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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 SECOND MOTION FOR SUMMARY DECISION AND ORDER OF REMAND

I. INTRODUCTION AND PROCEDURAL HISTORY

This appeal involves two adjoining lots in Beach Plum Village, an affordable housing development in its last stages of completion, and a proposed modification of the comprehensive permit issued by the Nantucket Zoning Board of Appeals (Board) in 2004 and amended in 2006 and 2008. Appeal ¶¶ 8, 11-12; Joint Memorandum of Rugged Scott, LLC and Blue Flag Path, LLC in Support of Summary Decision (Developer-Blue Flag Memorandum), Exh. 2.

The developer, Rugged Scott, LLC (Rugged Scott or developer) has attempted in two different ways to obtain permission to build a garage on one lot for the benefit of an abutting lot, resulting in a complicated procedural posture in this appeal. Initially it asked the Board, pursuant to 760 CMR 56.05(11)(a), to allow the construction of a garage on an affordable lot for the exclusive use of the adjoining market-rate lot as an insubstantial modification consistent with a garage access and use easement in the deeds for the two lots.[1] *See* Appeal,

[1] The parties' memoranda and exhibits indicate that a waiver of the Town's Zoning Bylaw § 139-2 was necessary to permit a lot having an accessory use on another lot. *See* Developer-Blue Flag

¶ 14. After determining the proposed change to be substantial and holding a hearing on the request, the Board denied the requested modification on March 8, 2018; the decision was filed with the Town Clerk on March 12, 2018. Appeal, ¶¶ 18-19; Developer Opposition, ¶¶ 14-15.

Rugged Scott then appealed the Board's modification denial to the Committee on March 26, 2018. Following the initial conference of counsel, the owners of the affordable lot, Simonas and Edita Zekas (collectively the Zekases or Zekas), and the owner of the market rate lot, Blue Flag Path LLC (Blue Flag), requested and were granted permission to participate as interested persons pursuant to 760 CMR 56.06(2)(c).

On October 23, 2019, the Board filed a motion for summary decision, which the developer opposed, and on August 31, 2021, the Committee issued a ruling granting the Board's motion in part, determining that the developer's proposed modification for the addition of a garage on the small affordable lot and grant of an easement to give exclusive use of the garage to the abutting lot constituted a substantial change. *Rugged Scott, LLC v. Nantucket*, No. 2018-01, slip op. at 9 (Ruling on Motion for Summary Decision Aug. 31, 2021) (*Rugged Scott I*). We denied summary decision on the question whether the substantial change should be approved, noting that Rugged Scott was entitled to present its case on whether denial of the modification would render the project uneconomic as part of proceeding to the issue of whether the proposed change is consistent with local needs.[2] *Id.* at 9-10.

While preparations were being made for the hearing, Rugged Scott decided on a second approach, and on June 9, 2022, the developer filed a Notice of Project Change

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Memorandum, ¶ 16 and Exh. 6; Memorandum in Support of Board's Motion for Summary Decision, p. 6.

[2] The developer filed with the Committee a similar appeal of a denial of a modification of the same comprehensive permit regarding a separate pair of adjoining lots at about the same time. On the same date, August 31, 2021, we ruled on summary decision motions in both cases. *See Rugged Scott, LLC v. Nantucket*, No. 2018-04 (Mass. Housing Appeals Comm. Summary Decision Aug. 31, 2021) (*Rugged Scott II*) (granting summary decision for Rugged Scott in contemporaneous decision on separate modification). In *Rugged Scott I*, we noted that we took official notice of our record in *Rugged Scott II*. *Rugged Scott I*, p. 1, n.1. Where appropriate, we incorporate herein relevant facts from *Rugged Scott II.*

pursuant to 760 CMR 56.07(4)(a). This request again seeks to add a garage to the lot—this time with a proposal to reflect a proposed reduction in the easement burdening the affordable lot and to include the grant of a new easement from the market-rate lot for the benefit of the affordable lot, thereby eliminating any reduction of the affordable lot's usable area.

Following a conference at which the parties agreed that the Zekases and Blue Flag should be allowed to intervene[3] and that Rugged Scott would submit a motion for summary decision on whether the new project change was substantial, on August 25, 2022, the developer and Blue Flag filed a joint motion for summary decision. While the Zekases filed an opposition, the Board submitted no response to the motion. The developer and Blue Flag thereafter filed a joint reply to the Zekases' opposition. Thereafter, at the presiding officer's request, the parties (except the Board) filed supplemental memoranda on the relevance and legal effect of the existing and proposed easements.

For the reasons discussed below, we rule that the new proposed modification, like the previous one for these two lots, is substantial.

II. UNDISPUTED FACTS

As stated in *Rugged Scott I, supra,* slip op. at 3-5, the following facts are undisputed. 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. *See* Appeal, ¶¶ 9-12. On May 9, 2008, the Board issued a further amendment, described as a "Clarification and Technical Correction," (2008 Clarification) 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. Developer Opposition, Exh. 2, 2008 Clarification, ¶ 4. The 2008 Clarification stated with respect to building locations and setbacks referenced in Condition 2.6:

[3] The joint motion to intervene of the Zekases and Blue Flag, joined by the parties, was allowed on September 26, 2022.

> [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 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.*, Exh. 2, p. 29.

Some years later, construction began on the development. Houses were constructed on both Lots 27 and 28, but no garage has been built. *See id.*, Exh. 2, pp. 29-30; Developer-Blue Flag Joint Reply to Opposition to Summary Decision (Developer-Blue Flag Reply), Exh. 2.[4] However, when the affordable house on Lot 27 was sold to its first and current 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. Developer-Blue Flag Memorandum, 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).[5] Lot 27 is 4,181 square feet (sq. ft.), and Lot 28 is 7,637 sq. t. 2008 Clarification, pp. 29-30. The area of the garage access and use easement on Lot 27 is 976 sq. ft. *Id.*, Exh. 3 (Lot 27 Deed), p. 6.

In the Notice of Project Change that is the subject of the pending motion for summary decision, the developer again proposes a modification to the permit to add a garage on Lot 27, the affordable lot owned by the Zekases. Although the notice does not specifically request a waiver of the accessory use Zoning Bylaw § 139-2 to allow for Lot 28 to have use

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[4] This assertion in the developer's opposition in *Rugged Scott I* is not contested.

[5] An affidavit submitted by Joshua Posner, the manager of Rugged Scott stated that "the sale of Lot 28 presumed that [the developer] would construct a garage for the benefit of Lot 28 on the easement area over Lot 27, and[b]ecause the [developer] had not yet constructed the garage at the time of the closing, the parties agreed to hold $100,000 in escrow for the construction of the garage." That amount remains in escrow. Affidavit of Joshua Posner, ¶¶ 8-11.

of the area of the proposed garage on Lot 27, that is presumably what the developer seeks. The new proposal would reduce the area of the current easement behind the house where the garage would be constructed from that provided in the deeds to Lots 27 and 28, reducing the size of the easement area benefiting Lot 28 from 976 sq. ft. to 790 sq. ft. *See* Notice of Project Change. The developer also proposes granting a 790 sq. ft. exclusive easement over Lot 28 for the benefit of Lot 27, the affordable lot. *Id*.

Lot 27 sits at the corner of Blazing Star Road and Blue Flag Path. The area of the proposed easement to be granted by Lot 28 to Lot 27 is along the side yard of the Zekas property bordering Blue Flag Path. *See* Notice of Project Change, Exh. 1 (Garage Access and Use Easement Plan), attached hereto. Lot 28, abutting Lot 27, also abuts Blue Flag Path. A photograph of Lots 27 and 28, which are now developed, shows a driveway on Lot 27 occupied by a truck and, separated by some shrubs, another driveway for Lot 28 in the area of the current easement. The photograph also shows the area of the proposed reciprocal easement from Lot 28 to Lot 27 to be fully landscaped with shrubs and lawn.[6] *See* Developer-Blue Flag Reply, Exh. 2.

The entire development consists of 41 single family homes. Four of these lots (Lots 27, 28, 29, and 30) are accessed from Blue Flag Path. Zekas Opposition to Joint Motion for Summary Decision (Zekas Opposition), p. 2, ¶ 1; p. 3, ¶ 3; Developer-Blue Flag Memorandum, Exh. 2, pp. 29-32. The plans accompanying the 2008 Clarification identify garages on 17 lots. *Id.*, Exh. 2. Rugged Scott's manager, Joshua Posner, submitted an affidavit regarding, in part, the square footage of various lots in the project development. Developer-Blue Flag Reply, Exh. 1. He stated that Lot 27 is the smallest lot in the development in "nominal" square footage, with 4,181 sq. ft. Affidavit of Joshua Posner, ¶¶ 9-10. The existing easement reduces the usable area of that lot by 976 sq. ft. to 3,205 sq. ft. *Id*., ¶ 10. According to Mr. Posner, several other lots in the development are also subject to various easements and restrictions that reduce their usable area; for example, Lot 10 has 4,418 sq. ft., but easements and other restrictions reduce the usable area to 4,155 sq. ft. *Id*., ¶

[6] Although Blue Flag argues this proposed new easement area is used by the Zekases for gardening and lawn without Blue Flag's formal permission, there is no evidence in the record regarding who installed and maintains the shrubs and lawn. *See* Developer-Blue Flag Reply, p. 5.

12. Lot 14 has 7,758 sq. ft., but easements reduce the usable lot area to 3,976 sq. ft. *Id*., ¶ 13. In sum, Mr. Posner stated that the usable square footage for Lots 4, 10, 14, 24, 33, 37, 38, 39, and 40 ranges from 3,976 to 4,391 sq. ft., because of easements and other limitations. *Id*., ¶¶ 10-19.

In our consideration of another modification request for a different pair of lots, where we found the modification insubstantial, undisputed facts show the developer granted an easement on a portion of Lot 23, an affordable unit, for exclusive use of a garage for Lot 24, a market rate unit, but in that case, the plans accompanying the 2008 Clarification show a garage on Lot 24, indicating the design approved by the Board.[7] Developer-Blue Flag Memorandum, Exh. 2, p. 26; *see Rugged Scott II, supra,* No. 2018-04, slip op. at 4-5.

The record in *Rugged Scott II* also shows that on February 8, 2018, before it ruled on the *Rugged Scott I* and *Rugged Scott II* modification requests, the Board issued a decision finding insubstantial yet another request for modification of the comprehensive permit "entailing a Garage Use Easement on Lot 16 for the benefit of Lot 17 (10 Thistle Way)." *See Rugged Scott II*, p. 5. Developer-Blue Flag Reply, p. 3; The project plans show a garage on Lot 16, the burdened lot. *Rugged Scott II*, p. 5. 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…." *Rugged Scott II, supra,* No. 2018-04, slip op. at 5, citing Developer-Blue Flag Reply, Exh. 1, p. 2 [internal citations omitted]. *See also Rugged Scott I,* slip op. at 5.

III. GENERAL CHALLENGES TO NOTICE OF PROJECT CHANGE

The Zekases make two preliminary arguments that the developer is prohibited from seeking this permit modification; as discussed below, neither is meritorious.

A. Whether Comprehensive Permit Bars Subsequent Modifications to the Permit

The Zekases argue that the developer has disregarded the terms of the comprehensive permit. They claim the developer has no legal right to construct a garage because it is not

[7] *See* § V.B., *infra.*

shown on the plans submitted to and approved by the Board for the original comprehensive permit, later clarified in the 2008 Clarification and Technical Correction (which included individual site plans for each lot). Zekas Opposition, p. 4, citing Exh. 2, p. 29. Under the express terms of the comprehensive permit, they argue, the developer is "bound by the submissions contained in the Application (as revised)" and therefore may not modify the permit. *Id.*, p. 6, citing Exh. 1, p. 13, ¶ 1. Further, they point to their individual property deed as well as the individual site plans submitted for each unit and cite the language in the deed into the Zekases stating it is "subject to, and with the benefit of" the conditions listed in the comprehensive permit. *Id.*, p. 6; Exh. 3, p. 2. They point out that the developer's submissions containing the Lot 27 plan do not show any garage. *Id.*, p. 6, Exh. 2, p. 29 (Lot 27 plan). Therefore, they claim it is not an approved use or structure under the comprehensive permit. *Id.*, p. 6.

The developer and Blue Flag counter that the comprehensive permit regulations allow for modifications of comprehensive permits. Developer-Blue Flag Reply, p. 2; S*ee Zoning Bd. of Appeals of Woburn v. Housing Appeals Comm*., 92 Mass. App. Ct. 1115 (2017) (Rule 1:28 decision) (upholding Committee decision overturning denial of modification). They also argue the fact that the garage is not shown on the plans was not the sole factor in the *Rugged Scott I* decision. Developer-Blue Flag Reply, p. 3.

The comprehensive permit regulations expressly provide that a comprehensive permit may be modified or amended after approval and issuance. Pursuant to 760 CMR 56.05(11)(a), a developer may request a modification of a permit by a board. *See VIF II/JMC Riverview Commons v. Andover*, No. 2012-02, slip op. at 14 (Mass. Housing Appeals Comm. Feb. 27, 2013) (Committee has jurisdiction to hear appeals on whether proposed changes are substantial pursuant to 760 CMR 56.05(11)). Under 760 CMR 56.07(4), a developer may submit a notice of project change during an appeal before the Committee, and the presiding officer shall determine whether the modification is substantial. The regulation allows for modifications including those that involve adding or removing structures. *See, e.g.,* 760 CMR 56.07(4)(b). Accordingly, the fact that an original permit or a previously modified permit does not contain structures or elements sought by a modification does not automatically preclude a developer from seeking to include them in a modification request

either before the board or on appeal to the Committee. Moreover, even if the language of a comprehensive permit could bar subsequent modification requests, the provisions cited by the Zekases do not purport to prohibit amendments.

B. Whether *Rugged Scott I* as Law of the Case Bars the Developer from Seeking its Proposed Modifications

The Zekases also argue the Committee expressly found in *Rugged Scott I* that the developer's first modification request for Lots 27 and 28 was substantial because the addition of a garage on Lot 27 and the resulting reduction in available area on the affordable lot was significant. Zekas Opposition, pp. 6-7, citing *Rugged Scott I* at 9. They assert that the developer's notice of project change constitutes a renewed modification request in contradiction of the "law of the case" without providing a basis to revisit or revise our earlier conclusion. Instead, they view this as a "prior settlement offer" dressed up as a summary decision. *Id.*, p. 7, and n.6, citing *Peterson v. Hopson*, 306 Mass. 597, 599 (1940) (where no change of circumstances, court not bound to reconsider case, issue, or question of fact or law in same case, once decided).

The developer and Blue Flag argue this notice of project change is not the same as the prior modification request, but instead improves upon the status quo existing at the time of the *Rugged Scott I* decision. They argue that the proposals to reduce the area of the existing easement burdening the Zekases' lot and to add a reciprocal easement of 790 sq. ft. for their benefit effectively makes an equal land swap, and this change in easements makes this a new proposal. Developer-Blue Flag Reply, pp. 6-7.[8]

We disagree with the Zekases that the developer's notice of project change contradicts the *Rugged Scott I* ruling or the law of the case in this appeal. Under this doctrine, an already decided issue should not be reopened "unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." *King v. Driscoll*, 424 Mass. 1, 8 (1996) (citation omitted).

[8] They also argue that preventing the construction of a garage of Lot 27 does not allow the Zekases to simply use the easement area as their own, but only prevents the garage. Developer-Blue Flag Reply, pp. 6-7 and Exh. 3.

Further, the law of the case doctrine "is permissive and not mandatory." *Vittands v. Sudduth*, 49 Mass. App. Ct. 401, 413, n.19 (2000).

The developer and Blue Flag argue they do not challenge *Rugged Scott I's* finding that the construction of a garage on the Zekases' lot and the grant of the existing easement to the Blue Flag lot for the exclusive use of the garage is a substantial change. Instead, the developer proposes a different change in which the existing easement on Lot 27 would be reduced and an equal reciprocal easement is proposed to be granted by Blue Flag to the Zekases' lot. While this project change proposes the construction of the same garage and waiver of the same accessory use bylaw, the plan layout proposed is different, and therefore the developer is entitled to file a second proposal.[9]

IV. STANDARD OF REVIEW

A. Summary Decision Standard

Summary decision is appropriate on one or more issues that are the subject of an appeal before the Committee if "the record before [it], 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), *aff'd sub nom. Haugh v. Housing Appeals Comm*., Norfolk Super. Ct. No. 1882CV01167, Aug. 7, 2019; *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). "Summary decision may be made against the moving party, if appropriate." 760 CMR 56.0(6)(5)(d); *Delphic Assocs., LLC v. Duxbury*, No. 2003-08, slip op. at 11, n.7 (Mass. Housing Appeals Comm. Ruling and Order Extending Comprehensive Permit Jan. 12, 2010); *Taylor Cove Dev., LLC v. Andover*, No. 2009-01, slip

[9] Contrary to the Zekases' argument, our order in *Rugged Scott I* for the appeal to proceed to the preparation of evidence on the local concerns issue and the developer's proof of economics did not preclude the developer submitting a notice of project change. *See* Zekas Opposition, p. 8.

op. at 1, n.1 (Mass. Housing Appeals Comm. Ruling on Motion for Summary Decision July 7, 2009).

B. Project Change Standard

Unlike the modification request denied by the Board and appealed to the Committee in *Rugged Scott I,* the developer's notice of project change was made pursuant to 760 CMR 56.07(4)(a), during the course of its appeal to the Committee. In this context, it is for the presiding officer to determine whether the proposed change is substantial and, if so, to remand the matter to the Board to determine whether to approve the change. If the presiding officer determines that the change is insubstantial and the developer had good cause for not originally presenting it to the Board, the change shall be permitted. *Id.*

The comprehensive permit regulations, rather than defining the term "substantial change," instead provide guidance on the kinds of changes that "generally" should be deemed substantial, as well as the kinds of changes that ordinarily are not substantial. 760 CMR 56.07(4); *VIF II/JMC Riverview*, *supra,* No. 2012-02, slip op. at 15. The list of examples in the regulations is by no means exhaustive. Moreover, these examples apply only generally and may not apply to a particular project set in a specific context. None of the examples listed in the regulations is similar enough to the proposed garage construction and accessory use provision to compel a result one way or another. *See* 760 CMR 56.07(4)(c) - (d); *see also VIF II/JMC Riverview,* slip op. at 15-16 (discussing applicability of examples to changes after issuance of a comprehensive permit). As we discussed in *Rugged Scott I,* slip op. at 8, since this proposed modification is not comparable to the types of modifications identified as either substantial or not substantial in the comprehensive permit regulations, *see* 760 CMR 56.07(4)(c)-(d), we look to our precedents for our analysis. We have stated that "[w]here the regulatory examples are not determinative, the issue of whether proposed project modifications are 'substantial' is one that requires a careful factual analysis. The specific changes proposed must be examined in relation to the original project, taking into consideration the adverse impacts, if any, the changes could have on residents or on the surrounding area." *VIF II/JMC Riverview, supra*, No. 2012-02, slip op. at 15, citing *Lever Development, LLC v. West Boylston*, No. 2004-10, slip op. at 2 (Mass. Housing Appeals Comm. Ruling on Notice of Change Dec. 16, 2005). In *Lever Development,* we

noted the importance of the effect of proposed changes on local concerns and stated that changes that lessen the impact of a project will not be considered substantial, or a reason to remand a case to the local board. *Id*. at 2, citing *Cloverleaf Apartments, LLC v. Natick*, No. 2001-21, slip op. at 5 (Mass. Housing Appeals Comm. Dec. 23, 2002).

In this case, although the proposed project change was filed during the appeal to the Committee, the only issue before us is the ultimate approval or disapproval of the proposed modification. For this reason, our analysis is like *Rugged Scott I's* consideration on an appeal of the board's denial of a modification request submitted to it under 760 CMR 56.05(11) (changes to project after issuance of a permit).

V. DISCUSSION

A. The Parties' Arguments

Pointing to our finding in *Rugged Scott I* that the addition of a garage to Lot 27 would reduce that lot's usable lot area from 4,181 to 3,205 sq. ft., a reduction of almost 25 percent, the developer and Blue Flag argue that our earlier determination of insubstantiality was based primarily on the size of the reduction in Lot 27's usable lot area in that iteration. With the now-proposed reduction of the existing easement and the grant of the second easement, they argue Lot 27 will have 4,181 sq. ft. of usable lot area, the same as the current total area of Lot 27, although not in the same configuration. The developer and Blue Flag argue this "one-for-one swap" essentially addresses the Committee's concern in *Rugged Scott I,* since Lot 27 will maintain the same amount of usable lot area as set out in the deed for the lot. Developer-Blue Flag Memorandum, pp. 5-7; Developer-Blue Flag Reply, p. 7. They also argue that the revision to the modification proposal, with the easement reduction and grant of a reciprocal easement, makes this case indistinguishable from the modification pertaining to Lots 23 and 24 that we found insubstantial in *Rugged Scott II* and from the modification for Lots 16 and 17 deemed insubstantial by the Board itself.[10] Developer-Blue Flag Memorandum, pp. 8-9.

The Zekases object to the new proposed modification, asserting the project change is still burdened by the same concerns we raised in *Rugged Scott I* in determining the earlier

[10] *See* V.B., *infra.*

modification request to be substantial. They assert that we found the earlier project change substantial in part because Lot 27 was undersized, with about 0.10 acre, and the existing easement would cause a significant decrease in Lot 27's usable area to less than the minimum lot size required under the comprehensive permit. Zekas Opposition, p. 7, citing *Rugged Scott I*, slip op. at 9. They also argue that the easement Blue Flag proposes to grant is adjacent to Blue Flag Path, the common driveway serving Lot 27 and the three other lots. They argue this area is less private and is subject to vehicular activity, and they contend that it would reduce Blue Flag Path to less than nine feet wide, leading to vehicle encroachment and related safety issues. Zekas Opposition, p. 7. They also claim that the proposed easement would be a non-exclusive use easement in fact because other property owners will use Blue Flag Path for vehicular access, and the easement area offered for Lot 27 would serve only as a traffic buffer. *Id.*

The developer and Blue Flag disagree with the Zekases' characterization of *Rugged Scott I's* analysis of the first proposal for Lots 27 and 28, arguing that the issue there, reduction in Lot 27's size, has now been addressed. Developer-Blue Flag Reply, pp. 6-7. They also dispute the Zekases' assertions that the proposed easement grant would be effectively non-exclusive, arguing the easement would not impact Blue Flag Path in any way because it would be on land Blue Flag owns in fee simple, not subject to any non-exclusive easements. They argue the Zekases could choose to convert the area of the proposed reciprocal easement into a driveway area, allowing them to convert the area currently used as the Lot 27 driveway into a backyard. Developer-Blue Flag Reply, pp. 5-6. The developer and Blue Flag also note that the reduction of the existing easement alone would maintain 3,391 sq. ft. of usable area on Lot 27. *Id.*, p. 5. Finally, they argue the Zekases' claim that Lot 27 is the smallest lot in the development is misleading because the development includes several lots of similar size and many lots are subject to reductions in usable lot area resulting from easements or other restrictions, including restrictions that reduce the usable area of some lots below 4,000 sq. ft. For example, they note, Lot 14 consists of 7,758 total sq. ft. but has only 3,976 sq. ft. of usable area because of environmental, roadway, and garage easements. Developer-Blue Flag Reply, p. 4, citing Exh. 1, ¶ 13.

B. Comparison of Modification Requests

Rugged Scott II involved Lot 24, an affordable lot, and Lot 23, a market rate lot in the same development. We found the waiver of the accessory use bylaw to permit the exclusive use of a garage on Lot 24 by the owners of the adjoining market rate lot, Lot 23, as evidenced by a plan showing an easement, was an insubstantial change. In so ruling, we noted the site plan for Lot 24 already included a garage, and the chair of the board had stated he had reviewed the plans attached to the building permit application, which noted that a garage on Lot 24 was deeded to Lot 23 and found the plans consistent with those plans approved during final review. *Rugged Scott II, supra,* No. 2018-04, slip op. at 5, 9. Therefore, in light of the chair's acknowledgement, the modification sought—a waiver of Nantucket Zoning Code § 139-2, which prohibits an accessory use not located on the same lot that it serves, to permit a change in which the lot would have exclusive use of a garage already planned for construction—was deemed not a substantial change. *Id*. We also noted that the modification was "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,* but instead a change in who would have use of the garage already planned for the development." *Id.* at 9. We were also mindful that the Board had earlier itself found the same modification request for another pair of lots insubstantial when it reviewed a modification "and consent to a placement of a garage use easement upon Lot 16 for benefit of Lot 17 as shown upon plan…." *Rugged Scott II, supra,* No. 2018-04, slip op. at 5 [internal citations omitted]. *See also Rugged Scott I,* slip op. at 5.

Rugged Scott I, in finding the requested modification substantial, contrasted the proposed change from the one found insubstantial in *Rugged Scott II*. We stated, "[h]ere, 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." *Rugged Scott I,* slip op. at 9. While we also stated that "[a]n addition of a garage for a single-family home may not necessarily be a substantial change," *id.,* we also ruled that, in light of the small size of the affordable lot, the proposed garage and use easement would take up almost 25 percent of the affordable lot's area and found the extent of the reduction in available area resulting from the modification to be

significant, ultimately ruling that the addition of a garage and its accompanying use easement to another lot represented a substantial change. *Id*.

The current proposal, like all of the others, seeks approval for a garage on one lot to serve exclusively an abutting lot. Unlike the others, it seeks the construction of a garage on an affordable lot that is not shown on plans approved for the comprehensive permit. Although the new proposal mitigates in part the concern we raised about the significant reduction in usable area that defeated the earlier request, the layout of the usable area is quite different than the lot boundary of Lot 27. Even if we accept the position of the developer and Blue Flag that because the usable lot area of Lot 27 would remain approximately 4,181 sq. ft. and these proposed changes will not result in the significant loss of usable area, lot size is not the only aspect in which a lot and its residents can be adversely affected by a proposed modification. These changes still represent, in our view, a significant reconfiguration of Lot 27's usable space.

In considering a proposed change, we must compare it to the currently approved comprehensive permit, taking into consideration the adverse impacts, if any, the changes could have on residents or on the surrounding area. *VIF II/JMC Riverview, supra*, No. 2012-02, slip op. at 15, citing *Lever Development, supra*, No. 2004-10, slip op. at 2. From that standpoint, the proposed change, based on easements that were included in deeds after the comprehensive permit plans were approved, adversely impacts the affordable Lot 27 by reconfiguring the lot and reducing the area of the more private rear yard, as noted by the Zekases. This reconfiguration has an adverse impact on the residents of the affordable lot. The fact that the developer granted a deed to the owners of Lot 27 containing a garage and use easement after the 2008 Clarification of the permit does not change our view, as we discuss in § V.C., *infra*. [11] Unlike *Rugged Scott II,* this configuration was not contemplated

[11] We are mindful that this proposal, and at least one of the two other pairs of abutting lots for which modifications were sought and approved, seeks to modify an affordable lot for the benefit of a market rate lot. The parties did not address, and the record does not indicate, whether all garages approved as part of the comprehensive permit would be on market rate lots, but proposals to reconfigure market rate lots to the detriment of affordable lots after permit issuance and occupancy may raise additional concerns, not addressed here, regarding the appropriate treatment of affordable and market rate units within a 40B development.

by the Board in granting the original permit or the 2008 Clarification. We therefore rule that it is a substantial change from the current permit.

C. Implications of Easement Law Issues

The parties' supplemental memoranda aided our consideration of whether the current easement, the proposed reduction in that easement, or the proposed reciprocal easement had any bearing on the substantiality issue or our ability to make that determination. However, as shown below, the legal validity of the proposed actions does not affect our conclusion that the proposed project change represents a substantial modification.

Reduction of Easement Area Granted to Blue Flag. Blue Flag argues it may reduce the size of the existing garage use and access easement it holds over the Zekases' lot by exercising and recording a release of a portion of the easement. Developer-Blue Flag Supp. Memorandum, p. 9, citing *Emery v. Crowley*, 371 Mass. 489, 495 (1976) ("[a]n express easement can be extinguished only by grant, release, abandonment, estoppel or prescription"). Blue Flag proposes either to execute and record a release of, or a statement of its intention to abandon, certain parts of the existing easement. *See* Developer-Blue Flag Supp. Memorandum, pp. 9-10. The Zekases appear to argue that Blue Flag's proposal amounts to an improper relocation or alteration of the easement by the dominant estate (Blue Flag) without consent of the servient estate (the Zekases), Zekas Supp. Memorandum, pp. 2-3, citing *M.P.M. Builders, LLC v. Dwyer*, 442 Mass. 87, 90, n.4 (2004). They acknowledge, however, that Blue Flag may release a portion of the easement it holds over their lot without their consent or acceptance. Zekas Supp. Memorandum, p. 5.

Reciprocal Easement Grant by Blue Flag. The developer and Blue Flag argue that Blue Flag may bind itself to an easement it grants over its own lot without the Zekases' consent and acceptance, thus creating a valid easement. In support, they cite *Chamberlain v. Badaoui*, 95 Mass. App. Ct. 670, 674 (2019). Developer-Blue Flag Supp. Memorandum, p. 7.

The Zekases assert they do not agree to the grant of a second easement or intend to accept it. Zekas Opposition, p. 7.[12] In fact, they allude to the possibility that the validity of

[12] The Zekases make clear they will not agree to alter the existing easement. *See* Interveners Supp. Memorandum, p. 7.

the existing garage use and access easement may be subject to legal challenge, noting that "[t]he mere fact that the Zekases took title to their lot with some knowledge of the claimed garage easement does not prevent them from challenging an action taken by [the developer] in violation of the comprehensive permit." *Id.*, p. 8, citing *McElligott v. Lukes*, 42 Mass. App. Ct, 61, 64 (1997) (rejecting argument that validity of lease cannot be challenged if owner takes title with knowledge of lease).

Relevance of Validity of the Easements at Issue. The parties make a number of arguments regarding the validity of the current easement from the Zekases' lot to the Blue Flag Lot, and the proposed reciprocal easement. The developer and Blue Flag argue that, even if the Zekases affirmatively reject or extinguish any easement granted to them by Blue Flag, the proposed modification at issue here is still insubstantial.[13] The Zekases challenge the validity of the current easement and the developer's right to grant such an easement, and they argue that, even if it did, the easement is impossible to exercise and therefore must be extinguished. Zekas Supp. Memorandum, p. 7.

The validity of the existing easement and any future easement agreement are not matters within our jurisdiction. Nor are they necessary to resolve for our determination regarding substantiality, which involves a comparison of the proposal to the current comprehensive permit and does not take into consideration the actions taken by the parties after the 2008 Clarification and its accompanying plans were issued. It is the Committee's long-standing rule to leave to the courts to adjudicate any legal dispute that may arise in this regard between private parties. *See, e.g., Hanover Woods, LLC v. Hanover*, No. 2011-04, slip op. at 20 (Mass. Housing Appeals Comm. Feb 10, 2014) (relating to developer's site control); *Billerica Development Co., Inc. v. Billerica*, No. 1987-23, slip op. at 18-19 (Mass. Housing Appeals Comm. Jan. 23, 1992); *Hamilton Housing Auth. v. Hamilton*, No. 1986-21, slip op. at 9 (Mass. Housing Appeals Comm. Dec. 15, 1988), *aff'd sub nom. Miles v. Housing*

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[13] The developer and Blue Flag assert the Zekases will have no right to use the area of the current easement no matter how the Committee rules on the modification, as Blue Flag has received a deeded right to use it as a driveway and garage area. However, they point out that if the proposed modification is granted, the size of the existing easement will be reduced by 186 sq. ft., increasing the usable area of the Zekases' lot, resulting in a net benefit to them compared to the existing conditions. *See* Developer-Blue Flag Supp. Memorandum, p. 11.

Appeals Comm., No. 8977CV00122 (Essex Super. Ct. Oct. 6, 1989); *Lexington Ridge Assoc. v. Lexington*, No. 1990-13, slip op. at 42-45 (Mass. Housing Appeals Comm. June 25, 1992); *Planning Office for Urban Affairs, Inc. v. Scituate*, No. 1973-02, slip op. at 6 (Mass. Housing Appeals Comm. Mar. 14, 1975), *aff'd,* No. 1348 (Plymouth Super. Ct. June 28, 1976).

It is not uncommon for cases before this Committee to raise title issues that must ultimately be addressed by the Superior or Land Court. The parties in this matter have not reported they currently have any active litigation or other proceedings relating to either the validity of the existing easement or any subsequent easements. Nor has any party sought to stay this proceeding pending a related court decision. *See Princeton Development Inc. v. Bedford*, No. 2001-19, slip op. at 2 (Mass. Housing Appeals Comm. Sept 20, 2005) (agreeing to stay recommencement of public hearing on remand until pending issue of first impression was resolved in land court).[14]

VI. CONCLUSION AND ORDER OF REMAND

Based on the foregoing, we find, pursuant to 760 CMR 56.06(5)(d), that there is no genuine issue as to any material fact and we conclude that the developer's proposed project change is a substantial change to the comprehensive permit. Accordingly, the joint motion of the developer and Blue Flag for summary decision in their favor is denied. Based on the undisputed facts, the Zekases are entitled to summary decision in their favor. In accordance with 760 CMR 56.07(4)(a), if a project change made during the course of an appeal is found to be substantial, the matter shall be remanded to the Board to determine whether to approve the change. Therefore, this matter is remanded to the Board with the following conditions:

1. The Board shall commence its hearing on remand no later than 30 days following the date of this decision.
2. The hearing is limited to the modifications to the comprehensive permit proposed in the Notice of Project Change: the addition of a garage on Lot 27

[14] While Blue Flag may have the legal right to make certain changes to the existing easement through a release and to pursue the creation of a second easement benefitting the Zekases' lot, as demonstrated by the parties' supplemental briefing, the Zekases have suggested they may challenge these actions. For example, the Zekases allude to the possibility they would oppose any "estoppel by deed" argument in court. That question of the legality of the current easement, a release of a portion of that easement, or the reciprocal easement may be addressed in court. They have no bearing on whether the modifications represent a substantial change from the comprehensive permit. *See* § V.C., *supra.*

in the area of the easement depicted on Exhibit 1, attached hereto, and a garage and use easement on Lot 27 identified in the easement grant on Exhibit 1, in the context of a reciprocal easement grant by Lot 28 to Lot 27 as shown on Exhibit 1.

3. The public hearing shall not extend beyond 30 days from the date of the opening of the hearing, presuming that Rugged Scott has made timely submissions of materials in response to reasonable requests of the Board, as provided in 760 CMR 56.05(3). The time to complete the public hearing may be extended with Rugged Scott's consent, or for good cause upon motion to the Committee.

4. The Board's written decision shall be issued within 40 days of the close of the public hearing, as required by G.L. c. 40B, § 21.

5. The Board shall render a written decision on the proposed modification and timely file it with the Nantucket Town Clerk.

6. If the Board's decision is not satisfactory to Rugged Scott, it may file a written notice of appeal of the remand decision, enclosing a copy of the remand decision, and a request for the scheduling of a pre-hearing conference before the Committee.

7. The Committee shall retain jurisdiction of this matter.

HOUSING APPEALS COMMITTEE

May 10, 2024

Shelagh A. Ellman- Pearl, Chair

Lionel G. Romain

James G. Stockard, Jr.

Caitlin E. Loftus, Counsel