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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 17-00403

DEBORAH BOYKAN and GRANT
COVELL, JOSEPH WEINSTEIN, and
ELAINE KOURY,

Plaintiffs,

v.

THE ZONING BOARD OF APPEALS OF
THE CITY OF SOMERVILLE by and
through its members, RICHARD MAUSER,
MOON REALTY TRUST, and TREAT
REALTY TRUST,

Defendants.

ORDER OF REMAND

The parties having filed a joint motion for the issuance of a court order remanding this matter to the Defendant Zoning Board of Appeals ("ZBA") for further proceedings to consider whether to add certain conditions to its January 18, 2017 decision granting to Moons Realty Trust and Treat Realty Trust variances, a special permit with site plan review, and special permits, it is hereby **ORDERED** that the matter is remanded to the ZBA for further proceedings *by agreement or without objection* in accordance with the following requirements:

1. Within 60 days following the date of this Order of Remand, the special permit and variance application originally filed with the ZBA on behalf of Moons Realty Trust and Treat Realty Trust, shall be updated and revised ~~to be consistent with the conditions set forth in paragraph 2 below.~~ *by the applicant.*

2. Upon receipt of the revised and updated application for variances, a special permit with site plan review, and special permits, the ZBA shall forthwith schedule a public hearing to consider whether its decision of January 18, 2017 shall be modified to include ^{any additional} ~~the following~~ conditions ^{The parties have discussed the following matters} related to Traffic & Parking, Design, and Site (based on new plans to be submitted by the developer consistent with those shared by the developer with the Plaintiffs dated December 14, 2017):

Traffic & Parking

- a. The Applicant Shall provide at least one off-street parking spot per unit.

Design

- a. The Applicant shall better preserve 5 Smith Avenue.
- b. The style of 104 Beacon Street shall match the triple deckers to its northwest on Beacon Street, as shown on the Applicant's plans dated December 14, 2017, and the Applicant shall use a paint color of a shade designed to blend in with the neighborhood, as approved by the City of Somerville Planning Department.
- c. The Applicant shall relocate the proposed bedroom window-well of 5 Smith that on the December 14, 2017 plans intrudes into the shared driveway with 9 Smith at its narrowest point to the northwest wall of the bedroom where it will be less intrusive. *The architect has indicated that this will be feasible and the developer has tentatively agreed to do so. (Note: this should eliminate the need for the "privacy wall" between 5 Smith and 9 Smith required by Condition #24 of the SZBA decision to extend through the shared driveway).*
- d. The Applicant shall replace the two chimneys on 5 Smith that are scheduled for removal with dummies that will help preserve the visual symmetry between 5 Smith and 9 Smith. *The architect has indicated that this will be feasible and the developer has tentatively agreed to do so.*
- e. The Applicant shall use all-wood exterior materials on the historic home at 5 Smith, and that they will match window trims. *(Note: Conditions #19 and #20 of the SZBA decision provide: "Applicant shall provide material samples for siding, trim, windows, and doors to Planning Staff for review and approval prior to construction ..." and "The exterior of 5 Smith Avenue shall be restored as guided by the Secretary of the Interior's Standards. Planning Staff (the Planner-Preservation Planner) shall determine and approve all materials and design for 5 Smith....")*

- f. The footprint and height of 5 Smith Ave., after renovation, should be no greater than at present. Appropriate plans are shown on the Applicant's plans dated December 14, 2017.
- g. The massing of the historic houses at 5 Smith Ave. and 9 Smith Ave., as seen from Smith Ave., shall not be impacted (e.g., 104 Beacon Street must not stick out too far to the rear). Appropriate plans are as shown on the Applicant's plans dated December 14, 2017.

Site

- a. The Applicant shall preserve more outdoor space by limiting the footprint of 5 Smith Avenue and 104 Beacon Street to no more than the size shown on the Applicant's plans dated December 14, 2017.
- b. Unless the utility company requires use of the utility pole between 5 Smith and 9 Smith Ave, pole, the Applicant shall avoid using that utility pole for any utility connections to 5 Smith, so as to facilitate the possible future removal of this pole. The Applicant may, as an alternative, use the utility pole on the opposite side of Smith Ave., or place these connections underground. *(Note: Condition #33 of the SZBA decision states: "The electric, telephone, cable TV and other such lines and equipment shall be placed underground from the source or connection.") The Plaintiffs had wanted the developer to have the utility pole removed entirely, but the developer states that removal is beyond his authority and ability.*

2A. This Court offers no opinion or guidance on the proposed additional conditions.

3. The ZBA shall publish, post, and send notices concerning the public hearing on the revised application, in accordance with the requirements provided in G.L. c. 40A, § 11.

4. Within fourteen (14) days after the ZBA decision on the revised application is filed with the City Clerk, the ZBA shall file a copy of that decision with this Court.

AND IT IS FURTHER ORDERED that the Court shall retain jurisdiction over this matter including any appeals which may be taken from the ZBA's decision following remand. Pursuant to the parties' joint motion for a remand order, the parties shall file a stipulation of dismissal under Mass. R. Civ. P. 41(A)(1)(ii) upon the filing of a ZBA decision *acceptable to the parties.* *adopting the conditions outlined above.* In the event that the Plaintiffs are aggrieved *from the* ~~because the ZBA decision does not~~ *adopt said conditions,* Plaintiffs need not initiate a new lawsuit appealing said decision, but shall,

within twenty ⁽²⁰⁾ ~~one (21)~~ days of the filing of the decision with the City Clerk, file with this court and serve upon all other parties a proper motion for leave to amend the pleadings to assert a right of judicial review of the decision following remand, with the form of the proposed amendment annexed to said motion, and within twenty ⁽²⁰⁾ ~~one (21)~~ days shall file with the City Clerk written notice of having filed such motion in the Superior Court, accompanied by true copies of the moving papers.

SO ORDERED



Justice of the Superior Court

Dated: May 15, 2018