

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2024-0223, My Way Realty, LLC v. City of Manchester, the court on April 14, 2025, issued the following order:

The court has reviewed the written arguments and the record submitted on appeal, and has determined to resolve the case by way of this order. See Sup. Ct. R. 20(3). The plaintiff, My Way Realty, LLC, appeals a decision of the Superior Court (Delker, J.) affirming a decision of the City of Manchester Zoning Board of Adjustment (ZBA or board) denying its application for a special exception to allow for the installation of a drive-through facility on its property. The plaintiff argues that the superior court erred in affirming the board's (1) finding that the proposal would create undue traffic congestion; (2) denial of its request to present additional evidence; and (3) denial of its application for a special exception. We affirm.

Our review in zoning cases is limited. Taylor v. Town of Wakefield, 158 N.H. 35, 38 (2008). Factual findings of the ZBA are deemed prima facie lawful and reasonable and will not be set aside by the superior court absent errors of law, unless the court is persuaded by a balance of probabilities on the evidence before it that the ZBA's decision is unreasonable. Id.; see RSA 677:6 (2016). The party seeking to set aside the ZBA's decision in the superior court bears the burden of proof. Malachy Glen Assocs. v. Town of Chichester, 155 N.H. 102, 105 (2007). We, in turn, will uphold the superior court's decision unless it is not supported by the evidence or is legally erroneous. Id.

A special exception is a use permitted upon certain conditions as set forth in a zoning ordinance. McKibbin v. City of Lebanon, 149 N.H. 59, 61 (2003). In applying for a special exception, the applicant has the burden of presenting sufficient evidence to support a favorable finding on each of the requirements. Id. In this case, the superior court affirmed the ZBA's decision that the plaintiff failed to present sufficient evidence to support a finding that the requested drive-through facility would not create undue traffic congestion, one of the conditions set forth in the City's ordinance.

The plaintiff first argues that the superior court erred in ruling that the ZBA properly rejected its expert's uncontradicted opinion that the proposed drive-through facility would not create undue traffic congestion. The plaintiff asserts that the ZBA improperly relied upon its own opinions and abutter comments to find that the proposal would create undue traffic congestion.

The ZBA may not simply ignore uncontradicted expert testimony. Condos East Corp. v. Town of Conway, 132 N.H. 431, 438 (1989). Board members may, however, rely in part upon their own judgment, experience, and personal knowledge, provided that the board's decision is "based on more than the mere personal opinion of its members." Continental Paving v. Town of Litchfield, 158 N.H. 570, 574 (2009) (quotation omitted). In this case, the record supports the superior court's ruling that the board did not ignore the expert's testimony; rather, it raised concerns regarding the credibility and methodology of the expert's presentation.

Specifically, a majority of the board questioned the expert's use of the traffic data manual, statements regarding the effects of Covid on traffic, and conclusion that the addition of a drive-through facility would either reduce the amount of traffic or result in a "wash." The ZBA was entitled to question and reject the methodology and conclusions of the expert's traffic assessment. See Trustees of Dartmouth Coll. v. Town of Hanover, 171 N.H. 497, 507 (2018). Based on this record, we conclude that the plaintiff has failed to show that the superior court erred in upholding the ZBA's decision. See Malachy Glen Assocs., 155 N.H. at 105.

The plaintiff next argues that the superior court erred in upholding the board's decision denying its request to present additional evidence, either at a continued hearing or a rehearing. The plaintiff asserts that the board violated Part I, Article 1 of the State Constitution by unreasonably failing to provide it with a full and fair opportunity to respond to the board's concerns. We have recognized that, in furtherance of Part I, Article 1 of our State Constitution, municipalities have an obligation to assist persons seeking approval under zoning ordinances. Richmond Co., Inc. v. City of Concord, 149 N.H. 312, 314-15 (2003). A board's actions in aiding an applicant must be reasonable. Id. at 316.

The plaintiff's attorney stated at the public hearing, in response to questions from the board, that the plaintiff had presented all evidence available to it on the issue of traffic congestion. After the board entered a deliberative session and started voting on a motion to deny the special exception, the plaintiff's attorney offered to "come back with a traffic study." The board denied the request and continued with the vote.

The purpose of a deliberative session is to decide the issues before the board. See Richmond, 149 N.H. at 316. The superior court ruled that the board's refusal to allow the plaintiff to provide additional information, after having entered a deliberative session and started to vote, was not unreasonable and did not constitute a failure to fulfill its constitutional obligations. Based on this record, we conclude that the plaintiff has failed to show that the

superior court erred in its decision. See Malachy Glen Assocs., 155 N.H. at 105.

The plaintiff also argues that the superior court erred in affirming the board's decision to deny its request for a rehearing. "A rehearing is not a matter of right, and may be granted by the ZBA when in its opinion good reason supports it." McDonald v. Town of Effingham Zoning Bd. of Adjustment, 152 N.H. 171, 174 (2005) (quotation omitted); see RSA 677:2 (2016). The superior court found that the plaintiff offered to present a different expert from the same engineering firm to speak about the same conclusions, using the same traffic data manual. Based on this record, we conclude that the plaintiff has failed to show that the superior court erred in affirming the board's decision denying its request for a rehearing.

In light of our decision affirming the superior court's ruling regarding traffic congestion, we need not address whether the plaintiff met the other requirements for a special exception. See McKibbin, 149 N.H. at 61 (plaintiff must present sufficient evidence to support favorable findings on all requirements for a special exception).

Affirmed.

MacDonald, C.J., and Bassett, Donovan, and Countway, JJ., concurred.

**Timothy A. Gudas,
Clerk**

Distribution:

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