COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-153

LISA M. MANCUSO[1] & another[2]

vs.

ZONING BOARD OF APPEALS OF MARBLEHEAD & another.[3]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiffs, abutters of a proposed assisted-living facility in Marblehead, appeal from a judgment of the Superior Court affirming a decision of the zoning board of appeals of Marblehead (board) to grant special permits to 263-269 Pleasant Street LLC (Pleasant Street). Where the board initially denied the special permits but then, within two years, granted the special permits, the plaintiffs argue that G. L. c. 40A, § 16, required the board to find "specific and material changes in the conditions upon which the previous unfavorable action was based," and "describe such changes in the record of its proceedings." The plaintiffs claim error in the board's failure

[1] Formerly known as Lisa M. Moran.
[2] Philip A. Mancuso, Jr.
[3] 263-269 Pleasant Street LLC.

to do so. The plaintiffs also argue that the Superior Court judge erred in precluding them from offering board members' testimony at trial. Because we conclude that the board did not need to find "specific and material changes" in the context of this case, where the board reconsidered Pleasant Street's project pursuant to a remand order issued in a prior appeal to the Land Court, and because we further discern no error in the Superior Court judge's decision to preclude the plaintiffs from offering board members' testimony, we affirm.

1. Background. On July 29, 2015, Pleasant Street applied for two special permits in connection with its plans to construct an assisted-living facility. On May 27, 2016, the board initially denied the special permits, and Pleasant Street appealed to the Land Court. While Pleasant Street's appeal was pending, Pleasant Street and the board submitted a joint motion requesting that the matter be remanded to the board because "[Pleasant Street] desire[d] to present and the [b]oard desire[d] to consider" revisions to Pleasant Street's project. A Land Court judge allowed the joint motion, and a remand order issued. The remand order required the board to hold a new public hearing on November 6, 2017, following proper notice. The remand order further provided that (1) if the board voted to deny the special permits, the matter would return to the Land Court for a trial as originally scheduled, but (2) if the board

instead voted to grant the special permits -- and filed a decision to that effect with the town clerk -- Pleasant Street and the board would stipulate to a dismissal of Pleasant Street's appeal.

On remand, the board voted to grant the special permits, and that decision was filed with the town clerk on December 5, 2017. The plaintiffs, abutters of the proposed assisted-living facility, then appealed to the Superior Court, and a Superior Court judge affirmed the board's decision. The plaintiffs now appeal from the Superior Court judgment.

2. Discussion. a. G. L. c. 40A, § 16. The plaintiffs' primary argument on appeal is that the board's reconsideration of Pleasant Street's project violated G. L. c. 40A, § 16. Pursuant to that statute, "[n]o appeal, application or petition which has been unfavorably and finally acted upon by the special permit granting or permit granting authority shall be acted favorably upon within two years after the date of final unfavorable action" unless said authority finds "specific and material changes in the conditions upon which the previous unfavorable action was based, and describes such changes in the record of its proceedings." G. L. c. 40A, § 16.[4] Pleasant

[4] The statute further provides that "all but one of the members of the planning board [must] consent[] thereto and after notice is given to parties in interest of the time and place of the

Street does not dispute that the board's December 5, 2017 decision occurred within two years of the board's prior May 27, 2016 decision or that the board did not find specific and material changes.[5] Pleasant Street instead contends that the board did not have to find specific and material changes where the board reconsidered Pleasant Street's project pursuant to a remand order. We agree with Pleasant Street.

Trial court judges have broad authority in appeals from decisions denying special permits to make decrees "as justice and equity may require." G. L. c. 40A, § 17. Pursuant to this broad authority, a trial court judge may, in proper circumstances, decide to remand a matter to the local zoning board of appeals.[6] See Roberts-Haverhill Assocs. v. City Council

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proceedings when the question of such consent will be considered." G. L. c. 40A, § 16.

[5] Pleasant Street does dispute that the May 27, 2016 decision was a "final" action, as that term is used in G. L. c. 40A, § 16. According to Pleasant Street, while the May 27, 2016 decision was initially a final action, it "no longer constitute[d] a 'final' action" once the matter was remanded to the board.

[6] The propriety of the Land Court judge's decision to allow the joint motion for a remand is not before us in this appeal. We note that the plaintiffs did not seek to intervene in the Land Court appeal once Pleasant Street and the board filed their joint motion for a remand; nor did the plaintiffs take any other steps to challenge the remand order. See, e.g., Berkshire Power Dev., Inc. v. Zoning Bd. of Appeals of Agawam, 43 Mass. App. Ct. 828, 831 (1997) (judge allowed abutters to intervene even after judgment had entered where zoning board of appeals no longer represented their interests). Nor is there anything inherently improper about a remand order issued at the request of the parties. See, e.g., Titcomb v. Board of Appeals of Sandwich, 64 Mass. App. Ct. 725, 727 n.3 (2005).

of Haverhill, 2 Mass. App. Ct. 715, 718-719 (1974). And, a judge who orders a remand sets the terms of the remand. See Nasca v. Board of Appeals of Medway, 27 Mass. App. Ct. 47, 49 (1989). Thus, as we have concluded in similar circumstances, we look to the remand order, and not G. L. c. 40A, § 16, to determine whether the board had to find specific and material changes. See Nasca, supra (rejecting argument that constructive grant provisions of G. L. c. 40A, § 15, "prescribe[d] the board's timetable when it [was] acting pursuant to a judicial remand"). Where the remand order imposed no such requirement, there was no error in the board's reconsideration of Pleasant Street's project.[7]

In reaching this conclusion, we further note that requiring compliance with G. L. c. 40A, § 16, during court-ordered remands would be inconsistent with both the purpose of remanding and the purpose of G. L. c. 40A, § 16. Remanding serves the goal of resolving controversies by "giving the board an opportunity to

[7] Even if we were to conclude that we should look to G. L. c. 40A, § 16, in determining whether the board had to find specific and material changes, we would not reach a different result. General Laws c. 40A, § 16, would have required the board to find specific and material changes only if there had been a "final" unfavorable action within the preceding two years. As Pleasant Street argues, see note 5, supra, once the Land Court remanded the matter to the board, the board's May 27, 2016 decision was no longer final. Cf. Lanley v. Prince, 926 F.3d 145, 164 (5th Cir. 2019) (judgment that has been remanded is no longer final for purposes of preclusive effect); Gosnell v. Troy, 59 F.3d 654, 657 (7th Cir. 1995) (same).

make further findings of fact or to state more fully the reasons for its decision, or . . . to reconsider an application in the light of stated principles different from those on which the board [had] thus far proceeded." Roberts-Haverhill Assocs., 2 Mass. App. Ct. at 717. Requiring zoning boards of appeals to find specific and material changes in the context of remands would impede the process, limit the situations in which zoning boards of appeals could reconsider their decisions, and be inconsistent with the goal of resolving controversies.[8]

As to G. L. c. 40A, § 16, the statute was designed to address repetitive petitioning and "to give finality to administrative proceedings and to spare affected property owners from having to go repeatedly to the barricades on the same issue."[9] Ranney v. Board of Appeals of Nantucket, 11 Mass. App.

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[8] The plaintiffs concede that there are some circumstances in which, on remand, it would be inappropriate to require zoning boards of appeals to find specific and material changes, such as if the purpose of the remand is to make additional findings or to take additional evidence. But the plaintiffs contend that here, where the purpose of the remand was to consider revisions to Pleasant Street's project, the board should have been required to find specific and material changes. In short, the plaintiffs ask us to adopt a rule that would require zoning boards of appeals to find specific and material changes during some court-ordered remands but not others, depending on the reason for the remand. As explained in the text, neither the statute nor our case law supports such a rule, which we also think would invite further litigation over the reason for any given remand.

[9] For this reason, see note 7, supra, G. L. c. 40A, § 16, does not require zoning boards of appeals to find specific and material changes before granting special permits unless there

Ct. 112, 115 (1981). See Paquin v. Board of Appeals of Barnstable, 27 Mass. App. Ct. 577, 580 (1989) (G. L. c. 40A, § 16, sets forth extra procedures for "repetitive petition[s]"). Here, however, there was no repetitive petitioning. The board denied the special permits, Pleasant Street appealed to the Land Court, the Land Court remanded the matter to the board, and the board then granted the special permits. This all occurred as part of one set of ongoing proceedings. A rule that would have required the board to find specific and material changes would not serve the purpose of the statute. For all these reasons, we conclude that there was no error in the board's reconsideration of Pleasant Street's project without first finding specific and material changes.

b. Board members' testimony. The plaintiffs also argue that the Superior Court judge erred in precluding them from offering board members' testimony at trial. The plaintiffs acknowledge that, as a general rule, we do not permit "[i]nquiry into the mental processes of administrative decision makers at an administrative hearing" absent "a strong showing of improper behavior or bad faith on the part of the administrator." New England Med. Ctr., Inc. v. Rate Setting Comm'n, 384 Mass. 46, 56

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has been a "final" unfavorable action within the preceding two years.

(1981).[10] Nonetheless, relying on Clear Channel Outdoor, Inc. v. Zoning Bd. of Appeals of Salisbury, 94 Mass. App. Ct. 594, 600 (2018), the plaintiffs argue that there was sufficient evidence of improper behavior to allow them to inquire whether the board considered legally irrelevant factors in making a discretionary zoning decision. On the record before us, we discern no error in the Superior Court judge's decision.

Unlike in Clear Channel Outdoor, Inc., 94 Mass. App. Ct. at 597, where the local zoning board of appeals admitted that two of its members considered legally irrelevant factors, nothing in the appellate record before us shows that the plaintiffs made a similar offer of proof. Instead, it appears that Pleasant Street submitted a motion in limine to preclude the plaintiffs from offering board members' testimony and that the plaintiffs objected on the basis that board members could "best inform" the court regarding procedural irregularities. We further note that the plaintiffs have not included a copy of the trial transcript in the appellate record, so we are unable to determine whether the plaintiffs made an offer of proof at trial regarding why they wanted to offer board members' testimony.[11] See Butts v.

[10] New England Med. Ctr., Inc., 384 Mass. at 56, also recognizes an exception, in certain cases, "if the agency has not made findings at the time of its decision."

[11] On appeal, the plaintiffs now argue that the alleged procedural irregularities, taken together, "indicate that the board may have committed sufficient bad behavior such that

Freedman, 96 Mass. App. Ct. 827, 832 n.8 (2020) (appellant has obligation to include in appellate record parts of transcript necessary for review of issues raised on appeal). On this record, there is no basis for us to conclude that the Superior Court judge abused his discretion in precluding the plaintiffs from offering board members' testimony.

Judgment affirmed.

By the Court (Meade, Blake & Lemire, JJ.[12]),

Joseph F. Stanton

Clerk

Entered: January 20, 2021.

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inquiry of board members at trial should have been allowed." The plaintiffs note that, while Pleasant Street's appeal was pending, Pleasant Street engaged in settlement discussions during which it discussed possible revisions to its project with some board members. The plaintiffs suggest that those discussions informed the board's decision and that, furthermore, the hearing on remand was not a "full hearing." Even assuming that the plaintiffs made this argument below, their evidence of improper behavior or of consideration of legally irrelevant factors is purely speculative and would have been insufficient to warrant inquiry of board members at trial.

[12] The panelists are listed in order of seniority.