MASSACHUSETTS Lawyers Weekly

Appeals Court: Lack of finality means zoning law doesn't apply

Board's reversal after remand on assisted-living project upheld

By: Kris Olson April 1, 2021

The Marblehead parcel at issue in 'Mancuso'

In reversing its previous rejection of a project after a Land Court judge issued a remand order in a prior appeal, a zoning board did not also need to find "specific and material changes" in the proposal, the Appeals Court has ruled.

The plaintiffs — a group of abutters opposed to the construction of an assisted-living facility near their homes — argued that because the proposed development would be back before the Zoning Board of Appeals within two years of its initial denial, the requirements of G.L.c. 40A, §16, had to be met.

Those requirements include that the zoning board find "specific and material changes in the conditions upon which the previous unfavorable action was based."

But in a summary decision issued under Rule 23.0, the Appeals Court agreed that the zoning board did not have to find such changes, as the board was reconsidering the project pursuant to a remand order.

In similar circumstances, the Appeals Court had concluded that the remand order, and not G.L.c. 40A, §16, is what controls, the court noted.

"Where the remand order imposed no such requirement, there was no error in the board's reconsideration of [the defendant's] project," the court concluded.

It added that requiring compliance with §16 during court-ordered remands would be inconsistent with the purpose of both remanding and §16. When a case is remanded, it gives the board an opportunity to make further findings of fact or state more fully the reasons for its decision, the court noted.

"Requiring zoning boards of appeals to find specific and material changes in the contexts 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," the panel wrote.

Plans for the assisted-living facility at the site

While §16 was designed to "spare affected property owners from having to go repeatedly to the barricades on the same issue," here there was only one set of ongoing proceedings, the court found.

"A rule that would have required the board to find specific and material changes would not serve the purpose of the statute," it concluded.

The nine-page decision is Mancuso, et al. v. Zoning Board of Appeals of Marblehead, et al., Lawyers Weekly No. 81-044-21.

Encouraging remand

The defendant developer's attorney, Paul L. Feldman of Boston, said that neither side could find a reported decision that spoke to the specific question at issue in the case.

Now that the Appeals Court has provided an answer — a zoning board's unfavorable action does not become "final" until after remand, and §16 does not apply — it puts that question to rest, Feldman said.

Since 1975, when the current version of the Zoning Act was adopted by the Legislature, the practice has been that Land Court and Superior Court judges routinely remand appeals to the permitting authority "for a whole host of reasons," like getting the board's blessing on a settlement that the developer and abutters have reached, Feldman said.

The plaintiffs' attorney did not challenge judges' authority to do that but instead tried to bring §16 to bear on such remands. But the Appeals Court has now clarified that §16 has no role to play in such circumstances, Feldman said.

Newburyport attorney Adam J. Costa, co-counsel to the Zoning Board of Appeals in Mancuso, said the Appeals Court affirmed what most land use law practitioners already understood to be true: "first, that finality with respect to zoning decisions is not typically achieved if appeals ensue, unless and until such appeals are finally resolved; and second, that a remand back to the zoning or planning board is, as the Appeals Court said, part of the same 'set of ongoing proceedings.'"

Boston real estate attorney Kate Moran Carter said that the Appeals Court reached the right decision from a systemic point of view.

"The underlying purpose of a remand — to allow the parties a second opportunity to get it right, either by providing more detailed findings or reasons for the board's original decision, or to reconsider the decision or project — should be encouraged," she said.

Local zoning boards fairly frequently fail to meet their obligations under the Zoning Act to issue detailed findings of fact when rendering decisions on applications for variances or special permits, according to Concord land use attorney Mark Bobrowski.

That makes remand an essential tool to allow a disgruntled applicant to "know what the target is and how to shoot at it," he said.

Carter said that Mancuso is consistent with longstanding notions of judicial deference applied when a trial court is asked to review the decision of a local permitting authority.

"By encouraging remand, the court allows the 'doing of the work' — the analysis of the bylaw or ordinance, the application of the project features to the bylaw language, the revision of the project design to address bylaw factors — to be done at the municipal level, in front of municipal agencies and departments best equipped with the knowledge of the local conditions and the governing zoning framework, rather than the court," she said.

But when the Marblehead Zoning Board of Appeals went from unanimously denying the petition to unanimously approving it upon remand, it "created a bitter taste in all of the neighbors' mouths," said the plaintiffs' attorney, Webb F. Primason of Lynn.

"It just didn't make sense to me or my clients," he said.

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As part of its decision, the Appeals Court suggested that the plaintiffs should have sought to intervene once the developer and zoning board filed their joint motion for remand or otherwise taken steps to challenge the remand order.

That places a difficult burden on abutters to stay abreast of proceedings to which they are not a party, Primason said.

"They would have to check the docket every day and then be ready to act right away," he said.

But Boston real estate attorney Nicholas P. Shapiro was unsympathetic, noting that the abutters would have gotten notice of the remand and subsequent public hearing.

Despite its lack of precedential value, Shapiro said the decision is helpful to practitioners in that it embodies a collection of the relevant case law.

"Reviews of remand orders do not happen all that often," he said.

Complete reversal

Defendant 263-269 Pleasant Street LLC applied for two special permits on July 29, 2015, in connection with its plans to construct an assisted-living facility in Marblehead.

On May 27, 2016, by a 5-0 vote, the Zoning Board of Appeals initially denied the special permits, and Pleasant Street appealed to the Land Court.

While that appeal was pending, Pleasant Street and the zoning board submitted a joint motion, requesting that the matter be remanded so that the board could have the opportunity to consider revisions to the project.

Land Court Judge Michael D. Vhay allowed the joint motion, requiring in his remand order that the board hold a new public hearing on Nov. 6, 2017, following proper notice.

The remand order further provided that if the special permit application were again denied, the matter would return to Land Court for a trial as originally scheduled. Meanwhile, favorable action by the board would trigger the dismissal of Pleasant Street's appeal.

On remand, the zoning board voted 5-0 to grant the special permits and filed its decision with the town clerk on Dec. 5, 2017.

Three separate groups of plaintiffs, abutters of the proposed assisted-living facility, then appealed to Superior Court, and their cases were consolidated.

In a 28-page decision issued on Nov. 5, 2019, Superior Court Judge C. William Barrett affirmed the decision by the zoning board to grant the permits.

With respect to the plaintiffs' argument based in §16, Barrett focused on another aspect of the law: the requirement of obtaining approval of the Planning Board before a petition previously rejected by the Zoning Board of Appeals could be reconsidered.

Barrett concluded that the provision applied only to applications in which there had been unfavorable "final" action.

"The 2016 Decision cannot be deemed a 'final' action where Pleasant Street appealed the Decision and it was subject to possible change following remand," Barrett wrote. "This fact alone provides sufficient basis to take the current matter outside the scope of G.L.c. 40A, §16."

Barrett also cited the "important distinction" between a new public hearing and a new "application or petition."

"A new application or petition re-commences the request for zoning relief at the starting gate with wholly new submissions and supporting documentation; but, a remand order that merely requires a new hearing is quite different," he wrote.

After receiving the unfavorable decision from the Appeals Court on Jan. 20, the plaintiffs sought further review from the Supreme Judicial Court, a request that the SJC denied on March 11.

No board member testimony

In their petition to the Appeals Court, the plaintiffs also argued that Barrett had erred in not allowing them to call the zoning board members to testify at trial.

Mancuso, et al. v. Zoning Board of Appeals of Marblehead, et al.

THE ISSUE: When, upon reconsideration pursuant to a remand order issued in a prior appeal, a zoning board reverses a previous decision and approves special permits for a project, did the board need to comply with G.L.c. 40A, §16, and find "specific and material changes" in the proposal?

DECISION: No (Appeals Court)

LAWYERS: Webb F. Primason of Bradley, Moore, Primason, Cuffe & Weber, Lynn (plaintiffs)
Paul L. Feldman and Shawn M. McCormack, of Davis, Malm & D'Agostine, Boston (defendant 263-269 Pleasant Street LLC)
Lisa Mead and Adam J. Costa, of Mead, Talerman & Costa, Newburyport (defendant Zoning Board of Appeals of Marblehead)

The plaintiffs had acknowledged that such inquiry into the mental processes of administrative decision makers is generally impermissible, absent "a strong showing of improper behavior or bad faith on the part of the administrator."

But the plaintiffs argued that there was sufficient evidence of improper behavior here to allow them to inquire whether the board considered legally irrelevant factors in making its decision.

As precedent, the plaintiffs pointed to the Appeals Court's 2018 decision in Clear Channel Outdoor, Inc., et al. v. Zoning Board of Appeals of Salisbury, et al.

But unlike Clear Channel, in which the local zoning board admitted that two of its members considered irrelevant factors, here there was nothing in the record to show that the plaintiffs had made a similar offer of proof, the Appeals Court said.

Instead, after Pleasant Street had submitted a motion in limine to preclude the plaintiffs from offering the board members' testimony, the plaintiffs objected on the basis that the board members could "best inform" the court regarding procedural irregularities.

The plaintiffs had also failed to include a copy of the trial transcript in the appellate record, leaving the Appeals Court unable to discern whether the plaintiffs had made an offer of proof at trial.

"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," the Appeals Court wrote.