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

RUGGED SCOTT, LLC, Appellant, v. NANTUCKET ZONING BOARD OF APPEALS, Appellee.	)	No. 2018-01

RULING ON MOTION FOR SUMMARY DECISION

I. INTRODUCTION AND PROCEDURAL HISTORY

Beach Plum Village is an affordable housing development that is in the very last stages of completion. This appeal involves two adjoining lots in the development and the proposed construction of a garage on one of those lots. The developer, Rugged Scott, LLC, appeals the denial of a request for an insubstantial modification of a comprehensive permit issued by the Nantucket Zoning Board of Appeals in 2004. The modification sought is for the addition of a garage on an affordable unit for the use of the neighboring market rate lot, and the grant of a waiver of a local zoning bylaw that prohibits accessory uses on adjoining lots.[1]

The owners of the two properties are not parties to this appeal. These owners are each represented by counsel and requested, and were granted, permission to participate in a limited manner as interested persons pursuant to 760 CMR 56.06(2)(c), but neither has requested full intervener status pursuant to 760 CMR 56.06(2)(b).[2]

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[1] Rugged Scott filed a similar appeal of a denial of a modification of the same comprehensive permit regarding another pair of adjoining lots. *See Rugged Scott, LLC v. Nantucket,* No. 2018-04 (*Rugged Scott II*). The Committee has taken official notice of its record in that matter for the instant appeal. Similarly, the Committee has taken official notice of the record in this matter for that case.

[2] In a letter to the Committee, counsel for the corporate owner of the market-rate home states, "If upheld, the [Board's] Decision could result in Blue Flag not being able to construct…. a garage… [on the

In 2003, Rugged Scott applied to the Board pursuant to G.L. c. 40B, §§ 20-23 for a comprehensive permit to build affordable housing on a ten-acre parcel between Rugged Road and Scotts Way in Nantucket. Appeal of Denial of Modification (Appeal), ¶ 3. The Board granted the permit, there was an appeal to this Committee, and after negotiations, the parties agreed upon a proposal to build 40 units of housing, and a stipulation of dismissal of the appeal to the Committee was entered on February 16, 2006. *Rugged Scott, LLC v. Nantucket,* No. 2004-13 (Mass. Housing Appeals Comm.). The Board later approved a Clarification and Technical Correction of the permit on May 9, 2008. Rugged Scott Opposition to Board Motion for Summary Decision (Rugged Scott Opposition), Exh. 2, May 9, 2008 Clarification and Technical Correction (May 9 Clarification).

The project was delayed for some time but is now under construction with many units built and some units in process. Appeal, ¶ 13. On or about September 1, 2017, with a number of units completed and sold, the developer filed a request with the Board for modification of the comprehensive permit with respect to two lots—an affordable unit and a market-rate unit—that had already been sold.[3] Appeal, ¶¶ 14-15. The actual request filed by the developer is not part of the record before us, but is described in the Appeal as follows: "The modification pertinent to this appeal was to allow a garage to be built on Lot 27 Beach Plum (8 Blazing Star Road), which is an affordable lot and home to be used for the benefit of Lot 28 Beach Plum (1 Blue Flag Path) a market lot and home, by way of an easement over Lot 27…." *See* Appeal, ¶ 15; *see also* Appeal Exh., Board March 8, 2018 Decision on Application to Modify Comprehensive Permit, p. 3 (Board 2018 Modification Denial).

Upon receiving the request from the developer, the Board ruled that the change was a substantial change pursuant to 760 CMR 56.05(11)(a). Appeal Exh., Board 2018 Modification Denial, p. 3. It then considered the request at five hearing sessions between September 2017 and February 2018. Appeal, ¶ 17. On March 8, 2018, it voted unanimously to deny the change in the project because "the burdening of an affordable lot, which is already undersized, with the

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adjoining lot] pursuant to the easement rights that … were granted…." Letter from Gareth I. Orsmond, June 22, 2018, p. 2, ¶ 5.

[3] At about the same time, the developer filed similar modification requests regarding two other pairs of lots. One of those requests is the subject of *Rugged Scott II,* the companion case also decided today. The other request was approved by the Board. *See* Rugged Scott Reply to Response to …. Motion for Summary [Decision] (Rugged Scott Reply, *Rugged Scott II*), Exh. 2, filed in *Rugged Scott II*.

Garage, in order to serve a market rate lot is inappropriate and would violate Nantucket Zoning Code § 139-2 which requires that any accessory use shall be located on the same lot that it serves…." Appeal, ¶ 18; Appeal Exh., Board 2018 Modification Denial, p. 3. The Board also determined that the developer had failed to provide evidence that denial of the request would render the project uneconomic. *Id.*

On March 27, 2018, the developer appealed to the Committee seeking a determination that the proposed modification is insubstantial and should be granted. The owners of the affected lots were notified of the appeal and requested and were granted leave to participate as Interested Persons. The parties and the Interested Persons were unable to resolve their differences through mediation, and on October 23, 2019, the Board filed a motion for summary decision pursuant to 760 CMR 56.06(5)(d) with an accompanying memorandum. Rugged Scott filed an opposition thereto.

II. UNDISPUTED FACTS

The following undisputed facts have been obtained from the Appeal and documents attached to that Appeal, as well as exhibits attached to the parties' memoranda.[4]

On May 25, 2004, the Board granted a comprehensive permit, with conditions, to Rugged Scott for the construction of 40 home ownership units in Nantucket. Appeal, ¶ 8. Rugged Scott appealed to the Committee, and plans to move forward were finalized in 2006, when that litigation settled.[5] Appeal, ¶¶ 9-10. On May 9, 2008, the Board issued a further decision, described as a "Clarification and Technical Correction," in order "to eliminate any question or controversy regarding … setbacks and building locations," and declared that the location of buildings shown on the individual lot plans by Site Design Engineering, LLC and Cullinan Engineering (which were attached to its decision) superseded provisions in the comprehensive permit in any case where there was inconsistency.[6] Rugged Scott Opposition, Exh. 2, May 9

[4] Certain cited background facts taken from the initial pleading or the parties' memoranda provide context and are not material to our decision.

[5] A copy of the Agreement and Stipulation of Judgment, or the 2006 Comprehensive Permit, was recorded on March 10, 2006 in the Nantucket County Registry of Deeds in Book 1010, at Page 1. *See* Rugged Scott Opposition, Exh. 1.

[6] The May 9 Clarification was dated May 9, 2008 but signed and filed with the Nantucket Town Clerk on May 12, 2008.

Clarification, ¶ 4. This decision stated it was a "clarification and technical correction" to the comprehensive permit, specifically as to the building locations and setbacks referenced in Condition 2.6:

> [i]n order to eliminate any question or controversy regarding the status of the present plans with regard to setbacks and building locations, the Board ... acted ... to issue this Clarification and Technical Correction to the Comprehensive Permit, by specifically approving the location and siting of buildings upon the lots in this project, as shown upon the individual lot plans ... attached hereto.

Id., Exh. 2, ¶¶ 2-4. It further stated, "that the effect of the approval of the final plans overrides the specific setback provisions in the [c]omprehensive [p]ermit…." *Id.*, Exh. 2, ¶ 3. Forty-one (41) individual lot site plans, prepared by Cullinan Engineering and dated June 18, 2007, were attached. No garage is shown on Lot 27 on the attached plans. *Id.*, p. 29.

Some years later, construction began on the development. It appears that houses were constructed on both Lots 27 and 28, but, since it was not shown on the plans, no garage has been constructed. *See* Rugged Scott Opposition, ¶ 11.[7] However, when the affordable house on Lot 27 was sold to its first owners on April 28, 2017, the deed for that property included the reservation of an easement on a portion of the lot for the construction of a garage and driveway for the benefit of the owner of Lot 28 and attached an easement plan showing the garage. Rugged Scott Opposition, Exh. 3 (Lot 27 Deed), p. 3, ¶ (n). A month later, on May 26, 2017, the developer sold Lot 28 to Blue Flag Path, LLC by a deed that referenced the easement. *Id.*, Exh. 4 (Lot 28 Deed), p. 2, ¶ (l). Lot 27 is 4,181 square feet (s.f.), and Lot 28 is 7,367 s.f. May 9 Clarification, pp. 29-30. The area of the garage access and use easement is 976 s.f. *Id.*, Exh. 3 (Lot 27 Deed), p. 6.

As noted above, three months later, on September 1, 2017, Rugged Scott filed a request with the Board asking it "to acknowledge the exclusive rights of Lot 28 to use the garage," which had not yet been built. Rugged Scott Opposition, ¶ 12. The developer described the request as a modification of the comprehensive permit, pursuant to 760 CMR 56.05(11)(a), to allow construction of a garage on Lot 27 in accordance with the garage access and use easement. *See* Appeal, ¶ 14.[8] The Board determined the request constituted a substantial change and

[7] This assertion in Rugged Scott's Opposition is not contested.
[8] Rugged Scott's Opposition cites to Exhibit 6 as support, but no Exhibit 6 appears in the record.

opened a public hearing on September 14, 2017, which closed on February 1, 2018. Rugged Scott Opposition, ¶¶ 14-15.

The record in *Rugged Scott II* shows that on February 8, 2018, the Board issued a decision finding insubstantial a third request for modification of this comprehensive permit "entailing a Garage Use Easement on Lot 16 for the benefit of Lot 17 (10 Thistle Way)." *See* Rugged Scott Reply, *Rugged Scott II*, pp. 7-8. The plans for this project show a garage on Lot 16, the burdened lot at issue in the third modification request, which was found insubstantial by the Board. *Id.*, p. 10. In a letter to the Town Clerk, the Board Chair stated that the approved proposed modification sought: "[t]o the extent necessary regarding Lot 16 (12 Wood Lily Road) … Modification of the Comprehensive Permit and consent to a placement of a garage use easement upon Lot 16 for benefit of Lot 17 as shown upon plan…." *Id.*, p. 8.

III. JURISDICTION

This Committee, like the courts, has not only the power, but also "the obligation to resolve questions of subject matter jurisdiction whenever they become apparent." *Adoption of Anisha*, 89 Mass. App. Ct. 822, 827 n.6 (2016), quoting *Nature Church v. Assessors of Belchertown*, 384 Mass. 811, 812. (1981). Standing is an issue of subject matter jurisdiction and can be raised at any time. *In re Harvard Pilgrim Health Care*, 434 Mass. 51, 56 (2001), citing *Ginther v. Commissioner of Ins.*, 427 Mass. 319, 322 (1998); *Litton Business Sys., Inc. v. Commissioner of Revenue*, 383 Mass. 619, 622 (1981). For the reasons discussed in detail in *VIF II/JMC Riverview Commons Investment Partners, LLC v. Andover*, No. 2012-02, slip op. at 3-15 (Mass. Housing Appeals Comm. Feb. 27, 2013), the Committee generally has subject matter jurisdiction in a number of situations to decide disputes about changes in projects that arise even after construction has been completed. *See* 760 CMR 56.05(11). In addition, the Board has raised the question of jurisdiction and whether Rugged Scott has standing to bring this appeal.[9]

The proposed change in the project here involves only two discrete properties and has no ramifications for the design of the development as a whole. The Board argues that because the developer has no property interest in either lot, it has no standing to bring this appeal, and the Committee is not presented with an actual, justiciable controversy. Board's Memorandum in

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[9] Although standing was not raised in *Rugged Scott II*, we raised it on our own in that decision.

Support of …Motion for Summary Decision (Board Memorandum), pp. 2-5. *See* 760 CMR 56.04(1)(c); *see also Braxton v. City of Boston*, 96 Mass. App. Ct. 714, 720 (2019) (standing and existence of actual controversy are closely related, and trust that is not owner of property lacks standing to assert easement). The Board argues that at the time of Rugged Scott's request for a modification, it no longer owned the two properties purportedly involved in the garage access and use easement area and had no legal or equitable interest in either lot. Board Memorandum, p. 3. The Board argues that Rugged Scott has not suffered any "infringement of [its] legal rights" and has not demonstrated a "more than speculative" injury. Board Memorandum, p. 3, citing *Marashlian v. Zoning Bd. of Appeals of Newburyport*, 421 Mass. 719, 721 (1996). Further, the Board asserts 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 Memorandum, pp. 3-4, citing *Sudbury Station, LLC v. Sudbury*, No. 2016-06, slip op. at 3 (Mass. Housing Appeals Comm. Ruling on Motions to Intervene Apr. 24, 2018).

Rugged Scott challenges the cases relied on by the Board as inapplicable and relating to appeals filed by parties other than the unsuccessful applicant for a modification, whereas here, Rugged Scott argues it continues to hold a financial and equitable interest in the project. The manager of Rugged Scott, Joshua Posner, filed an affidavit stating that the developer "retains ownership of… Lots 15, 16, 38 and 40," that the developer retains control of the Homeowner's Association, and that $100,000 has been held in escrow from the sale of Lot 28 for the construction of the garage. Rugged Scott Opposition, Exh. 5, Affidavit of Joshua Posner, ¶¶ 9, 10, 12, 13.[10]

Relevant to our decision regarding jurisdiction is the status of the overall project. It is arguable that since the developer still owns lots in the development, and particularly if they or other aspects of the entire project have not yet been completed, then the developer's interest is sufficient to confer standing. Therefore, under the unique circumstances presented by this case we rule that the developer's interest is an interest sufficient to confer standing to pursue this appeal.[11]

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[10] The heading of the affidavit attached to Rugged Scott's Opposition mistakenly refers to the case as No. 2018-04. No similar affidavit was filed in *Rugged Scott II* (No. 2018-04).

[11] Because the circumstances here are so unusual and the facts not well developed, this ruling is limited to the facts of this case and the companion case, *Rugged Scott II.*

IV. 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).

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 challenges both the Board's determination that the change is substantial, and the Board's denial of that change.

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*, *supra,* No. 2012-02, slip op. at 14. 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. None of the examples listed in the regulations are similar enough to the proposed garage easement modifications to compel a result one way or another. *See* 760 CMR 56.07(4)(c)-(d); *see also VIF II/JMC Riverview*, *supra*, slip op. at 15-16 (discussing applicability of examples to changes after issuance of a comprehensive permit). Where 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. *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).

Since this proposed modification is not comparable to the types of modifications identified as either substantial or insubstantial in the comprehensive permit regulations, *see* 760 CMR 56.07(4)(c)-(d), we look to our precedents for our analysis. In *Lever Development, supra,* slip op. at 2, 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 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).

Additionally, proposed project changes generally fall into two distinct contexts: project changes proposed in the course of an appeal of a comprehensive permit decision to the Committee, and project changes proposed to a board after the comprehensive permit has been issued, either before or after the commencement or completion of construction. 760 CMR 56.07(4) (substantial changes to project during appeal to Committee); 760 CMR 56.05(11) (changes to project after issuance of a permit). In the first context, the Committee may be more amenable to finding the proposed changes insubstantial because the change will still be subject to a *de novo* review by the Committee where it will be evaluated to ensure it is consistent with local needs. *See VIF/Riverview, supra*, slip op at 16.

This modification request is presented in the second context, after the permit has been granted and is final. Additionally, this permit was finalized over a decade ago and substantial construction has begun. We have been less likely to approve post construction changes as insubstantial. *See VIF/Riverview, supra*, slip op at 16 and cases cited. However, in *Rugged Scott II,* decided today, we determined the modification request was insubstantial based on the specific facts of that case.

Here, unlike *Rugged Scott II,* the companion case decided today, Rugged Scott asks not only for the grant of a waiver of the zoning bylaw § 139-2 but also to add a garage that was not identified originally in the approved plans for the project. As the developer notes, in the May 9 Clarification, the Board approved a range of lot sizes. *See e.g.*, Rugged Scott Opposition, Exh. 2, pp. 4, 13, 14. In addition, Lot 27, the affordable lot on which the garage is proposed, is one of the smaller lots at 4,181 s.f. The easement (976 s.f.) covers nearly a quarter of the lot.

To determine whether this modification constitutes a significant change, we consider the same questions raised in *Rugged Scott II.*[12] There, the garage was already included in and shown on the plans, and the chair of the Board had reviewed the plans. We have today determined the waiver to permit the accessory use in the specific circumstances presented there is an insubstantial change. *See Rugged Scott II*, at 4-5. Here, however, the modification is distinguishable in that it also includes, in addition to a waiver of the zoning bylaw § 139-2 that we approved in *Rugged Scott II,* the construction of a garage not previously shown on the plans.

An addition of a garage for a single-family home may not necessarily be a substantial change.[13] However, as the Board points out, the proposed garage would take up almost 25% of the lot area of the affordable unit, giving the exclusive use of the area to the benefitted market rate lot, and leave the remainder of Lot 27—about 3,205 s.f.—available to the owner of Lot 27. The Board stated in granting the modified comprehensive permit that the lots in the development range from approximately 4,000 s.f. to 15,000 s.f. in lot area. Rugged Scott Opposition, Exh. 1, Decision on Application of Rugged Scott LLC as Modified Pursuant to the "Agreement and Stipulation for Entry of Judgment" in Housing Appeals Committee Docket No. 2004-13, p. 9, ¶ 2.6. We agree with the Board's assessment in its decision that Lot 27 was already undersized at .10 acre. Appeal Exh, Board 2018 Modification Denial, p. 3. Thus, the extent of the reduction in available area on the affordable lot resulting from the modification is significant. We agree with the Board that the addition of this garage, together with the grant of the easement to another lot for the use of the garage, is a substantial change. Rugged Scott's request therefore warrants review to determine whether the proposed change is consistent with local needs.[14]

The record submitted by the parties is not adequate to address whether this substantial change should be approved. The Board argues, and stated in its decision denying the modification, that the developer did not assert that without the requested change, the project is

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[12] In *Rugged Scott II,* Lot 23, the burdened lot consists of 5,177 s.f.; therefore, with an easement covering approximately 885 s.f., Lot 23 retains 4,292 s.f. Lot 23's lot area, even if discounting the area covered by the garage access and use easement, exceeds the 4,000 s.f. lot area minimum specified in the comprehensive permit. *See* Rugged Scott Memorandum (*Rugged Scott II*), Exh 1, p.14.

[13] The fact that Lot 27 is already subject to an easement granting Lot 28 rights to a garage on Lot 27 does not change the comprehensive permit itself.

[14] Under the specific circumstances presented here, the easements referenced in the deeds for the two affected lots have no bearing on the substantiality of the proposed modification.

uneconomic. *Id.*, p. 3. In requesting Board approval of a modification of an issued comprehensive permit, the developer is not required to show that without the change the project is uneconomic, but that *is* the initial burden of proof placed on the developer if it appeals the Board's denial of the modification request.. *Avalon Cohasset, Inc. v. Cohasset*, No. 2005-09, slip op. at 10 n.11 (Mass Housing Appeals Comm. Sept. 18, 2007). Although Rugged Scott may well suffer some financial injury if the change is not approved in this case, it may be difficult to prove—when the project is virtually completed—that it "will not realize a Reasonable Return…." 760 CMR 56.02 (definition of uneconomic). That, however, is a question of fact, regarding which the developer is entitled to present its case. Therefore, the motion for summary decision is granted in part with respect to our determination that the proposed modification is substantial but denied in all other respects.

V. CONCLUSION AND ORDER

Based on the foregoing, the Board is entitled to partial summary decision determining that the proposed modification to the comprehensive permit is substantial. In all other respects, the motion for summary decision is denied.

HOUSING APPEALS COMMITTEE

August 31, 2021

Shelagh A. Ellman-Pearl, Chair

Rosemary Connelly Smedile

James G. Stockard, Jr.