COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-295

IMMANUEL CORP.

vs.

ZONING BOARD OF APPEALS OF UXBRIDGE.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Between July 2014 and December 2016, under a licensing agreement for "soil importation," Immanuel Corp. (Immanuel) allowed RHR, LLC (RHR) to deposit more than 330,000 cubic yards of materials on a property (property) that Immanuel owned in the town of Uxbridge (town) that had long been used as a gravel quarry. After the town's zoning enforcement officer (ZEO) issued a cease and desist order notifying Immanuel that its soil importation violated the town's zoning bylaws, and the town's zoning board of appeals (board) upheld the order, Immanuel challenged the board's decision in the Superior Court under G. L. c. 40A, § 17. After a jury-waived trial, a judge concluded that the board had acted within its discretion. Immanuel appeals, arguing that soil importation was not prohibited by the zoning bylaws, and alternatively that soil

importation was allowed under the terms of Immanuel's prior permits for gravel excavation. We affirm.

Background. We recite the relevant facts as found by the judge, supplemented by undisputed facts from the record. In 1999, Immanuel bought the property, which covers about 133 acres, and operated a gravel quarry under a series of annual earth removal permits issued by the town. The last of that series of permits expired on December 31, 2009. Since it bought the property, Immanuel has removed about three million tons of sand and gravel from it. The earth removal permits generally required Immanuel to restore any areas no longer in use for excavation by covering them with loam and vegetation.

On May 5, 2014, Immanuel entered into the licensing agreement authorizing RHR to deposit soil and other non-soil materials on a five acre area of the property.[1]

In 2014 and 2015, the town issued two one-year earth removal permits allowing Immanuel again to remove gravel from the property. Those earth removal permits required Immanuel to restore the excavated area pursuant to § 181-4(B) of the town's general bylaws, by grading and leveling it and then covering it with "suitable topsoil" and planting it with "suitable ground cover." Neither of those earth removal permits authorized

[1] Immanuel and RHR executed amended versions of that agreement in July 2014 and March 2015.

commercial importation of soil and other materials to the property. Immanuel's last earth removal permit expired in October 2016.

Effective May 13, 2014, the town's zoning bylaws provided that "[n]o[] . . . land [shall] be used or occupied, except for the purposes permitted as set forth in the accompanying [t]able of [u]se [r]egulations." Uxbridge Zoning Bylaws § 400-10. That table listed "[e]arth removal," but not filling or soil importation. Effective October 25, 2016, the town amended its zoning bylaws to expressly prohibit, "[e]xcept where lawfully in existence at the time of these [b]ylaws," use of land as a "[c]ommercial land filling operation and/or dumping ground." Uxbridge Zoning Bylaws § 400-10(D)(8). On the same date, and effective on February 10, 2017, the town amended its general bylaws to prohibit "[t]he removal, importation or filling of any material to or from any parcel of land in the [t]own . . . unless a written permit therefor is obtained from the [p]lanning [b]oard." Uxbridge General Bylaws § 181-2. The general bylaws further detailed that if the amount of fill was "in excess of 100,000 cubic yards over the life of the project," an administrative consent order would be required as part of the permitting process. Id.

Meanwhile, in the two and one-half years between July 30, 2014, and December 31, 2016, Immanuel or RHR deposited on the

property more than 330,000 cubic yards of material, which amounted to 16,000 truckloads -- enough to cover a football field to a height of more than 200 feet. Those materials included not only soil, but also man-made materials and construction debris from multiple construction sites; the amount of potentially harmful matter among them is not known. For importing fill to the property, Immanuel has been paid more than $600,000. The judge found that "[t]his importation was done, not to restore the site, but to profit from providing a location to dump unwanted material from excavation in other places," and that "[s]ince 2014, the soil importation has been far more pervasive than any gravel removal activities on the [p]roperty."

In December 2016, the town's planning board requested that the ZEO inspect the property to ensure that it complied with the new zoning bylaw prohibiting commercial landfilling, § 400-10, and to determine whether gravel removal was underway there. On January 9, 2017, after an investigation, the ZEO notified Immanuel by letter that its soil importation operation violated the town's zoning bylaws. On February 1, 2017, the ZEO issued a cease and desist order requiring Immanuel to discontinue all soil importation activities, and then issued an amended cease and desist letter on February 6 clarifying that the importation activity violated the town's zoning bylaws.

Immanuel appealed the cease and desist order to the board, arguing that under the new general bylaws, soil importation was permissible as a principal use on receipt of a permit, and also that soil importation was permissible as incidental to the historical use of the property as a gravel quarry. On April 19, 2017, after a hearing, the board upheld the cease and desist order, concluding that under the zoning bylaws commercial landfilling was not permitted as a principal use, the new general bylaws allowing landfilling as an incidental use did not apply because Immanuel had not obtained a permit, and Immanuel's soil importation activity was not incidental to gravel excavation.

Immanuel appealed to the Superior Court pursuant to G. L. c. 40A, § 17. After trial, the judge affirmed the board's decision, concluding that the town's zoning bylaws did not allow commercial landfilling operations as a principal use of land, and that Immanuel's principal use of the property between mid-2014 and early 2017 was as a commercial landfilling operation. The judge further found that some of the materials imported to the property were not soil, but rather "man-made or construction debris," and any authority for Immanuel to bring loam or topsoil to the property to restore the area excavated for gravel had lapsed when the earth removal permits expired.

Discussion. 1. Standard of review. In reviewing the judge's decision, we accept his findings of fact unless clearly erroneous, but review de novo his legal conclusions, including interpretations of zoning bylaws. See Shirley Wayside Ltd. Partnership v. Board of Appeals of Shirley, 461 Mass. 469, 475 (2012); Wendy's Old Fashioned Hamburgers of N.Y., Inc. v. Board of Appeal of Billerica, 454 Mass. 374, 383 (2009). "If the board's decision is supported by the facts found by the judge, it 'may be disturbed only if it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary.'" Fish v. Accidental Auto Body, Inc., 95 Mass. App. Ct. 355, 362 (2019), quoting Bateman v. Board of Appeals of Georgetown, 56 Mass. App. Ct. 236, 242 (2002).

2. Zoning bylaws' prohibition of commercial landfilling. Immanuel argues that because the town's zoning bylaws did not expressly prohibit commercial landfilling in 2014, when Immanuel began importing fill to the property, the board and the judge erred in interpreting them to prohibit commercial landfilling. Immanuel contends that, because the 2016 amendment to the zoning bylaws expressly prohibited commercial landfilling and included the language, "[e]xcept where lawfully in existence at the time of these [b]ylaws," § 400-10(D), that meant that Immanuel's use of the property as a commercial landfill operation was protected as a prior use.

The plain language of both the 2014 and 2016 versions of the zoning bylaws supports the board's interpretation that those bylaws prohibit commercial landfilling. In 2014, when Immanuel first began importing fill, the zoning bylaws prohibited use of land except for the purposes set forth in the table of use regulations, which did not include commercial landfilling. Uxbridge Zoning Bylaws § 400-10. The town's 2016 amendment of the zoning bylaws to more clearly prohibit commercial landfilling did not preclude an interpretation of the previous zoning bylaws as prohibiting that use of land. See Styller v. Zoning Bd. of Appeals of Lynnfield, 487 Mass. 588, 597 (2021) (amendment of bylaw to specifically prohibit rentals in single-residence districts did not prohibit town from interpreting prior bylaw as prohibiting rentals by omitting them from list of permitted uses); Leonard v. Zoning Bd. of Appeals of Hanover, 96 Mass. App. Ct. 490, 494-495 (2019) (use not allowed before zoning bylaw amendment not a prior nonconforming use). Cf. Valley Green Grow, Inc. v. Charlton, 99 Mass. App. Ct. 670, 680 (2021) (amendment to G. L. c. 40A, § 3, to exclude marijuana cultivation from exemption from zoning regulation for commercial agriculture and horticulture "does not bear on whether a town's existing bylaw allows the growing and cultivation of marijuana"). Therefore, the board's decision that Immanuel's use of the property for commercial landfilling was prohibited by

the zoning bylaws was not "unreasonable, whimsical, capricious or arbitrary" (citation omitted).[2] Fish, 95 Mass. App. Ct. at 362.

3. Whether Immanuel's 2014 and 2015 earth removal permits authorized it to import landfill. Immanuel argues that the earth removal permits it obtained in 2014 and 2015 authorized its importation of soil to the property. Those earth removal permits required Immanuel to reclaim the excavated area by "re-vegetation," and incorporated § 181-4 of the general bylaws, which required the permit holder to grade and level the excavated area at least annually, and to cover it "with not less than four inches of suitable topsoil" and to plant it with "suitable ground cover." The judge found that neither of those earth removal permits authorized Immanuel to import soil and other materials to the property, and in any event what Immanuel imported was "not soils," but rather "man-made or construction

[2] Contrary to Immanuel's argument, the ZEO's trial testimony acknowledging that the general bylaws that became effective in 2017 allowed landfilling with a written permit from the planning board had no bearing here, because Immanuel never obtained any such permit. Thus we do not reach the question whether the general bylaw allowing for importation of fill under certain circumstances conflicted with the zoning bylaw prohibiting commercial landfilling. Cf. Jaworski v. Earth Removal Bd. of Millville, 35 Mass. App. Ct. 795, 796 (1994). However, we note that § 400-4 of the zoning bylaws provides that "[w]here the application of these [b]ylaws imposes greater restrictions than those imposed by any other regulations, permits, [or] restrictions . . . the provisions of these [b]ylaws shall control."

debris." The last of those earth removal permits expired in October 2016, but Immanuel was intending to import at least another one-half of a million cubic yards of material to the property before its operation was halted when the ZEO issued the cease and desist order.

Based on those facts which he found de novo, the judge considered whether the board's decision interpreting its own zoning bylaw was "arbitrary, capricious, whimsical, or based on a legally untenable ground." Stevens v. Zoning Bd. of Appeals of Bourne, 97 Mass. App. Ct. 713, 717 (2020) (after jury-waived trial, judge concluded that town properly ordered landowner to cease and desist renting property as wedding venue based on town's interpretation of zoning bylaw). We discern no error of law or abuse of discretion.

4. Allocation of burden of proof. Finally, Immanuel argues that the judge erred in handling Immanuel's motion in limine that sought a ruling that at trial the board bore the burden of proof to establish that Immanuel's commercial landfilling business violated the town's zoning bylaws. The judge declined to rule on the motion, noting that at Immanuel's request he was taking some witnesses out of order, and that because the trial was jury-waived, "we have some flexibility," and he would consider arguments on the burden of proof "down the

road a little bit."[3] Immanuel's counsel pressed the issue, arguing that Immanuel would be prejudiced if it was required to call its witnesses first, rather than have the opportunity to question on cross-examination witnesses such as the ZEO. The judge commented that he would allow Immanuel's counsel "some leeway" in questioning the ZEO, "[s]o you can cross-examine [the ZEO] if you call him," and thus Immanuel would not be prejudiced by being the first party to call witnesses. On direct examination of the ZEO, Immanuel's counsel was permitted to pose many leading questions.

Immanuel has failed to show that it was prejudiced by the judge's refraining from ruling on the motion in limine. The judge's detailed findings of fact and rulings of law make clear that he applied the correct legal standard under G. L. c. 40A, § 17, reviewing de novo the correctness of the board's decision on facts found by the judge. See Stevens, 97 Mass. App. Ct. at 717. Contrast Fish, 95 Mass. App. Ct. at 363 (discussing cases where "unfortunate turn of phrase suggested" that judge shifted burden of proof). Like the judge, we afford deference to the

[3] The docket contains a notation that the judge issued a memorandum and order on the motion in limine, but Immanuel has not included it in the record appendix. As appellant, it was Immanuel's burden to do so. Mass. R. A. P. 18 (a) (1) (A) (v) (b), as appearing in 481 Mass. 1637 (2019).

board's interpretation of its own zoning bylaws. See Styller, 487 Mass. at 597.

Judgment affirmed.

By the Court (Green, C.J., Englander & Grant, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: May 13, 2022.

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