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

RUGGED SCOTT, LLC

v.

NANTUCKET ZONING BOARD OF APPEALS

No. 2018-04

SUMMARY DECISION

August 31, 2021

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RUGGED SCOTT, LLC, Appellant, v. NANTUCKET ZONING BOARD OF APPEALS, Appellee.	)	No. 2018-04

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 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 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]

[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. 2018-01 (*Rugged Scott I*). 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 owners of the market-rate home stated, "[a]pparently in response to claims by [the owner of the affordable home] that the Garage had not been approved by 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/Clarification (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 Memorandum of Law in Support of Motion for Summary [Decision] (Rugged Scott Memorandum), Exh. 2, May 9, 2008 Clarification and Technical Correction (May 9 Clarification), ¶ 4. This approval included a plan sheet that depicted a garage on Lot 24 but no indication that the garage was proposed for the use of another lot. *Id.,* Exh. 2, p. 26.

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. The request concerned an easement for use and a garage on the property of the affordable unit for the benefit of the owner of the neighboring market-rate unit. Appeal, ¶ 15. The affordable unit and the garage are on Lot 24 (12 Blazing Star Road), and the lot benefited is Lot 23 (14 Blazing Star Road). Appeal, ¶ 15; Rugged Scott Memorandum, Exh. 8, June 14, 2018 Board Decision on Modification Request (Board 2018 Modification Denial), p. 4, ¶ 9.

The developer's actual request to the Board is not part of the record before us, but the developer describes it as follows. "On or about September 1, 2017, the Applicant sought a further modification/clarification of the comprehensive permit to acknowledge the exclusive

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Comprehensive Permit … Rugged Scott applied to the Board to 'modify/clarify' the Comprehensive Permit. … If upheld, the [Board's] Decision could… [affect] the… property rights [of the owners of the market-rate home]." Letter from Gareth I. Orsmond, July 16, 2018, p. 2, ¶¶ 5, 7.

[3] At about the same time, the developer filed similar requests regarding two other pairs of lots. One of those requests is the subject of a companion appeal before us, also decided today, *Rugged Scott I*. The other request was approved by the Board. *See* Rugged Scott Reply to Board Response to …Motion for Summary [Decision] (Rugged Scott Reply), Exh. 1.

rights of Lot 23 to the use the garage located on Lot 24."[4] Rugged Scott Memorandum, ¶ 13. The Board's decision states, "On September 1, 2017, the Applicant filed a modification request to modify the 2006 [comprehensive permit] further to allow the Garage … to be used for the benefit of Lot 23…." *Id.,* Exh. 8 (2018 Board Modification Denial), p. 4, ¶ 9. Both parties have framed the issue primarily in terms of 760 CMR 56.05(11), relating to a "change [after the issuance of a comprehensive permit] in the details of [the] Project as approved by the Board…." We note that while changes to comprehensive permits are expressly addressed in the comprehensive permit regulations, there is no specific regulatory provision regarding "clarification." *See* 760 CMR 56.05(11).

Upon receiving the request from the developer, the Board viewed the request as a request for a change in the project, and, following the procedures in 760 CMR 56.05(11)(a), ruled that it was a substantial change. Rugged Scott Memorandum, ¶ 14. It then considered the request at several hearing sessions between September 2017 and May 2018. *Id.,* Exh. 8 (Board 2018 Modification Denial), p. 2. On June 14, 2018, it voted unanimously to deny the change in the project because it "would violate Nantucket Zoning Code § 139-2, which requires that any accessory use shall be located on the same lot that it serves…." and because the developer did not provide evidence that the denial of the request would render the project uneconomic. *Id.,* Exh. 8, p. 4.

On July 3, 2018, the developer appealed to this 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 June 14, 2019, the developer filed a motion for summary decision pursuant to 760 CMR 56.06(5)(d).

[4] The appeal filed with this Committee by the developer has a similar description: "On or about September 1, 2017, Rugged Scott applied to 'modify/clarify' the comprehensive permit… to allow a garage to be built on Lot 24… to be used for the benefit of Lot 23… by way of an easement over Lot 24…." Appeal, ¶¶ 14-15.

II. UNDISPUTED FACTS

The following undisputed facts are from the initial pleading (Appeal) and its attachments, as well as the parties' briefs and exhibits.[5]

On May 25, 2004, the Board granted a comprehensive permit with conditions to Rugged Scott for the construction of 40 home ownership units. Appeal, ¶ 8. Rugged Scott appealed to the Committee, and plans to move forward were finalized in 2006, when that appeal settled. *See* Rugged Scott Memorandum, Exh. 1.[6] On May 9, 2008, the Board issued a further decision, described 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.[7] *Id.*, Exh. 2, May 9 Clarification, ¶ 4. It 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. The garage on Lot 24 is shown on the attached plans, indicating the design approved by the Board. *Id.*, Exh. 2, p. 26.

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

[6] 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 Memorandum, Exh. 1.

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

Some years later, construction began on the development, including on Lots 23 and 24. The record before us chronicles some of the activities during construction. A February 18, 2015 letter from the chair of the Board to the building commissioner headed "Re: Lot 24; Garage" addresses the "above referenced Application for a Building Permit… [for a] proposed single-car garage… on Lot 24…," and the Board chair noted that he had the "ability to sign off on individual designs as the project progresses in [his] capacity as Chairman of the Zoning Board of Appeals." *Id.*, Exh. 3. The letter also stated that he had reviewed the plans attached with the application. He found that the plans were "consistent with those approved during final review…." *Id.*, Exh. 3. The building permit application itself noted quite prominently in the center of the first page, "New unheated garage on Lot #24 but *deeded to Lot # 23*" (emphasis added). *Id.*, Exh. 4, p. 1. From a time stamp, it appears that the application was then filed with the building department the next day, February 19, 2015, and a building permit for the garage was issued on March 27, 2015. The garage was constructed, and a certificate of occupancy was issued on October 23, 2015. *Id.*, Exh. 4, pp. 1, 6.

The market-rate house on Lot 23 was sold to its first owners on May 19, 2016. At that time, the developer still owned Lot 24 with the garage, and on that same day, it granted the owners an easement to use the garage. Then, on December 16, 2016, the affordable house on Lot 24 was sold, subject to the easement. Rugged Scott Memorandum, Exhs. 5, 6, 7, p. 2, ¶ (n).

Furthermore, with respect to the Board's actions on modification requests pertaining to this development, we note that on February 8, 2018, on a separate modification application pertaining to yet another pair of lots in this development, the Board issued a separate decision finding the request for modification of the comprehensive permit in that instance to be insubstantial. That application "entail[ed] a Garage Use Easement on Lot 16 for the benefit of Lot 17 (10 Thistle Way). Rugged Scott Reply to Board's Response to … Motion for Summary [Decision]" (Rugged Scott Reply), Exh. 1, February 8, 2018 Board Modification Decision (February 8 Board Decision). The plans for the development show a garage on the burdened Lot 16. *Id.,* Exh. 1. In a letter to the 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.,* Exh. 1.

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).

Although it has not been raised by the parties in this case, there is a question as to whether Rugged Scott has standing to bring this appeal.[8] *See Talmo v. Zoning Board of Appeals of Framingham*, 93 Mass. App. Ct. 626, 629 (2018) (standing is jurisdictional prerequisite properly reached by judge *sua sponte* before proceeding with case), citing *Nature Church, supra*, 384 Mass. 811, 812 (courts have both power and obligation to resolve issues of subject matter jurisdiction when they become apparent, regardless of whether parties raise issue).

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. Arguably, 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. *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 an easement). But what is also relevant to our decision regarding jurisdiction is the status of the overall project. It is also arguable that if 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. The record submitted in this case is not adequate to answer these questions, but in *Rugged Scott I*, the record contains an affidavit by the manager of Rugged Scott

[8] *See* discussion of standing in *Rugged Scott I,* at 5-7, which we incorporate herein.

stating that that entity retains ownership of four lots in the development and retains control of the Homeowner's Association.[9] Rugged Scott Opposition to Board Memorandum in Support of Summary Decision, *Rugged Scott I,* Exh. 5, Affidavit of Joshua Posner, ¶¶ 12, 13. Based on that affidavit, the record indicates the developer retains ownership of four lots in the development. Therefore, in the unique circumstances presented by this case, and as discussed in *Rugged Scott I,* we rule that the developer's interest in the overall project is an interest sufficient to confer standing to pursue this appeal.[10]

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

[9] The heading of the affidavit filed in that case mistakenly refers to the case as No. 2018-04. No similar affidavit was filed in this case.

[10] 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 I*.

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*, slip op. at 16, citing *Lever Development, LLC v. West Boylston*, No. 04-10, slip op. at 2 (Mass. Housing Appeals Comm. Rulings on Notice of Change Dec. 16, 2005).

As noted above, the final comprehensive permit is described in the May 9 Clarification and attached plans. The building permit application filed in February 2015 clearly showed that the garage to be built on Lot 24 would be "deeded to Lot # 23." The use of the garage in this way, as an accessory use not located on the same lot that it serves, was not in compliance with Nantucket Zoning Code § 139-2. In his February 18, 2015 letter to the building commissioner approving the plans attached to the building permit application, the chair of the Board prefaced his approval with the following statement: "[i]n accordance with [the Comprehensive Permit Decision] and my ability to sign off on the individual designs as the project progresses in my capacity as Chairman of the Zoning Board of Appeals, I have reviewed the plans attached with the building permit application and hereby find that they are consistent with those approved during final review ... on February 24, 2006." *See* Rugged Scott Memorandum, Exh. 3.

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, LLC v. West Boylston*, *supra,* No. 2004-10, slip op. at 2, we have 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. 01-21, 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 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. Here 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 *Riverview,* but instead a change in who would have use of the garage already planned for the development. As noted earlier, the application for the building permit for the garage on Lot 24 stated that the garage was for the benefit of Lot 23, and the Chair of the Board stated he had reviewed the plans.

Additionally, as discussed earlier, the record shows that in circumstances very similar, if not identical to the case here, the Board determined that a waiver of Nantucket Zoning Code § 139-2 for another pair of lots in this development that had included a garage on the plans did not constitute a substantial change. In that case, the developer applied for a modification and requested it be approved as an insubstantial change for the waiver of the same zoning bylaw to allow use of a garage on one lot for the benefit of another lot. Rugged Scott Reply, Exh. 1.

Under the circumstances presented here, we find and rule that the waiver of the same zoning provision in this instance is an insubstantial change to the comprehensive permit.

V. 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 Rugged Scott, LLC is entitled to summary decision as a matter of law determining that the waiver of Nantucket Zoning Code § 139-2 constitutes 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

August 31, 2021

Shelagh A. Ellman-Pearl, Chair

Rosemary Connelly Smedile

James G. Stockard, Jr.