THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2017-0294, W. Robert Foley, Trustee of the W. Robert Foley Trust v. Town of Enfield, the court on February 2, 2018, issued the following order:

The plaintiff, W. Robert Foley, Trustee of the W. Robert Foley Trust, appeals an order of the Superior Court (MacLeod, J.) upholding the denial of his requested variance by the Town of Enfield Zoning Board of Adjustment (ZBA). The plaintiff argues that the ZBA erred in finding that the variance would violate the spirit of the ordinance by promoting overcrowding of the land. He also argues that ex parte communications by a ZBA member violated his right to a fair hearing. We affirm.

The plaintiff owns a .37 acre parcel on Crystal Lake in the Town of Enfield (town). The plaintiff's parcel is one of several parcels located on Rollins Point, a relatively narrow strip of land that protrudes into Crystal Lake. The properties are served by a private road known as Rollins Point Road. The plaintiff's property is located in the town's R3 District, which requires that any structure on the property must be located at least 30 feet from the lot line adjacent to the road. See Enfield, N.H., Zoning Ordinance art. IV, § 401.2(L). The plaintiff seeks to replace his seasonal, one-story cottage with a year-round, two-story house and an attached, two-car garage. The plaintiff requested a variance to allow him to construct the house within the 30-foot setback from Rollins Point Road, eight to ten feet from his lot line. The town asserts, among other things, that the plaintiff has failed to justify his request for a two-car garage. On appeal, we consider only the proposal reviewed by the ZBA and the superior court.

Judicial review of zoning cases is limited. Dartmouth Corp. of Alpha Delta v. Town of Hanover, 169 N.H. 743, 749 (2017). The ZBA's factual findings are deemed prima facie lawful and reasonable. Id. at 750. The superior court may 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. Id.; RSA 677:6 (2016). We, in turn, will uphold the superior court's decision on appeal unless it is unsupported by the evidence or legally erroneous. Alpha Delta, 169 N.H. at 750. The party seeking to set aside the ZBA's decision — in this case, the plaintiff — bears the burden to prove that it is unlawful or unreasonable. Id. at 750.

Under RSA 674:33, I(b) (2016), a zoning board of adjustment has the power to grant a variance if: (1) "[t]he variance will not be contrary to the

public interest; (2) "[t]he spirit of the ordinance is observed"; (3) "[s]ubstantial justice is done"; (4) [t]he values of surrounding properties are not diminished"; and (5) "[l]iteral enforcement of the provisions of the ordinance would result in an unnecessary hardship." The ZBA denied the plaintiff's request for a variance on the grounds that "[g]ranting this variance would violate the spirit of the ordinance by promoting overcrowding of the land." The superior court upheld the board's decision, concluding that the ZBA acted reasonably and lawfully in finding that granting the variance would violate the spirit of the ordinance.

The plaintiff first argues that the ZBA's finding — that the requested variance is contrary to the spirit of the ordinance — is unsupported by the record. The first step in analyzing whether granting a variance would be contrary to the spirit of the ordinance is to examine the applicable ordinance. Harborside Assocs. v. Parade Residence Hotel, 162 N.H. 508, 514 (2011). The stated purposes of the town's zoning ordinance include "prevent[ing] the overcrowding of the land," "assur[ing] proper use of natural resources," and "provid[ing] for harmonious development of the land and its environs." Zoning Ordinance art. I, § 101(E), (H), & (I); see also RSA 674:17, I(e) (2016) (zoning ordinances are designed "[t]o prevent overcrowding of land," among other things).

We have held that the granting of a variance would be contrary to the spirit of the ordinance if it would violate the ordinance's "basic zoning objectives." Harborside Assocs., 162 N.H. at 514 (quotation omitted). One method for ascertaining whether a variance would violate the ordinance's basic zoning objectives is to examine whether the variance would "alter the essential character of the neighborhood." Id. (quotation omitted). The plaintiff argues that "[t]he construction of a one-family house in a zone that specifically allows and designates as a 'permitted use' one-family houses will not alter the essential character of the locality."

The ZBA found, however, that "Rollins Point is a natural environment on a small, treed point of land where camps were established early in time." The plaintiff's proposed construction would occupy approximately 720 square feet of the 30-foot setback from Rollins Point Road. The ZBA found that "[t]he other properties on Rollins Point suffer from similar size and setback restrictions," and that granting the requested variance "would crowd the land on Rollins Point and might encourage further such crowding." See Devaney v. Town of Windham, 132 N.H. 302, 307 (1989) ("One purpose of the setback requirements is to prevent overcrowding on substandard lots.").

The plaintiff argues that the ZBA erred by considering the potential for future crowding on Rollins Point. We disagree. In Bacon v. Town of Enfield, 150 N.H. 469 (2004), we affirmed the superior court's decision upholding the ZBA's denial of the plaintiff's requested variance to install a 22-square-foot

shed for a propane boiler within the town's 50-foot setback from Crystal Lake. We noted that "[w]hile a single addition to house a propane boiler might not greatly affect the shorefront congestion or the overall value of the lake as a natural resource, the cumulative impact of many such projects might well be significant." Bacon, 150 N.H. at 473. Similarly, in this case, the ZBA chair noted that while the plaintiff's proposed construction of a larger house on his property may not have a "great effect" on Rollins Point, the cumulative effect of granting similar variance requests in the future could be "large and irreversible." During deliberations, the majority of the ZBA observed that the plaintiff's proposed construction "would crowd the land of Rollins Point and might encourage further such crowding and thereby would degrade the natural environment of the point." We conclude that, in evaluating the plaintiff's variance request, the ZBA acted properly in considering the cumulative impact of granting similar variances in the future on Rollins Point. See id.

The plaintiff next argues that "the zoning board's favorable vote on the 'public interest' criterion is inconsistent and contradicts its vote on the 'spirit of the ordinance' criterion where both criteria rely on the same facts and standards." We have observed that 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 v. City of Keene, 158 N.H. 684, 692 (2009). However, we have never held that a zoning board's findings on these two statutory criteria must be the same. See Pennelli v. Town of Pelham, 148 N.H. 365, 367-68 (2002) (noting that "the legislature is presumed not to have used superfluous or redundant words" (quotation omitted)). Given the evidence before the ZBA concerning the potential for overcrowding on Rollins Point if similar variance requests were granted, and the superior court's deferential standard of review, we cannot find that the court erred in concluding that the ZBA acted reasonably and lawfully in finding that granting the variance would violate the spirit of the ordinance. See Alpha Delta, 169 N.H. at 750.

The plaintiff next argues that ex parte communications by the board chair violated his right to a fair hearing on his rehearing request because, he asserts, if he had known about the communications before the hearing, he might have asked the chair to be recused. The record shows that the day before the ZBA met to consider the plaintiff's rehearing request, the chair e-mailed members of a zoning "list serve" asking, "Should the board members consider precedents when deciding their position on a case?" The chair noted in his e-mail that "this one variance probably wouldn't have too bad of an effect. However, if the other properties in the immediate area were similarly expanded, the result would be a crowded area and would almost certainly change the character of the area." The chair received a number of responses, from municipal employees and zoning board members in other communities, which varied in content. The following day, the ZBA voted to deny the rehearing request.

The plaintiff learned of the chair's e-mail to the "list serve" members only after he appealed the ZBA's decision to the superior court. The certified record did not include the members' responses, which the plaintiff obtained through an on-line search. He argues that if he had known earlier that the chair had sought advice from other persons, he would have asked to re-open the hearing to respond to the information, and that "[d]epending upon the nature of that information, [he] may have requested to recuse [the chair]."

It is the burden of the appealing party, here the plaintiff, to provide us with a record to demonstrate that he raised his issues in the superior court. Bean v. Red Oak Prop. Mgmt., 151 N.H. 248, 250 (2004). In this case, although the plaintiff asserts that he raised this issue during "[o]ral argument at superior court," he has failed to provide us with a hearing transcript to demonstrate that he raised this issue in the superior court. In addition, when an error first appears in the trial court's final order, it must be raised in a motion for reconsideration to preserve it for appellate review. See Super. Ct. Civ. R. 12(e); N.H. Dep't of Corrections v. Butland, 147 N.H. 676, 679 (2002). Here, the plaintiff did not move to reconsider the superior court's order, even though it did not address the ex parte communications issue. Moreover, on appeal, we consider only evidence and documents presented to the trial court. Flaherty v. Dixey, 158 N.H. 385, 387 (2009). Two days before the superior court hearing, the plaintiff obtained the members' responses, which he has included in the appellate record, but which he failed to provide to the superior court. For these reasons, we agree with the town and the intervenors that the issue is not preserved for our review.

We note that even if the issue had been preserved, we would find no error. Whether an ex parte communication by a zoning board member requires disqualification depends upon several factors, including whether there was prejudice to the complaining party. See In the Matter of Tapply & Zukatis, 162 N.H. 285, 304 (2011); Appeal of Courville, 139 N.H. 119, 130 (1994). The record shows that the ZBA denied the plaintiff's rehearing request the day after the chair's e-mail on the ground that granting the requested variance would violate the spirit of the ordinance by promoting overcrowding of the land on Rollins Point. This is the same reason the majority of the ZBA, the chair included, gave for denying the variance when it voted over one month earlier. Thus, we would conclude that the plaintiff failed to demonstrate that he suffered any prejudice as a result of the communications. See Tapply, 162 N.H. at 304; Appeal of Courville, 139 N.H. at 130.

Affirmed.

HICKS, LYNN, and BASSETT, JJ., concurred.

Eileen Fox,
Clerk