

C O M M O N W E A L T H O F M A S S A C H U S E T T S

H O U S I N G A P P E A L S C O M M I T T E E

85 BRICK KILN, LLC

v.

FALMOUTH ZONING BOARD OF APPEALS

No. 2026-03

SUMMARY DECISION

September 8, 2026

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85 BRICK KILN, LLC,

Appellant

v.

FALMOUTH ZONING BOARD OF APPEALS,

Appellee

I. INTRODUCTION AND PROCEDURAL HISTORY

Brick Kiln appealed the Board's decision to the Housing Appeals Committee (Committee) pursuant to 760 CMR 56.05(11)(d). An initial conference of counsel was held on March 5, 2026, and a status conference was held on April 1, 2026. Thereafter, Brick Kiln filed a motion for summary decision (Developer motion) and submitted Exhibits A-E, including an Affidavit of Nicholas Mirrione, the Project Manager for Brick Kiln (Mirrione Affidavit). The Board filed an opposition and motion for summary decision (Board motion) with an Affidavit of Noreen Stockman, the Town's Zoning Administrator (Stockman Affidavit). Brick Kiln filed its

opposition to the Board's motion and reply to the Board's opposition (Developer opposition), along with a Second Affidavit of Nicholas Mirrione (Second Mirrione Affidavit), on June 11, 2026.

For the reasons discussed below, the Board's motion for summary decision is denied, and the Developer's motion for summary decision is granted.

II. UNDISPUTED FACTS

The following undisputed facts are taken from the initial pleading and the parties' exhibits and affidavits.

On March 20, 2025, Brick Kiln was granted a comprehensive permit, subject to conditions, to construct 40 residential apartment units throughout nine duplex buildings and two multi-unit buildings on 4.28 acres of vacant land located at 85 Brick Kiln Road, East Falmouth. Developer Exh. B. Brick Kiln appealed the Board's decision to the Committee on April 8, 2025. The appeal was resolved by a revised comprehensive permit agreed upon by the parties and incorporated into a decision on stipulation and entry of judgment issued by the Committee on September 4, 2025 (2025 Permit). Developer Exh. C.

The 2025 Permit amended the use and dimensions of the two garages allowed on the premise and modified Condition G8 to state:¹

There shall be two (2) garages allowed at the premises, as follows: One (1) garage dimensioned 36-feet by 24-feet, with two (2) garage doors, shall be used for storage of supplies, parts and maintenance equipment for this development only. There shall be a second garage dimensioned 24-feet by 24- feet, with two garage doors, to provide space for studio residents' bicycle storage. There shall be no parking in front of the garages which impedes sidewalk access.

Developer Exh. C, p. 2.

¹ Condition G8 contained in the original comprehensive permit stated:

The 24-foot by 60-foot garage structure, planned to be 17 feet, 10 7/16 inches in height for storage of property owners vehicles, equipment, materials and possible work space is denied; and shall be removed from the plan, and not replaced.

The two bay garage, dimensioned 20-feet by 24-feet, is granted, to provide space for studio residents' bicycle storage. The developer may also install a second two-bay garage, dimensioned 20-feet by 24-feet for storage of supplies and items for this development only. There shall be no parking in front of the garages which impedes sidewalk access.

Developer Exh. B, p. 15.

On November 6, 2025, the Board voted to approve Brick Kiln’s unrelated modification to relocate a residential duplex building, and the Board’s decision was filed with the Town Clerk on January 9, 2026 (Modified Permit). *See* Developer Exh. D. On December 1, 2025, Mr. Mirrione filed a letter with the Board requesting permission to further amend the Modified Permit by 1) renumbering the units in accordance with the directive from the Town’s engineer; and 2) allowing for a 12-foot by 24-foot portion of the three-bay maintenance and storage garage to be used as an on-site management office with a half-bathroom (i.e., a sink and a toilet). Developer Exh. E. On December 18, 2025, the Board voted to approve the renumbering of the units, finding it to be an insubstantial change. At that same meeting, the Board determined that the request for an office and half-bathroom constituted a “substantial” change to the project. The Board subsequently held a public hearing on January 29, 2026, where Brick Kiln withdrew its request for an office but continued with its request to install a half-bathroom in the maintenance garage, consisting of a sink and toilet for use by maintenance workers who will be on staff daily at the development. Developer Exh. A; Mirrione Affidavit, ¶ 9. On the same date, Board voted to deny the request for the half-bathroom and filed its decision with the Town Clerk on February 6, 2026. Developer Exh. A.

III. STANDARD OF REVIEW

A. Summary Decision Standard

Summary decision is appropriate on one or more issues that are the subject of an appeal before the Committee if “the record before the Committee, together with the affidavits (if any) shows that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law.” 760 CMR 56.06(5)(d); *see Catlin v. Board of Registration of Architects*, 414 Mass. 1, 7 (1992); *Pond View Commons, LLC v. Lunenburg*, No. 2023-01, slip op. at 7 (Mass. Housing Appeals Comm. Summary Decision Nov. 22, 2023) and cases cited. “Summary decision may be made against the moving party, if appropriate.” 760 CMR 56.0(6)(5)(d); *Rugged Scott, LLC v. Nantucket*, No. 2018-01, slip op. at 9 (Mass. Housing Appeals Comm. Ruling on Second Motion for Summary Decision May. 10, 2024) and cases cited. The Committee must “examine whether the undisputed evidence, when considered in the light most favorable to the nonmoving party ... is legally sufficient to support a decision in favor of the movant.” *Matter of Oxford and 722 Main Street*, No. 2021-11, slip op. at 3 (Mass. Housing Appeals Comm. Nov. 16, 2022) and cases cited.

B. Project Change Standard

A developer may appeal either a determination by a Board that a requested change is substantial or the denial of the requested change. 760 CMR 56.05(11)(c)-(d). If the developer does not appeal the substantiality determination immediately, its right to raise the issue in an appeal, such as the one before us now, is still preserved. 760 CMR 56.05(11)(d). In this case, after the Board found the modification to be substantial, the Board held a public hearing on Brick Kiln's request to add a half bathroom to the garage. The Board voted to deny the request. Thereafter, Brick Kiln filed its appeal with the Committee, challenging both the Board's determination that the change is substantial and the Board's denial of the project change.

The comprehensive permit regulations do not define the terms "substantial" or "insubstantial." Rather, the regulations "provide guidance on the kinds of changes that 'generally' should be deemed substantial, as well as the kinds of changes that ordinarily should be deemed insubstantial." 760 CMR 56.07(4); *VIF II/JMC Riverview Commons Investment Partners, LLC v. Andover Zoning Board of Appeals*, No. 2012-02, slip op. at 15 (Mass. Housing Appeals Comm. Feb. 27, 2013); *see also CMA, Inc. v. Westborough*, No. 1989-25, slip op. at 19-21 (Mass. Housing Appeals Comm. June 25, 1992). The list of examples in the regulations is by no means exhaustive. Moreover, these examples apply only generally and may not apply to a particular project set in a specific context. *VIF II/JMC Riverview, supra*, No. 2012-02, slip op. at 15.

None of the examples listed in the regulations address whether the addition of a half-bathroom to an already approved structure constitutes a substantial or insubstantial change. *See* 760 CMR 56.07(4)(c)-(d); *VIF II/JMC Riverview, supra*, No. 2012-02, slip op. at 15-16 (discussing applicability of examples to changes after issuance of a comprehensive permit). Therefore, we look to Committee precedents for our analysis. *Rugged Scott, LLC v. Nantucket*, No. 2018-01, slip op. at 8 (Mass. Housing Appeals. Comm. August 31, 2021); *See* 760 CMR 56.07(4)(c)-(d). We have stated that "[w]here the regulatory examples are not determinative, the issue of whether proposed project modifications are 'substantial' is one that requires a careful factual analysis. The specific changes proposed must be examined in relation to the original project, taking into consideration the adverse impacts, if any, the changes could have on residents or on the surrounding area." *VIF II/JMC Riverview, supra*, No. 2012-02, slip op. at 15-16, citing

Lever Development, LLC v. West Boylston, No. 2004-10, slip op. at 2 (Mass. Housing Appeals Comm. Ruling on Notice of Change Dec. 16, 2005).

IV. DISCUSSION

The questions before us are whether: 1) standing exists for Brick Kiln to pursue this appeal; 2) the Board erred in its determination that adding a half-bathroom to the already approved maintenance and storage garage constitutes a substantial change to the project; and 3) the Board's denial is consistent with local needs.

A. Lack of Standing

The Board claims that Brick Kiln lacks standing to pursue an appeal with the Committee, arguing that adding a half-bathroom to the storage garage is unconnected to the creation of housing, and therefore the Committee lacks jurisdiction to resolve this appeal. Board motion, pp. 9-10. Ms. Stockman notes that “[c]onstruction of 85 Brick Kiln LLC’s 40-unit comprehensive permit project as authorized by the [2025 Permit] is currently in progress.” Stockman Affidavit, ¶ 14. It contends that the absence of the half-bathroom presents no impediment to the construction and operation of housing. The Board therefore argues that Brick Kiln has not demonstrated a cognizable injury protected by Chapter 40B or its regulations for standing, and therefore the Committee lacks subject matter jurisdiction to hear this appeal. Board motion, pp. 5, 9, citing *In re Harvard Pilgrim Health Care*, 434 Mass. 51, 56 (2001), citing *Ginther v. Commissioner of Ins.*, 427 Mass. 319, 322 (1998) (standing is an issue of subject matter jurisdiction and can be raised at any time).

The Board also argues that “only a developer who has been denied a comprehensive permit or has been issued a permit with conditions that make the building or operation of such housing uneconomic may appeal a decision of a board of appeals to the Committee.” Board motion, p. 9, citing *Sudbury Station, LLC v. Sudbury*, No. 2016-06 slip op. at 3 (Mass. Housing Appeals Comm. Ruling on Motion to Intervene Apr. 24, 2018). The Board states that appeals involving the denial of a requested change are treated as an appeal of conditions in a comprehensive permit, where the developer has the initial burden of proving that a denial of the modification would render the project uneconomic. *Id.*, p. 9-10, citing *Drumlin Development, LLC v. Sudbury*, No. 2001-03, slip op. at 3 (Mass. Housing Appeal Comm. Sept. 27, 2001). Because Brick Kiln did not demonstrate some financial injury to the construction and operations of housing, the Board argues that there is “no justiciable issue before the Committee to resolve.” *Id.*, p. 10.

Brick Kiln challenges the Board's reliance on *Sudbury Station* as misplaced and relating to the standing of an abutter, rather than a developer. Brick Kiln argues that its ownership in the development provides the Developer with standing in this matter. Developer opposition, p. 6, citing *Rugged Scott, LLC v. Nantucket*, No. 2018-04, slip op. at 6,7 (Mass. Housing Appeals Comm. Summary Decision Aug. 31, 2021).

We find that Brick Kiln has standing to pursue this appeal with the Committee. The Committee has authority to resolve post-permit disputes involving a developer's proposed project change. 760 CMR 56.05(11)(c). Pursuant to 760 CMR 56.05(11)(a), a developer may request a modification of a permit by a board. *See VIF II/JMC Riverview Commons v. Andover, supra*, No. 2012-02, slip op. at 14 (Committee has jurisdiction to hear appeals on whether proposed changes are substantial pursuant to 760 CMR 56.05(11)). The regulation allows for modifications including those that involve adding or removing structures. *See e.g.*, 760 CMR 56.07(4)(b). Accordingly, the fact that the requested modification does not directly involve the construction and operation of housing does not preclude the Developer from establishing standing before the Committee. *See e.g. Patricia A. Klauer v. Falmouth Zoning Board of Appeals*, No. 2022-02, (Mass. Housing Appeals Comm. Oct. 10, 2023) (allowing the owner of a single-family home within a 40B development to seek a modification of the comprehensive permit and ruling the addition of a shed was an insubstantial change).

B. Whether the Proposed Modification is an Insubstantial Change

1. Developer's Arguments

Brick Kiln relies on *Marion Village* to argue that the installation of half-bathroom is not considered a substantial change to the original comprehensive permit. *See Marion Village Estates, LLC v. Marion*, No. 2022-01 (Mass. Housing Appeals Comm. Summary Decision Mar. 24, 2023) (ruling that increasing the number of water meters was an insubstantial change based on the modification's nominal effect to the development's physical layout, building design, tenants and the surrounding area). It asserts that the additional bathroom would neither change the dimension of the maintenance garage, be noticeable from the exterior, nor adversely impact the future tenants of the development and nearby properties. Developer motion, p. 9, citing *Marion Village Estates, supra*, No. 2022-01. Brick Kiln also contends that denying the proposed project change could negatively impact tenants and the surrounding neighborhood. Mr. Mirrione

explains that the completed project will be staffed daily with maintenance workers responsible for maintenance of the residential units and common facilities, as well as for seasonal landscaping tasks, such as lawn mowing, planting, leaf and snow removal within the development. Developer Exh. E, ¶ 9. Mr. Mirrione stated that Brick Kiln will perform its own maintenance work on the property rather than contracting out the maintenance work. Developer Exh. E, ¶ 10. Therefore, the Developer argues that denying the proposed bathroom may result in workers using “the private bathroom facilities of the tenants or may resort to inappropriate alternatives (e.g., secluded outdoor areas), creating sanitation issues and exposure to fines or complaints.” Developer motion, p. 9.^{2 3}

2. Board’s Arguments

The Board argues that adding a half-bathroom departs from material terms agreed upon by the parties that resulted in the issuance of the 2025 Permit. Board motion, pp. 5-6. The Board explains that the use and size of the garage “were significant topics of dispute” during their settlement negotiations in August of 2025. *Id.*, p. 5; *see* Affidavit of Noreen Stockman, ¶¶ 3-7. To modify terms so material to the parties’ agreement, the Board argues, would undermine the parties’ settlement efforts, and discourage negotiations by signaling to future parties that their negotiated terms could be under “immediate collateral attack” pursuant to 760 CMR 56.05(11). Board motion, p. 6.

The Board makes an additional argument that providing a half-bathroom for maintenance workers would convert the storage garage into a workplace, thereby adding commercial use to

² Brick Kiln makes a second argument that state and federal law requires sanitary toilet facilities be provided for the development’s on-site maintenance workers pursuant to G.L. c. 149, § 18A and 29 C.F.R. § 1910.141(d)(2)(i). Developer motion, p. 9. Mr. Mirrione acknowledges that Brick Kiln could install a port-a-potty indefinitely; however, the Developer argues that “this would negatively impact the tenants and the surrounding property” and states that such an alternative “would be a visual eyesore within the residential development.” Developer motion, p. 9; Developer Exh. E, ¶ 15. Therefore, Brick Kiln claims that for the Board to deny this modification request “would result in Brick Kiln, as an employer, being in violation of state and federal workplace safety laws.” *Id.* We do not have authority to decide whether there would be a violation of state and federal workplace laws to determine whether the Board erred in its determination that the additional half-bathroom is a substantial change.

³ G.L. c. 149, § 18A states, in part that “Employers shall provide...lavatories having hot and cold water, in every place of employment where the lack of such facilities would be harmful to health.” 29 C.F.R. § 1910.141(d)(2)(i) states, in part, “[l]avatories shall be made available in all places of employment. The requirements of this subdivision do not apply to mobile crews or to normally unattended work locations if employees working at these locations have transportation readily available to nearby washing facilities....”

the residential project. The Board notes that the 2025 Permit limits the use of the garage to storage for the Brick Kiln development only. *Id.*, p. 7. The Board stated in its decision denying the requested modification that “Board members expressed concern that the application before them for an employee bathroom was a veiled attempt to introduce a commercial use into a residential project.” Developer Exh. A, p. 2. The Board argues that it is “highly unusual” for a newly constructed, 40-unit development to require daily maintenance workers on the property. Board motion, p. 7. The Board submitted an affidavit from Ms. Stockman, in which she stated that “comparable multi-family residential developments do not have maintenance garages, nor do they have garages with bathrooms.” Noreen Stockman Affidavit, ¶12. It also points to Brick Kiln reliance on state and federal workplace laws, arguing that the Developer would not need to invoke these workplace laws if it were not adding a workplace to the development. Board motion, pp. 7-8. It therefore argues that the proposed change “discloses a new, different and commercial use” not previously reviewed and approved by the Board and constitutes a substantial change under 760 CMR 56.05(11). *Id.*, pp. 8-9.

3. Committee Conclusion

We agree with the Developer that the proposed change is unsubstantial. Brick Kiln’s modification consists of installing a sink and toilet within the storage garage. This storage garage has been approved by both the original comprehensive permit and the 2025 Permit. Developer Exhs. B, C. The additional half-bathroom does not affect the physical layout of the development, unlike in *VIF II/JMC Riverview* where the additional garage increased lot coverage. *See VIF II/JMC Riverview, supra*, No. 2012-02, slip op. at 21. Furthermore, the additional bathroom would not be visible from the exterior buildings and would benefit both the development’s tenants and neighbors by providing a discrete and unintrusive private bathroom for on-site maintenance workers. *See Marion Village, supra*, No. 2022-01, slip op. at 6. In *Lever Development, supra*, No. 2004-10, we noted the importance of the effect of proposed changes on local concerns and stated that “[c]hanges that lessen the impact of a project will not be considered substantial or a reason to remand a case to the local board.” *Id.* at 2, citing *Cloverleaf Apartments, LLC v. Natick*, No. 2001-21, slip op. at 5 (Mass. Housing Appeals Comm. Dec. 23, 2002); see also *Klauer v. Falmouth*, No. 2022-02, slip op. at 12 (Mass. Housing Appeals Comm. Oct. 10, 2023 Summary Decision and Denial of Motion to Dismiss) (post-construction modification to add a shed was insubstantial; Committee modified permit to incorporate change).

Because we find the modification to be insubstantial, we need not determine whether the denial is consistent with local needs (and whether the developer must first prove that the denial renders the project uneconomic). See *VFII/JMC Riverview, supra*, No. 2012-02, slip op. at 21; *Klauer, supra*, slip op. at 12; see also 760 CMR 56.05(11)(d)1. See also *Rugged Scott v. Nantucket*, No. 2018-04, slip op. at 7, 9 (Mass. Housing Appeals Comm. Summary Decision Aug. 31, 2021) (ruling that the post-permit modification to allow addition of a garage was an insubstantial change and the developer was not required to prove the economics of the proposed change). Cf. *Rugged Scott, LLC v. Nantucket*, No. 2018-01, slip op. at 9 (Ruling on Motion for Summary Decision Aug. 31, 2021) (proposed modification was a substantial change and hearing required for developer to prove that the conditions rendered building or operation of housing uneconomic).

Moreover, the fact that the modification sought involves conditions previously negotiated by the parties is not conclusive as to whether the modification is substantial. See *Rugged Scott, LLC v. Nantucket*, No. 2018-01, slip op. at 8-9 (Mass. Housing Appeals Comm. Ruling on Second Motion for Summary Decision May. 10, 2024) (“the fact that an original permit or a previously modified permit does not contain structures or elements sought by a modification does not automatically preclude a developer from seeking to include them in a modification request”). In this matter, Condition G7 of the original comprehensive permit - together with Chapter 40B and its regulations – provide the process in which the Developer may seek a modification. Condition G7 states, in part, that “[a]ny changes requested shall be properly submitted to the Zoning Board of Appeals, *as provided for under M.G.L. Ch. 40B, and the associated regulations.*” Developer Exh. B, p. 15 (emphasis added). The regulations expressly allow for a comprehensive permit to be modified or amended after approval and issuance pursuant to 760 CMR 56.05(11) and there is no language in the 2025 Permit stating that changes to the storage garage would be deemed substantial.

Lastly, the Board’s argument that adding a half-bathroom to the storage garage will add commercial use to this residential project is without merit. Both the original permit and the 2025 Permit expressly designate this garage for storage of supplies relating to this development. Developer Exh. B, p. 15. Mr. Mirrione stated that this garage will continue to store equipment and materials used exclusively for the residential complex, and the modification would simply be providing basic sanitary facilities to daily on-site workers. Second Affidavit of Nick Mirrione, ¶¶

8-11. Therefore, we find that both the garage and half-bathroom are incidental to the residential use of the proposed development and conclude that the approved use of the storage garage would not change because of the additional bathroom.

V. CONCLUSION AND ORDER

For the reasons stated herein, pursuant to 760 CMR 56.06(5)(d), we find that there is no genuine issue as to any material fact and Brick Kiln is entitled to summary decision as a matter of law. The installation of a half-bathroom in the storage and maintenance garage is an insubstantial change to the comprehensive permit and the permit is therefore deemed modified to incorporate this change pursuant to 760 CMR 56.05(11)(b). Accordingly, Brick Kiln's motion for summary decision is hereby granted and the Board's motion for summary decision is denied.

HOUSING APPEALS COMMITTEE

September 8, 2026

/s/ Lisa V. Whelan
Lisa V. Whelan, Chair

/s/ Lionel G. Romain
Lionel G. Romain

James G. Stockard, Jr.
James G. Stockard, Jr.