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

MARION VILLAGE ESTATES, LLC

v.

MARION ZONING BOARD OF APPEALS

No. 2022-01

SUMMARY DECISION

March 24, 2023

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Counsel for Appellant
Mark Bobrowski, Esq.
Christopher Alphen, Esq.
Blatman, Bobrowski & Haverty, LLC
9 Damonmill Square, Ste. 4A4
Concord, MA 01742

Counsel for Board
Jonathan D. Witten, Esq.
Jonathan G. Murray, Esq.
KP Law, P.C.
Town Counsel
101 Arch Street, 12th Floor
Boston, MA 02110-1109

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

MARION VILLAGE ESTATES, LLC, Appellant,	)	
v.	)	No. 2022-01
MARION ZONING BOARD OF APPEALS, Appellee.	)	

SUMMARY DECISION

I. INTRODUCTION AND PROCEDURAL HISTORY

Marion Village Estates, LLC (MVE or developer) owns and operates Marion Village Estates (Marion Village or development), a development authorized by a comprehensive permit issued by the Marion Zoning Board of Appeals (Board). This appeal involves MVE's request for a determination of an insubstantial change regarding its proposal to replace the six two-inch water meters serving Marion Village's 60 rental units (10 units per meter) for 60 individual 5/8-inch water meters, each serving a single unit at the rental component of the development.

On October 27, 2021, the developer submitted its request for this insubstantial change to the Board pursuant to 760 CMR 56.05(11) and the Board considered this request at its meeting of December 23, 2021. The Board voted to determine that the requested change was "substantial," and the developer appealed that determination to the Committee pursuant to 760 CMR 56.05(11)(d). After a conference of counsel held on January 28, 2022, the developer filed this motion for summary decision and an affidavit of Kenneth Steen, Manager of MVE (Steen Affidavit). The Board filed an opposition and cross-motion for summary decision in its favor, requesting a remand to the Board for further public hearing pursuant to 760 CMR 56.05(11)(d)(2).

The developer thereafter filed a Supplemental Memorandum in Support of its Motion for Summary Decision, providing information regarding a recent decision by the Board, approving an unrelated comprehensive permit to Heron Cove Estates, LLC,[1] which approval included the grant of a waiver request to allow for the individual metering of water service for each dwelling unit in that project. The developer argues the waiver for Heron Cove provides the same relief that it is requesting as an insubstantial change in this matter. The Board filed an Opposition, arguing that the waiver granted in the Heron Cove project is irrelevant to the issue here and can be distinguished from the present project in several ways: First, it is a Local Initiative Project that included a negotiated agreement between the developer and the Marion Select Board, which included payment of funds by the developer towards wastewater services and infiltration improvements to benefit the Town. Second, the Heron Cove project is subject to less stringent conditions in some respects and, therefore is not an "apples to apples" comparison. Further, the Board argues that the two projects are different in size, location, density, and design.

II. UNDISPUTED FACTS

The following undisputed facts are from the initial pleading (Appeal) and its attachments, as well as the parties' briefs and exhibits.

Marion Village is located at Field Stone Lane and 32 Village Drive, Marion and has a total of 60 rental apartments. Steen Affidavit, ¶ 2; Board Opposition, ¶ 2. On or about October 27, 2021, the developer submitted to the Board a notification of a proposed change to its comprehensive permit. The nature of the requested change was to change the water meters serving the development from six two-inch water meters serving Marion Village's 60 rental units (10 units per meter) to individually metering each of the 60 rental units with a 5/8-inch meter. The Board ruled that the requested change was "substantial" in a decision filed with the Town Clerk on December 28, 2021. Steen Affidavit, ¶¶ 3, 4; Board Opposition, ¶¶ 5, 10-12.

The application for this comprehensive permit was first submitted to the Board in 2001 by MVE's predecessor in interest, Bay Watch Realty Trust (BWRT). The 2001 application requested approval of 192 rental apartments. BWRT's application for a comprehensive permit in 2001 proposed that each of the 16 buildings (each containing 12 dwelling units) would be

[1] The manager of MVE is also the manager of Heron Cove Estates, LLC.

separately metered. The flows for both water and sewer to each building were estimated at slightly less than 10,000 cubic feet. Steen Affidavit, ¶¶ 5, 6.

In 2002, BWRT appealed to the Committee alleging that there had been a constructive denial of the comprehensive permit. After a remand from the Committee, the Board granted a comprehensive permit to BWRT in 2002 for 96 dwelling units (the 2002 Decision).[2] BWRT renewed its appeal to the Committee, alleging that the project was rendered "uneconomic" by the 2002 Decision. After an evidentiary hearing, the Committee issued a Decision—*Bay Watch Realty Trust v. Marion*, No. 2002-28, slip op. (Mass. Housing Appeals Comm. Dec. 5, 2005) (the 2005 Decision). The 2005 Decision is silent on the issue of water and sewer tiers, charges, and the applicable rate schedule. BWRT and the Board ultimately agreed to a modification of the 2005 Decision and, in 2012, the Board issued a modification of the 2005 Decision (the 2012 Modification), reducing the project to 60 units. The 2012 Modification is silent on the issue of water and sewer categories, charges, and the applicable rate schedule. Steen Affidavit, ¶¶ 7-9.

BWRT transferred the development to MVE in 2013. Construction of the rental units began in 2013.[3] The rental units are located in two buildings, each with 30 units. The water provided to the rental units is metered by six two-inch meters, three in each building, each serving ten units. Steen Affidavit, ¶¶ 10, 11. Marion has changed its Schedule for Water & Sewer Charges at least twice since 2001. In 2012, the Town adopted a three-tiered rate schedule for water and sewer. The rates for the three tiers were increased in 2020-2021. Steen Affidavit, ¶ 12. Beginning in 2013 with the connection of the development to the municipal system, the majority of the development's water and sewer charges was billed at the tier 3 rate, the highest rate, in accordance with the applicable billing schedule. Board Opposition, ¶ 7. Beginning June 1, 2019, consumption limits within the Town were adjusted so that all consumption over 2,000 cubic feet per meter was billed at the tier 3 rate. Board Opposition, ¶ 8. In 2020, the 60 rental units at the development were charged for 324,501 cubic feet of water consumption and sewage usage. Board Opposition, ¶ 9.

MVE now seeks to "swap out" the six two-inch meters, each serving ten units, for 60 individual 5/8-inch meters, each serving one unit. Steen Affidavit, ¶ 13. The six two-inch

[2] The 96-unit development includes the adjacent Sippican Woods, which has 36 homeownership single family units. Only the 60 rental units at Marion Village are relevant in this appeal. Steen Affidavit, ¶ 2.

[3] The record does not indicate when construction was completed.

meters, each serving ten units, are currently located in two locked-door utility rooms, not visible from the exterior of the buildings. Steen Affidavit, ¶ 14. In the event that the developer installs 60 individual 5/8-inch meters, the meters will be located in four locked-door utility rooms, also not visible from the exterior of the buildings. Steen Affidavit, ¶ 15. Water and sewer services at Marion Village are part of the tenants' monthly rent bill. In the event the developer is allowed to install 5/8-inch meters there will be no change in rents attributable to the tenants' water or sewer service. Steen Affidavit, ¶ 18.

III. STANDARD OF REVIEW AND DISCUSSION

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. 2018-10, 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).

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, the developer immediately brought its challenge to the Board's substantiality determination.

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); *VIF II/JMC Riverview Investment Partners, LLC v. Andover,* No. 2012-02, slip op. at 14 (Mass. Housing Appeals Comm. Feb. 27, 2013). The list of examples in the regulations is by no means exhaustive. Moreover, the listed examples apply only "generally" and may not apply to a particular project set in a specific context.

In this case, the developer argues that the proposed change fits within example number 4 of 760 CMR 56.07(4)(d)— "a change in the color or style of materials used"—and is "nothing

more than a 'change … of materials used.'" The developer argues, in the alternative, that the proposed change is insubstantial because it will have no adverse impacts on the residents of Marion Village or the surrounding area. The Board disagrees, arguing that the developer has not proposed a change to the style of the water meter infrastructure, but is fundamentally altering and reconfiguring both the physical utility infrastructure at the development and also the method and means by which the Town performs the accounting of services used by hundreds of residents.[4]

We agree with the Board that the proposed change of the water meters is not a "change in the…style of materials" within the meaning of 760 CMR 56.07(4)(d). As used in 760 CMR 56.07(4)(d), the word "style" should be read in its full context, together with the words "color or" indicating a "manner or custom," or "quality, form or type of something." *See Merriam-Webster.com*. Merriam-Webster, 2022 (Web. 3 Oct. 2022).

Since replacement of the water meters is not "a change in the…style of materials" within the meaning of 760 CMR 56.07(4)(d), and no other examples listed in the regulation are similar enough to the proposed change at issue before the Committee to compel a result one way or another, the issue of whether proposed project modifications are "substantial" is one that requires a careful factual analysis. *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). First, we look to Committee precedents to consider whether the proposed modification is comparable to the types of modifications identified as either substantial or insubstantial in the comprehensive permit regulations.

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. *See VIF II/JMC Riverview*, *supra,* No. 2012-02, slip op. at 16, citing *Lever Development, LLC v. West Boylston*, No. 2004-10, slip op. at 2 (Mass. Housing Appeals Comm. Rulings on Notice of Change Dec. 16, 2005); *Rugged Scott, LLC v. Nantucket*, No. 2018-04, slip op. at 7-9 (Mass. Housing App. Comm. August 31, 2021).

Additionally, in *Lever Development*, *supra,* No. 2004-10, slip op. at 2, the presiding officer noted the importance of the effect of proposed changes on local concerns and stated that

[4] Both parties allude to the effect of the smaller individual meters and that they will cause a drop in consumption billed per meter, further resulting in a reduction in the tier-rate billed per meter and, consequently, a reduction in the amount of the developer's water bills and, therefore, in the amount of revenue to the Town. Developer brief, pp 6-7; Board opposition, p. 6.

"[c]hanges that lessen the impact of a project will not be considered substantial, or reason to remand a case to the local board." *Id., citing Cloverleaf Apts. v. Natick*, No. 2001-21, slip op. at 5 (Mass. Housing Appeals Comm. Dec. 23, 2002). However, in the context of a change after the issuance of a comprehensive permit, we have also noted the importance of an opportunity to review the proposed change, and thus the standard of what is substantial can be higher in this context. *See VIF II/JMC Riverview, supra,* No. 2012-02 slip op. at 21.

In this case, we agree with the developer that the proposed change is insubstantial.[5] The modification sought is not one that affects the physical layout of the development, such as increasing the lot coverage by the addition of a garage, as occurred in *VIF II/JMC Riverview,* or the allowance of the building of a garage on an affordable lot for the sole use of the abutting market rate lot, as in *Rugged Scott, LLC v. Nantucket*, No. 2018-01, slip op. at 9 (Mass. Housing App. Comm. August 31, 2021). Nor does it impact the neighborhood surrounding the development. Instead, this is a change in how water is metered to the units and, consequently, billed by the Town. As noted earlier, the proposed change in water meters will not be visible from the exterior of the buildings nor will it change the tenants' monthly rent bill. There will be no change or adverse impacts to the development discernable to the tenants or the surrounding area associated with the proposed meter change.

The Board argues it should have the opportunity to consider in a public hearing "current water and sewer rates, potential water and sewer rates, alternative meter configurations, or alternative billing methods." Board memorandum, p. 6. This argument for considering the financial ramifications of potential changes to the Town's accounting practices is without merit. The Committee has long held that negative impact on a town's finances is not relevant under G.L. c. 40B. *See Woodcrest Village Associates (Maynard Development Associates) v. Maynard*, No. 1972-13, slip op. at 27-28, n.40A (Mass. Housing Appeals Comm. Feb. 13, 1974), *aff'd, Board of Appeals of Maynard v. Housing Appeals Comm.*, 370 Mass. 64, 68 (1976) (strain on municipal facilities or increase in municipality's financial burden insufficient grounds for denial of permit); *Hilltop Preserve Ltd. Partnership v. Walpole*, No. 2000-11, slip op. at 26, 29 (Mass. Housing Appeals Comm. Apr. 10, 2002) (cost of necessary municipal services not element of concept of consistency with local needs). This necessarily applies to the Board's asserted impact

[5] We do not consider the the Heron Cove project described in the developer's supplemental memorandum pertinent to our analysis.

on water rate payers in the Town; the manner in which the Town performs its accounting and billing for water service is not relevant here.

Under the circumstances presented here, we find and rule that the developer's requested change in the water meters is an insubstantial change to the comprehensive permit.

IV. CONCLUSION AND ORDER

Pursuant to 760 CMR 56.06(5)(d), we find that there is no genuine issue as to any material fact and that Marion Village Estates, LLC, is entitled to summary decision as a matter of law determining that the change from six two-inch water meters to 60 individual 5/8-inch water meters 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, the motion for summary decision is hereby granted.

HOUSING APPEALS COMMITTEE

March 24, 2023

Shelagh A. Ellman-Pearl, Chair

Lionel G. Romain

Rosemary Connelly Smedile

James G. Stockard, Jr.

Lisa V. Whelan, Presiding Officer