis added)** when it instructed the Plaintiff to "separate" the RV units by 50 feet as reflected in their meeting minutes for 10/6/21 and in our letter dated 1/3/22, with which we complied, and then later denied the site plan application for "aggregation" of the RV units." These descriptions in our Complaint provide ample information for the Superior Court to at least warrant questioning if wrongful acts were committed by the Town.

We brought this issue before the Superior Court in our Motion for Reconsideration as having "independent merit." (Apx. at 31). There, of course, has not been a "finding of a wrongful act" because the Superior Court never reviewed the Certified Record (which included letters from our attorney (Daniel Luker of Preti Flaherty) to the Town describing their wrongful acts) and never heard or questioned the validity of the claim related to "acting in good faith" nor "performing its duties" as prescribed by case law. They ignored it. These two wrongful acts are not related to the validity of their decisions to deny the site plan but are unlawful acts related to their conduct. Had the Superior Court obtained the Certified Record it would have revealed the Town's negligence in

performing its obligations under the law as established by Richmond Company v. City of Concord (especially given that all state permits were obtained for the project). The Superior Court made no attempt to understand the Town's wrongful acts; they ignored it.

In Win-Tasch Corporation v. Town of Merrimack, 120 N.H. 6 (1980), the NH Supreme Court ruled:

> "We now come to the question whether the master properly dismissed the plaintiff's claim for damages. We hold that he did not.
>
> *11 [7, 8] We agree that the "judicial, quasi-judicial, legislative or quasi-legislative" acts of a town may not ordinarily subject it to claims for damages. Hurley v. Town of Hudson and Sunland Corp., 112 N.H. 365, 368, 296 A.2d 905, 907 (1972). However, the master found that "it is clear that the defendant has not acted in good faith" in withholding from the plaintiff its rightful exemption under the grandfather clause. In such a case it makes no sense to preclude a damage claim when one's property or right to enjoy property is harmed. See 25 C.J.S., Damages § 41 (1966). Such a rule would encourage municipalities and their agents not to act in good faith. Indeed, our legislature has recognized the wisdom of withholding immunity from those in officialdom who fail to interact with the citizen in good faith. Since Hurley the legislature has said that members of boards of adjustment, among others, are not liable for damages as long as they act in "good faith." RSA 31:104 (Supp. 1977). Indemnification is

provided in certain circumstances. See RSA 31:105, :106 (Supp. 1977).

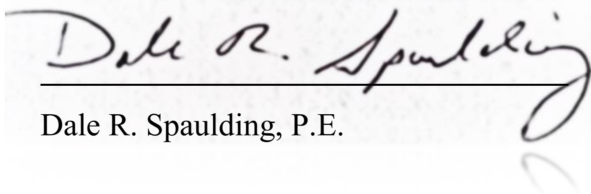
We hold that in this case it was improper to dismiss the damage claim. To hold otherwise in the circumstances of this case would be to encourage developers to violate ordinances and force town injunction proceedings rather than to obey the ordinances and seek redress through available channels. We remand to superior court for consideration of damages for the economic loss."

C. Conclusion:

- Our appeal to the Superior Court is timely and in accordance with RSA 677:4; and with the intent/presumption of RSA 679:7 I. Having spent 5 months in the ZBA appeal process, we could not have submitted to the Superior Court immediately following the HAB's June 17th Order while also being in compliance with RSA 677:15, I-a.
- The HAB Order to Dismiss is either: void as the HAB did not establish their jurisdiction pending a live Motion to Dismiss for Lack of Subject Matter Jurisdiction over an RV Park; or the Order is of no consequence as RSA 679:7 I plainly allows a filing to the Superior Court . Either way, the HAB Order did not require action by the Supreme Court.

- There is no evidence that the HAB acted *sua sponte* as it relates to timeliness.
- We never asked the Superior Court to assert itself over the HAB.
- The Doctrine of *Res Judicata* is applicable in this case and it would be the responsibility of the Superior Court to make those determinations. See Questions 1 and 2 (Brief at 6).
- The claims against the ZBA are not moot and must be heard since those claims were never submitted to the HAB (as acknowledged by both the Superior Court and the Town). Furthermore, there can be no assumption by the Superior Court that somehow one reason for denial would prevail without, as a minimum, having reviewed the Certified Record from the Town.
- Our claim for damages must be heard. The Superior Court did not inquire about our claims or state any cause for denial. The award of damages are permitted under the law in cases such as ours.

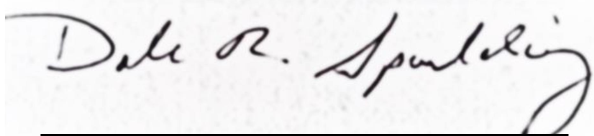
Respectfully submitted this 10th day of August, 2023.



Dale R. Spaulding, P.E.

D. Certification Concerning Compliance with the 3,000-word Limit:

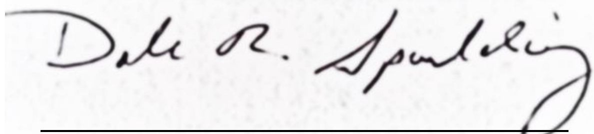
I hereby certify that this document is in compliance with Rule 16(11). The word count of this document, excluding the cover, table of contents, signature blocks and certifications, has 2,966 words.



Dale R. Spaulding, P.E.

E. Certification Concerning Delivery of the Reply Brief to the Opposing Party:

I hereby certify that a copy of the foregoing Reply Brief has, this 10th day of August, 2023 been forwarded by electronic mail through the Court's e-filing system to all counsel of record.



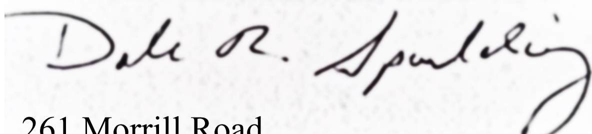
Dale R. Spaulding, P.E.

Dated this 10th day of August, 2023.

Respectfully,

Newfound Serenity, LLC

Dale R. Spaulding, P.E., Registered Agent



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