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

PATRICIA A. KLAUER

v.

FALMOUTH ZONING BOARD OF APPEALS

No. 2022-02

SUMMARY DECISION AND DENIAL OF MOTION TO DISMISS

October 10, 2023

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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

PATRICIA A. KLAUER, Appellant,	)	
v.	)	No. 2022-02
FALMOUTH ZONING BOARD OF APPEALS, Appellee.	)	

SUMMARY DECISION AND DENIAL OF MOTION TO DISMISS

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This is an appeal by Patricia A. Klauer, pursuant to G.L. c. 40B, §§ 20-23 and 760 CMR 56.00 *et. seq.*, of a decision by the Falmouth Zoning Board of Appeals (Board) denying Ms. Klauer's request to modify a comprehensive permit, the Board issued to Locustfield, LLC (developer), to allow her to maintain a shed on her property.

On January 19, 2022, Ms. Klauer filed an appeal with the Committee objecting to the Board's modification denial, asserting that: it is not consistent with local needs; it fails to apply local requirements and regulations as equally as possible to subsidized and unsubsidized housing; and it is arbitrary and capricious and exceeds the Board's authority. Initial Pleading, ¶¶ 7-9. Ms. Klauer requests a decision overturning the Board's decision and allowing the addition of the shed. *Id.*, pp. 2-3.

On November 7, 2022, the Board filed a motion to dismiss, asserting Ms. Klauer had failed to state a claim upon which relief may be granted and she lacks standing to appeal the Board's decision because she is not a proper applicant under the comprehensive permit regulations. On December 5, 2022, Ms. Klauer filed an opposition to the Board's motion and

moved, pursuant to 760 CMR 56.06(5)(d), for summary decision in her favor. The Board filed no response to Ms. Klauer's motion for summary decision.

II. UNDISPUTED FACTS

On July 1, 2019, the developer was granted a comprehensive permit, subject to 45 conditions, to construct 12 detached single-family ownership units, three designated for low or moderate income housing, on an undeveloped four-acre parcel located at 430 Locustfield Road in East Falmouth, Massachusetts. Initial Pleading, Exh. A; Board Motion to Dismiss, Exh. A.

The developer constructed the homes (Locustfield Estates or project), and on May 20, 2020, executed a declaration of covenants, easements, and restrictions (Declaration), which is recorded in the Barnstable County Registry of Deeds. Motion to Dismiss, Exh. B. The Declaration runs with the land for all 12 lots and provides that the developer and its successors and assignees shall be subject to its covenants and restrictions. *Id.*, pp. 1, 4. The Declaration further provides that "…no alteration, addition, remodeling or any change in the exterior of any nature whatsoever shall be made to any dwelling except in conformance with the comprehensive permit…."[1] *Id.*, p. 1. In addition, Locustfield Estate Lot owners shall be members of the Locustfield Estates Homeowners' Corporation, Inc. (Homeowners' Association or HOA) entitled to voting rights. The "covenants and restrictions may be amended at any time by an instrument in writing executed by one hundred percent of the owner(s) of the legal title to the Lots." *Id.*, pp. 2-4.

Ms. Klauer owns Lot 3 of the Locustfield Estates, which is located at 10 Beach Plum Path, East Falmouth. Klauer Affidavit, ¶ 2 and Exh. A. Sometime before October 4, 2021, she purchased a one-story, 164-square-foot shed. The shed was placed on cinder blocks in her backyard in the southwest corner of Lot 3, where it is detached from her house. *Id.*, ¶¶ 3-5 and Exh. A. The dimensions of the shed are 10.1 feet by 16.25 feet, as shown on the "Existing Conditions Plan for #10 Beach Plum Path," prepared for Ms. Klauer by Falmouth Engineering, dated October 14, 2021. *Id.*, ¶ 3; Exh. A. Ms. Klauer stated that before purchasing the shed, she called the Town's building department to find out whether a permit was needed to have a shed

[1] The Declaration does not provide a procedure for seeking changes in conformance with the comprehensive permit. The comprehensive permit provides, in Condition 1, that "[a]ny changes requested shall be properly submitted to the [Board], as provided for under M.G.L. Ch. 40B." Motion to Dismiss, Exh. A.

on the property and was told that a permit was not needed if the shed was smaller than 200 square feet. *Id.*, ¶ 6. This, she asserts, is consistent with her understanding of the Massachusetts Building Code, 780 CMR 51.00, R105.2, which exempts from permit, "[o]ne-story detached accessory structures, provided that the floor area does not exceed 200 [square] feet…." *Id.*, ¶ 7.

Additionally, Ms. Klauer obtained permission from the Homeowners' Association for the shed on her property. *Id.,* ¶ 9; Klauer Affidavit, Exh. B. On August 2, 2022, the Homeowners' Association and Ms. Klauer entered into "The Locust Field Estates Homeowners' Corporation, Inc. Approval of Shed for Lot 3 (Agreement)," which provides that "the HOA and [Ms.] Klauer hereby agree as follows: 1) [Ms.] Klauer may construct/keep a shed at her own cost and expense as shown on the Shed Plan; 2) [Ms.] Klauer shall be solely responsible for all maintenance, repairs, and replacement of the shed; 3) Klauer shall be responsible for obtaining approval for the shed from the [Board]; and 4) The HOA agrees that the shed on Lot 3 of the Subdivision shall be the only shed approved by the HOA unless the [Board] approves another shed or sheds." *Id.* The agreement is intended to run with the land in perpetuity. *Id.*

Ms. Klauer stated the shed "is important to my enjoyment of my home because I am an elderly widow, I need to park my car in my garage so therefore there is not much room for storage of yard equipment in the garage, such as lawnmower, wheelbarrow, yard tools, other tools of my late husband[], and storage of my yard furniture in the winter." Klauer Affidavit, ¶ 8. She further noted "[t]he shed is not intrusive and is in keeping with the homes in the subdivision" and she "know[s] of many other nearby homes that also have sheds that are not Chapter 40B projects…." *Id.*, ¶¶ 10-11.

On October 4, 2021, the Town's building department issued an enforcement order to Ms. Klauer, which ordered removal of the shed from her property. Motion to Dismiss, Exh. C. On November 3, 2021, Ms. Klauer filed with the Board an appeal of the building department's enforcement order and a request for a modification of the comprehensive permit to keep the shed on her property. *Id.* The record does not indicate whether the Board issued a determination pursuant to 760 CMR 56.05(11)(a) regarding whether the requested change was substantial or not. But the Board did open a public hearing on Ms. Klauer's appeal on December 16, 2021, and two weeks later denied her modification request and upheld the decision of the building commissioner requiring removal of her shed. *Id.* In its decision, the Board cited four

comprehensive permit conditions[2] and found that the shed is a structure and Ms. Klauer "did not properly comply with various Conditions of the Comprehensive Permit, requiring advance permission from the [Board], prior to installing a structure (shed) on the Premises, and that the shed is a violation of the terms of the Permit." *Id.* The Board stated that the shed "would result in increased density in the development, and that the placement would be inequitable with other lots (including affordable units) in the development." *Id.* The Board required removal of the shed from Ms. Klauer's property within six months of its decision. *Id.*

III. MOTION TO DISMISS FOR LACK OF STANDING

A. Board's Arguments Against Standing

The Board argues that Ms. Klauer has no standing to pursue an appeal with the Committee because she is not a proper applicant under the comprehensive permit regulations. It argues that a plain reading of Chapter 40B and its regulations requires the Committee to dismiss her appeal because only an "applicant," as defined in the regulations, may seek a modification of a comprehensive permit under G.L. c. 40B, § 22 and 760 CMR 56.05(11)(c). It notes that c. 40B, § 22 provides that the "applicant" may appeal to the Committee and that 760 CMR 56.02 defines "Applicant" as "a public agency, a non-profit organization, or a Limited Dividend Organization that proposes a Project for which is has submitted or intends to submit an application for a Comprehensive Permit to the Board." 760 CMR 56.02: *Applicant*. Motion to Dismiss, pp. 3, 4.

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[2] The four comprehensive permit conditions are:

"Condition 1: Where this Comprehensive Permit is made specifically under M.G.L. Ch. 40B, Sect 20-23, allowing the override of local zoning (density), there shall be no as-of-right changes made to the subject property. Any changes requested shall be properly submitted to the Zoning Board of Appeals, as provided for under M.G.L. Ch. 40B."

"Condition 11: There shall be no further division or subdivision of the Premises, or the creation of additional housing units or any other structures without further approval of the Zoning Board of Appeals in the form of an amendment to this Decision."

"Condition 35: Any deviation, no matter how minor, from plans submitted and approved, shall be submitted to the Board for approval, prior to implementation of said change. The Zoning Administrator may make a determination as to whether the changes are minor in nature, and can be approved administratively, or whether they will require a hearing for an amendment. Changes made prior to an approval may be subject to a full hearing, and are at risk that the [Board] may deny the request, subjecting any unapproved condition be ordered undone.

Condition 41: Each condition in this Decision shall run with the land and shall, in accordance with its terms, be applicable to and binding on the Applicant, and the Applicant's successors and assigns." Motion to Dismiss, Exh. C.

The Board argues Ms. Klauer "did not have standing to request the change to the comprehensive permit in the first instance and does not now have standing to bring this appeal." *Id.*, p. 4. As a result, it argues the Committee has no jurisdiction to hear her appeal. Motion to Dismiss, pp. 4, 6, 8. Rather, it argues, the appropriate applicant to request changes to the comprehensive permit is the original applicant and developer who, it contends, still maintains control over the site through the Homeowners' Association. *Id*, p. 4. The Board asserts that limiting appeals to a developer who still retains control over the site prevents individual unit owners from bringing piecemeal appeals to the Committee and conserves judicial and municipal economy. Moreover, the Board suggests that if Ms. Klauer is allowed to proceed with this appeal, then all other unit owners within the development will follow suit. *Id.* The Board did not suggest what recourse Ms. Klauer would have, if any, if she cannot pursue her appeal to the Committee.

The Board makes an additional argument that Ms. Klauer does not have standing because her interest in maintaining a shed for additional storage is "purely economic" and the "need for additional storage is simply not an injury that chapter 40B was intended to protect." *Id.*, p. 6. It relies on *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 30 (2006), to argue that an appellant to the Committee must show that they have been aggrieved by a decision of a local zoning authority and their injury is one that chapter 40B was designed to protect. Motion to Dismiss, p. 5. Therefore, the Board argues, Ms. Klauer fails the test for standing which "deprives the Committee of subject matter jurisdiction to hear this appeal and it must be dismissed." *Id.*, p. 6.

B. Ms. Klauer's Response

Ms. Klauer objects to the Board's claim that she did not have standing because it considered her application for a permit modification on the merits and did not state she could not make the request for a shed. Klauer Opposition and Motion for Summary Decision, p. 2. Moreover, she argues, various conditions of the comprehensive permit contemplate changes to the property after the project was completed and the units were sold, and those conditions, requiring approval from the Board, apply to future owners of the homes in the development as well as to the original developer. *Id.* She argues that although Condition 1 does not state who may request approval from the Board, logically, it must apply to the future owners of the homes in the development as well as to the original owner. She argues Condition 11 does not prohibit future homeowners from requesting changes, and the Board was clearly contemplating future

requests by homeowners, otherwise "an owner of a home in a 40B project would never be allowed to make any, even minor, changes to their property." *Id.*, pp. 2-3. She also argues that Condition 41 "explicitly contemplates that someone other than the original developer [or] Applicant would be subject to the Comprehensive Permit" including conditions governing future changes, "because such [homeowners] are successors to the Applicant." *Id.*, p. 3.

Ms. Klauer acknowledges that there may be no Committee decisions addressing a unit owner's standing but refers to two cases brought under G.L. c. 40A that she suggests are analogous and instructive: *Quimby v. Zoning Bd. of Appeals of Arlington*, 19 Mass. App. Ct. 1005 (1985) (reversing denial of tenant motion to amend complaint to add property owners as co-plaintiffs to their challenge to grant of parking variance on trial judge's failure to provide grounds justifying denial) and *39 Joy Street Condominium Ass'n v. Board of Appeals of Boston,* 426 Mass. 485 (1998) (holding condominium owner had standing to seek variance without condominium association permission with respect to their own property in which they had exclusive fee interest). Opposition and Motion for Summary Decision, pp. 3, 4. She cites *Quimby* for the proposition that she has standing because she has a possessory interest in, and control of, the property, and therefore should not be barred from making her appeal. *Id.*, p. 4. She asserts her "situation is similar to the condominium owner" in *Joy Street* and notes she had obtained permission from the Homeowners Association to have the shed. *Id.*; Klauer Affidavit, Exh. B.

C. Committee Discussion

The Committee has authority to resolve post-permit disputes involving a developer's proposed project change. 760 CMR 56.05(11)(c). As we have previously stated,

> [t]he Comprehensive Permit Law's mandate to facilitate the construction of affordable housing, coupled with the Committee's express statutory authority to issue a comprehensive permit in the first instance, clearly and necessarily implies the authority of the Committee to modify a comprehensive permit, if necessary, to permit a project change that is consistent with local needs. Disputes over project changes are fairly common, and the prompt resolution of such disputes is necessary to achieve the intent of the Act.

VIF II/JMC Riverview Commons Investment Partners, LLC, v. Andover, No. 2012-02, slip op. at 6 (Mass. Housing Appeals Comm. Summary Decision Feb. 27, 2013) (determining Committee's general authority to resolve post-permit disputes involving proposed project changes extends to projects with no affordable units). We have had occasion to review modifications requests under

a variety of circumstances. *See, e.g., 511 Washington Street, LLC v. Hanover*, No. 2006-05, slip op. at 14 (Mass. Housing Appeals Comm. Jan. 22, 2008) (allowing post-construction removal of permit condition restricting occupancy to tenants at least 55 years old, where market conditions caused the age-restricted project to become uneconomic), *aff'd Board of Appeals of Hanover v. Housing Appeals Comm.* (Land Ct. No. 08PS381349 April 2, 2009); *Rugged Scott, LLC v. Nantucket*, No. 2018-04, slip op. at 7, 9 (Mass. Housing Appeals Comm. Summary Decision Aug. 31, 2021) (ruling developer's overall interest in project was sufficient to confer standing and ruling post-permit modification to allow addition of garage was insubstantial change); *cf.*, *Avalon Cohasset, Inc. v. Cohasset*, No. 2005-09, slip op. at 7-8 (Mass. Housing Appeals Comm. Ruling on Motion to Dismiss Jan. 9, 2006) (treating developer's post-permit appeal of denial of substantial change as equivalent to appeal of condition in comprehensive permit and thus requiring developer to prove that conditions render building or operation of housing uneconomic).

While the comprehensive permit regulations define "Applicant," they also define "Developer" more broadly, as "the Applicant *or any successor that owns or controls a Project*." 760 CMR 56.02: *Developer*. (Emphasis added). The various regulatory provisions that apply to the developer instead of the applicant envision the Committee's continued jurisdiction over projects once comprehensive permits are issued and construction is completed. *See, e.g.*, 760 CMR 56.01 ("… the developer of a project that includes a sufficient level of subsidized low and moderate income housing may apply for a Comprehensive Permit from the local zoning board of appeals (the 'Board'). Appeals by *developers* from decisions of the Board are decided by the [Committee]…."") (Emphasis added); 56.02: *Reasonable Return*; 56.04(8)(a)-(c) (cost examination and limitations on profits and distributions).

The Board argues "[t]he only appropriate applicant to request changes to the comprehensive permit … is the original applicant and developer who still maintains control over the site through the [Homeowners' Association]." Motion to Dismiss, p. 4. Ms. Klauer asserts that homeowners are successors to the applicant, and she should have standing to seek modification of the comprehensive permit as it relates to her property because Condition 41 provides that each condition is "binding on the Applicant, and the Applicant's successors and assigns." Opposition and Motion for Summary Decision, p. 3. Neither party supports their

conclusions with an analysis of the ownership or control interests required to be a successor to an applicant.

The Declaration appears to be the HOA's governing document. It sets forth the ownership interest of the lot owners in the HOA by virtue of their membership in it. The Declaration does not provide detail regarding the operation and management of the development. Nor does it provide a mechanism for seeking approvals or modifications of the comprehensive permit. The HOA controls some aspects of the project, such as the identified restrictions limiting lot use to residential use only, prohibiting new dwellings, requiring vehicles to be parked in garages and unexposed to public view, requiring boats and trailers to be kept within enclosed buildings or within the side or rear yard of a dwelling, prohibiting public view of laundry drying facilities, prohibiting fencing on frontage of the lots, and requiring shared expense of certain maintenance and repairs. Motion to Dismiss, Exh. B. Ms. Klauer has control with respect to Lot 3—her own property—subject to the Declaration, and with respect to the project as a whole through her interest and control with other homeowners as a voting member of the HOA.

We need not determine the precise ownership and control interests over the project because both Ms. Klauer and the HOA agree that the shed should be allowed, and that Ms. Klauer would be the one to request it from the Board. Klauer Affidavit, Exh. B. Even if we credited the Board's argument that the HOA is the only proper applicant, we believe the HOA, through the Agreement, has delegated authority to Ms. Klauer to bring the request to the Board and granting her the authority to do so is akin to establishing her agency. "Under Massachusetts law, '[a]n agency relationship is created when there is mutual consent, express or implied, that the agent is to act on behalf and for the benefit of the principal, and subject to the principal's control.'" *TargetSmart Holdings, LLC v. GHP Advisors, LLC*, 366 F. Supp. 3d 195, 207 (D. Mass. 2019), quoting *Theos & Sons, Inc.* v. *Mack Trucks, Inc.*, 431 Mass. 736, 742 (2000). "Though an agency relationship may be formed by express consent of the parties, evidenced by a writing, it need not be. It may also be implied from 'conduct by the principal which causes a third person reasonably to believe that a particular person has authority to enter into negotiations or to make representations as his agent.'" *Id.* at 208, citing *DeVaux* v. *American Home Assurance Co.*, 387 Mass. 814, 819 (1983).

The HOA agreed to give Ms. Klauer permission for the shed, and the HOA agreed she would be the one to request permission from the Board. Klauer Affidavit, Exh. B. We find the

Agreement granted Ms. Klauer authority to seek Board approval of the shed. Moreover, the Board considered Ms. Klauer's modification request on the merits, and the Committee has jurisdiction to review the Board's decision. 760 CMR 56.05(11)(d).

The Board's assertion that Ms. Klauer's injury is purely economic and thus not protected by Chapter 40B is inapposite. In *Standerwick*, the appellant claiming the Chapter 40B project would diminish their real estate value was an abutter to the affordable housing site, not the developer or its successor. Here, Ms. Klauer is challenging the legality of the Board's decision and conditions that prevent her from making even the most minor changes to her own property, including the addition of a detached shed that is typically allowed as of right and requires no building permit. Under the comprehensive permit, "[a]ny deviation [from approved plans], no matter how minor" requires a modification request, and additionally, any change to the property that would not even constitute a modification of the permit requires prior Board approval. Motion to Dismiss, Exh. A, Conditions 1, 35, pp. 10, 16. Here also, there is a question of whether the shed constitutes a change to the permit or requires approval merely as a change to the property. The HOA has delegated authority to Ms. Klauer to bring the modification request relating solely to her property. We therefore rule that Ms. Klauer has standing to bring this appeal, and we deny the Board's motion to dismiss.[3]

IV. MS. KLAUER'S MOTION FOR SUMMARY DECISION

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); *Warren Place, LLC v. Quincy,* No. 2017-10, slip op. at 4 (Mass. Housing Appeals Comm. Aug. 17, 2018); *Delphic Assocs., LLC v. Duxbury,* No. 2003-08, slip op. at 6 (Mass. Housing Appeals Comm. Sept. 14, 2010); *Grandview Realty, Inc. v. Lexington,* No. 2005-11, slip op. at 4 (Mass. Housing Appeals Comm. July 10, 2006).

Ms. Klauer raises several legal issues. In her Initial Pleading, Ms. Klauer stated she filed a notice of project change with the Board seeking a modification of the comprehensive permit to

[3] The two c. 40A cases cited by Ms. Klauer, *Quimby* and *Joy Street,* are also persuasive, but under the circumstances here, we do not rely solely on them.

allow her to place a shed in her yard. Initial Pleading, p. 2. The Board denied her request, and Ms. Klauer appealed and objected to the Board's decision, arguing the Board's decision is not consistent with local needs, it fails to apply local requirements and regulations as equally as possible to subsidized and unsubsidized housing, and it is arbitrary and capricious and in excess of the Board's authority. *Id.* In her motion for summary decision, Ms. Klauer argues that the Board's allegation that her shed has a negative impact on the absorption of groundwater into the Town's drinking water supply is conclusory and unsupported by any evidence and is therefore inconsistent with local needs. She also argues that the shed is not even a structure under the Town's zoning bylaw and is thus not prohibited by the comprehensive permit. She further claims that because other non-subsidized owners may have sheds as a matter of right, local requirements and regulations have not been applied as equally as possible to subsidized and unsubsidized housing. Opposition and Motion for Summary Decision, pp. 8-9.

If the addition of the shed is not a modification to the comprehensive permit, the shed cannot be a substantial change and must be granted as an insubstantial change. 760 CMR 56.05(11)(b). Essentially, Ms. Klauer argues that the Board's failure to grant the change as insubstantial, without any evidence supporting the denial, is arbitrary, capricious, and ultra vires of the Board's authority under the comprehensive permit regulations. Initial Pleading, pp. 2-3; Opposition and Motion for Summary Decision, p. 9. Thus, the dispositive issue in this case is whether Ms. Klauer's shed amounts to an insubstantial change to the comprehensive permit. As in all of our proceedings, we review this issue *de novo.* G.L. c. 40B, § 22; *Board of Appeals of Hanover v. Housing Appeals Comm.,* 363 Mass. 339, 369-71 (1973).

A. Whether the Modification Request is for an Insubstantial Change

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). 760 CMR 56.05(11)(a) allows applicants "to change the details of its Project as approved … [by] promptly notify[ing] the Board in writing, describing such change. Within 20 days the Board shall determine and notify the Applicant whether it deems the change substantial or insubstantial…." *Id.* "If the change is determined to be insubstantial or if the Board fails to notify the Applicant by the end of such 20-day period, the Comprehensive Permit shall be deemed modified to incorporate the Change." 760 CMR 56.06(11)(b). "A decision of the Board denying the change

… may be appealed to the Committee pursuant to M.G.L. c. 40B, § 22….” 760 CMR 56.05(11)(c).

The comprehensive permit regulations do not define the terms “substantial” or “insubstantial.” Instead, they 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); *Andover, supra,* No. 2012-02, slip op. at 15. The list of examples in the regulations is not exhaustive. Moreover, the listed examples apply only “generally” and may not apply to a particular project set in a specific context.

The parties dispute whether the shed is a structure. The Board argues it is a structure, and allowing any additional structures increases lot coverage and “will compromise the integrity of [the] [t]own’s drinking water supply.” Motion to Dismiss, p. 7. Ms. Klauer argues the shed is not a structure under the Town’s zoning bylaws and is therefore not prohibited by the comprehensive permit for this project.[4] Opposition and Motion for Summary Decision, p. 7. She asserts the shed is an “accessory use” that is “customarily incidental” to the use of her one-family detached house, which is allowed as of right under Article VIII of the zoning bylaw because the shed “comes nowhere close to the 30% of the floor area of the house on the lot or 50% of the lot area.”[5] *Id.*, p. 8. We need not decide whether the shed is a structure to determine whether the addition of the shed is a substantial or insubstantial change.

The Board argues that the shed is a change to the subject property, and it is subject to Condition 1, which states “there shall be no as-of-right changes made to the subject property. Any changes requested shall be properly submitted to the Zoning Board of Appeals, as provided for under M.G.L. Ch. 40B.” However, Condition 1 does not specify what constitutes a “change”

[4] Section 240-13 of the Town’s zoning bylaw (Bylaw) defines “Structure” as “[a]nything constructed or erected, the use of which requires fixed location on the ground or attachment to something located on the ground, including but not limited to tennis or similar sports courts and swimming pools if more than 24 inches deep or 250 square feet in area or gas or liquid storage tanks if principally above ground, but not including retaining walls or fences….” Opposition and Motion for Summary Decision, p. 7.

[5] Section 240-13 of the Bylaw defines “Accessory Building” as “A building such as a garage or shed, located on the same lot with, and accommodating a use accessory to, the principal permitted use of the premises.” It also defines “Accessory Use” as “A use of land or building on the same lot with, and customarily incidental but secondary to, a permitted use except that if more than 30% of the floor area or 50% of the lot area is occupied by such use, it shall no longer be considered ‘accessory.’” Opposition and Motion for Summary Decision, pp. 7-8.

to the subject property, or whether that language is so broad as to include, in addition to a shed, a swing set, a raised bed of flowers or vegetables, a bench, a sandbox, or a bird bath. The possibilities are limitless. Unless these are regulated by the Declaration or an agreement of the owners that limits or prohibits such actions, the placement of something that does not require a building permit or further waiver of zoning bylaws is an insubstantial change. The mere assertion that the change will add a structure to a lot is not sufficient to show a change is substantial. *Rugged Scott, LLC v. Nantucket*, No. 2018-01, slip op. at 9 (Mass. Housing Appeals Comm. Summary Decision Ruling Aug. 31, 2021) ("addition of a garage for a single-family home may not necessarily be a substantial change").[6] For these reasons, we find the addition of the shed, as depicted on Ms. Klauer's existing conditions plan, is an insubstantial change and the comprehensive permit is therefore modified to incorporate this change.

B. Unequal Treatment Claim

Ms. Klauer argues that the Board's denial of the shed violates 760 CMR 56.07(2)(a)4 by not applying local requirements and regulations as equally as possible to subsidized and unsubsidized housing. Opposition and Motion for Summary Decision, p. 9. She asserts that, because the Town does not require a building permit for sheds smaller than 200 square feet, the denial of her shed when homeowners in non-subsidized housing can have a shed as a matter of right was unequal treatment. *Id.*, pp. 5-6; Klauer Affidavit, ¶¶ 3-6. In her affidavit, she stated that she knows of "many other nearby homes that also have sheds that are not Chapter 40B projects." Klauer Affidavit, ¶ 11.

Based upon the evidence before us, Ms. Klauer has not established that local requirements and regulations were not applied as equally as possible between subsidized and unsubsidized housing and her motion for summary decision on this basis is denied.[7]

[6] Although the issue was not raised by the parties in their memoranda, there is no indication in the record regarding whether the Board made a substantiality determination within the 20-day period required by 760 CMR 56.05(11).

[7] Ms. Klauer asserts the Board's denial decision was arbitrary, capricious, and in excess of the Board's authority. Initial Pleading, p. 2. However, she has provided no facts and cites no legal authority for this argument. We therefore decline to reach it.

V. CONCLUSION AND ORDER

For the foregoing reasons, the Board's Motion to Dismiss is denied and Ms. Klauer's Cross-Motion for Summary Decision is granted in part and denied in part. The July 1, 2019, Comprehensive Permit (#006-19) is hereby modified to allow Ms. Klauer to keep and maintain a shed as depicted on the Existing Conditions Plan in Exhibit A of Ms. Klauer's Affidavit.

HOUSING APPEALS COMMITTEE

October 10, 2023

Shelagh A. Ellman-Pearl, Chair

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Rosemary Connelly Smedile

James G. Stockard, Jr.

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