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

WALL STREET DEVELOPMENT CORP. Appellant, v. TOWN OF WALPOLE ZONING BOARD OF APPEALS, Appellee,	)	No. 2020-01

RULING ON NOTICE OF PROJECT CHANGE

I. PROCEDURAL HISTORY AND BACKGROUND

In February 2019, developer Wall Street Development Corporation (Wall Street or Developer) applied to the Town of Walpole Zoning Board of Appeals (Board) for a comprehensive permit to build housing on a site off Burns Avenue in Walpole. The Developer's original application proposed to construct 36 townhouse condominiums in six buildings, with nine units being affordable. The Board granted a comprehensive permit for a reduced 32-unit project in the same number of buildings on January 6, 2020, subject to conditions.

On January 31, 2020, the Developer appealed the Board's decision to the Housing Appeals Committee. Subsequent to the Developer's filing of its appeal with the Committee, it notified the Board of changes it proposed to the project stating that it had recently acquired a parcel of land adjacent to the project site it believed would allow changes to the project that could potentially resolve some issues that were the subject of its appeal. With the Board's assent, on February 26, 2020 the Developer moved to stay the proceedings before the Committee, including the scheduling of the conference of counsel, for 60 days, so the revised plans could be submitted to the Board for review. The presiding officer granted the motion to stay and ordered a joint status report to be filed no later than May 1, 2020. On April 20, 2020, the Developer, again

with the Board's assent, moved to further extend the stay for an additional 90 days. The presiding officer granted the extension and ordered the parties to provide a joint status report on or before July 31, 2020.[1]

On May 16, 2020, the Developer filed a motion with the Committee to lift the stay, schedule the conference of counsel, and restart the appeal process, which the Board opposed. On September 17, 2020, the presiding officer issued a ruling on the Developer's motion, stating it expired on July 31, 2020 on its own terms, and scheduled the conference of counsel, which was held on October 5, 2020. Thereafter, the parties filed a joint motion to remand the matter to the Board for a public hearing on the Developer's proposed changes previously submitted to the Board. An order of remand issued on November 16, 2020.

The Board opened a public hearing on November 18, 2020, continued the hearing to November 30, 2020, and the hearing closed on January 6, 2021. The Board voted to deny the revised project at its February 11, 2021 meeting. The Board issued its written decision on February 18, 2021, stating that its denial of the Developer's revised project was based on the Developer's refusal to provide funds for the Board's selected engineering peer reviewer. On February 24, 2021, the Developer filed with the Committee a motion for a determination pursuant to 760 CMR 56.07(5)(d) that the project change had been constructively approved, as well as an appeal of the Board's denial. The presiding officer denied the motion for constructive approval on November 8, 2021 and remanded the matter back to the Board for further consideration of the revised project.[2]

In accordance with this ruling, the Board opened a public hearing on December 6, 2021. The hearing was held over several dates between December 6, 2021 and May 4, 2022, during which time the Developer considered revising the project from a 38-unit townhouse development to 20 single-family homes. However, the Developer did not present this revised 20 single-family home plan to the Board before that body voted to close the hearing on May 4, 2022. The Board deliberated on the 38-townhouse unit project and denied it on June 1, 2022. The Developer

---

[1] At a virtual meeting on May 6, 2020, the Board voted that the proposed project changes were substantial, requiring a public hearing. Due to the COVID-19 state of emergency then in place, the Board stated that the public hearing would open within 45 days of the termination of the state of emergency.

[2] The November 8, 2021 remand specifically stated the Board was to engage its selected peer reviewer at the expense of the Developer for reconsideration and review of the Board's decision on the propose changes to the project, in accordance with the original remand order issued on November 16, 2020.

appealed that denial to the Committee on June 15, 2022.[3] On August 18, 2020, the Developer filed a notice of project change with the Committee and a motion for the Committee to retain jurisdiction for review of the proposed project change. The Board filed an opposition to the motion on September 2, 2022. On November 10, 2022, the presiding officer held a status conference to further hear from the parties regarding the proposed changes to the project, as well as additional detail regarding the scope of the Board's review of earlier project iterations during the public hearing.[4]

II. STANDARD FOR DETERMINATION OF SUBSTANTIALITY

Pursuant to 760 CMR 56.07(4)(a), when a developer involved in an appeal before the Committee proposes to change its project from the application originally presented to the Board, the presiding officer must determine whether the proposed changes are substantial. If the changes are deemed substantial, the matter is remanded to the board for further local hearings. If the changes are deemed not substantial, and the presiding officer finds the applicant has good cause for not originally presenting such changes to the Board, the changes will be permitted, and the Committee will proceed with the appeal on the modified proposal. *Id*.

The comprehensive permit regulations do not define "substantial" changes. Instead, to assist the presiding officer in making the determination, the regulations provide examples of changes that "generally" will be considered substantial, and changes that that will not. 760 CMR 56.07(40(b)-(d). The examples are not exhaustive and are meant to "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." *VIF II/JMC Riverview Commons Inv. Partners,*

---

[3] The 20 single-family home plan is the third iteration of the project proposed by the Developer but it was never formally presented to or deliberated on by the Board. The original 36 townhouse unit project proposed by the Board was reduced to the 32-unit project initially approved by the Board in the comprehensive permit with conditions issued in January 2020. The first project change proposed by the Developer, or the second iteration of the project, is the 38-unit townhouse project proposed by the Developer following the two remands to the Board. This is the version of the project denied by the Board on June 1, 2022.

[4] In advance of the status conference, the Developer filed a "Project Summary," to provide a factual summary of the proceedings before the Board and the specific differences between the original project, the first amended proposal of thirty-eight townhouse units, and the second amended proposal of twenty single-family homes. At the conference, Board counsel stated he had no objection to the filing and declined the offer to further respond in writing.

LLC v. Andover, No. 2012-02, slip op. at 15 (Mass. Housing Appeals Comm. Feb 27, 2013), quoting 760 CMR 56.07(4); *see also CMA, Inc. v. Westborough*, No. 1989-25, slip op. at 19-21 (Mass. Housing Appeals Comm. June 25, 1992).

The regulations do not set the "outer bounds of the characteristics of an insubstantial change." *Lever Development, LLC v. West Boylston*, No. 2004-10, slip op. at 5 (Mass. Housing Appeals Comm. Dec. 16, 2005). The listed examples apply generally and therefore may not apply to a particular project set in a specific context. *See Andover, supra*, slip op. at 15. They are not established, "hard and fast" rules. *See Surfside Crossing, LLC v. Nantucket*, No. 2019-07, slip op. at 2 (Mass. Housing Appeals Comm. Determination of Insubstantial Change July 31, 2020), citing *West Boylston*, *supra*, slip op. at 5.

The context in which an applicant proposes project changes factors into the Committee's analysis as well. Whether the project changes are proposed to a board after a permit has been finalized and therefore will undergo no further review, or whether it is submitted to the Board during the course of a pending appeal before the Committee, as is the case here, has bearing on whether a change should be considered substantial. *See Andover supra*, slip op. at 16. A determination of substantiality establishes only that a remand to the board for further consideration is required. 760 CMR 56.07(4)(a). Where "changes are not so great as to represent a totally new or different proposal, and it seems unlikely that the local board will reverse it previous decision," and remand would only result in delay, then the merits can be resolved in the *de novo* proceeding before the Committee. *West Boylston*, *supra*, slip op. at 5.

In this matter, the Developer proposes to change the type of housing in the project from townhouses to single-family homes and to reduce the number of units from 38 townhouses to 20 single-family homes, among other changes. The proposed project changes therefore include changes the regulations have deemed both an example of a what will generally be considered a substantial change ("a change in building type, e.g., garden apartments, townhouses, high-rises") and one generally considered an insubstantial change ("a reduction in the number of housing units proposed"). *See* 760 CMR 56.07(4)(c)4.; 760 CMR 56.07(4)(d)1.

As discussed below, the Developer's request for a determination that its proposed changes are not substantial is denied. The Board's request for remand is granted, in accordance with the conditions provided in Section IV, below.

III. DISCUSSION

In its Motion and its August 18, 2022 letter to the Committee noticing the proposed project change, the Developer describes the changes as follows:

1. Revising the development concept from 38 townhouse condominium units in seven buildings to a 20 single-family home concept (20 Lot Plan);
2. The 20 single family lots will range in lot area from 2,700 to 5,600 square feet, with frontage from 38 feet to 52 feet;
3. A 600-foot extension of Brook Lane ending in a circular turnaround;
4. Eliminating secondary access from Burns Avenue and limiting access solely to Brook Lane, which will provide a single-entrance, 40-foot wide way, including a 22-foot wide paved travel width with cape-cod berm and one sidewalk;
5. Providing for the construction of a one-or two-car attached garage on each single-family lot;
6. Service of the project by municipal water and sewer; and
7. Intent to dedicate the roadway as a public way upon project completion.

See Motion, pp. 7-8; Notice of Project Change dated August 18, 2022.

The Board argues the change in building type alone constitutes grounds to remand the project proposal to the Board, because it is expressly noted as an example of a substantial change under 760 CMR 56.07(c)(4). *See* Board's Opposition, p. 1. It further argues it has never had an opportunity to review the new 20-Lot Plan, and that it was not raised by the Developer during the public hearing sessions held from December 6, 2021 to May 4, 2022. Opposition, p. 2. While the Developer maintains that at the May 4, 2022 public hearing session it requested that the hearing be continued until May 18, 2022 in order to present the 20 Lot Plan, the Board asserts the Developer did not make this request relating to the 20 Lot Plan until after leaving the May 4 public hearing session. Motion, p. 6; Opposition, p. 2. While the reason is not relevant to this discussion, both parties state that the 20 Lot Plan was not formally presented to the Board during the public hearing process before it closed on May 4, 2022.

The Developer argues that the comprehensive permit regulations provide guidance as to what changes will be considered substantial, and the change in building type does not automatically mandate a finding that the proposed change is substantial. Motion, p. 12. It argues the examples are "guideposts," and one of many factors to consider when evaluating a proposed project change. Motion, p. 12. Further, the Developer asserts that when the proposed changes do not "significantly affect" a board's concerns, the changes can be deemed not substantial, without further remand proceedings before the local board. Motion, p. 13, citing *Westborough*, *supra*, slip op. at 19-21. Here, the Developer argues it is proposing a 50 percent reduction in overall density due to the reduction in total units. While the Board never reviewed the specific building type of individual single-family homes, the Developer states previous iterations of the project have been expertly peer reviewed by the Board's engineering consultants twice. The Developer maintains that the proposed changes address several primary concerns raised by the Board, specifically traffic, as access would be limited to one thoroughfare rather than neighborhood streets, and therefore would minimize or eliminate traffic impacts. Motion, p. 13.

<u>Building Type</u>. The most significant difference between the 20-Lot Project and the 38-unit project deliberated on by the Board is the 38-unit project consisted of townhouse-style condominium units across seven buildings. The Developer's current plan consists of 20 individual single-family homes.

Proposed home ownership developments often consist of one building type, such as all single-family homes or all condominiums. *Nantucket, supra*, slip op. at 4. The architectural relationship of these building types to the surrounding area can be quite different, and a change from type to another "requires a reevaluation of the appropriateness of the development's design." *Nantucket, supra*, slip op. at 4. Hence the regulations listing a "change in building type" as one that will generally be considered a substantial change. *Nantucket, supra*, slip op. at 4, citing 760 CMR 56.07(4)(c)(4).

As previously noted in Section II, the examples in the regulations are provide general guidance rather than strict mandates when analyzing proposed project changes. In *Nantucket*, the presiding officer considered whether a proposed change from a mix of multi-family condominium units and single-family homes to all multi-family units constituted a substantial change. *Nantucket, supra*, slip op. at 4. Although a change in building type is specifically listed as an example of a substantial change in the regulations, the presiding officer concluded this was

not a substantial change in the context of that particular project. The presiding officer noted that because the original project plan contemplated both types of housing – multi-family and single-family – the Board had been able to evaluate the effects of both types during the public hearing. *Nantucket, supra*, slip op. at 4. Additionally, alternative designs that included larger condominium buildings had been presented for the Board's review. Therefore, although the developer proposed a change in building type, the presiding officer found, within the context of that particular project, that it was not a substantial change, that the developer had good cause for not originally presenting the modified plan to the board, and the matter should proceed with the *de novo* hearing on the merits before the Committee.

In the instant matter, however, the context relied on by the presiding officer in *Nantucket* is not present. In *Nantucket*, the Board had the opportunity to review the type of building ultimately proposed, even if it was originally part of a proposal using mixed building types. Here, the Board was not presented with any proposal showing a single-family home ownership plan during the public hearing process and did not review alternative plans that included this building type. In past cases, the Committee has found a proposed project change meeting just one of the examples provided in the regulations sufficient, by itself, to constitute a substantial change. *See Hanover Woods, LLC v. Hanover*, No. 2011-04, slip op. at 5 (Mass. Housing Appeals Comm. Ruling on Notice of Project Change Mar. 12, 2012) (stating change from ownership to rental, in itself, sufficient to constitute substantial change). A change in building type can affect a project's character and compatibility with the surrounding neighborhood. While the Developer argues single-family homes are more compatible with the surrounding neighborhood in this case, *see* Motion, p. 5, it represents a significant change in the proposal. I find the current 20-Lot Plan to be a substantial change due to the change in building type, and therefore the matter must be remanded to the Board for further review.

Additional Proposed Changes. The Developer proposed several additional project changes and noted other details that it argues would remain unchanged. In terms of building height, the Developer states that none of the individual single-family homes would exceed the 35-foot height permitted under the current zoning ordinance, although heights may vary due to grading. The original 32-unit and amended 38-unit townhouse plans included setbacks of 16- and 15-feet, respectively. The 20 Lot Plan further reduces the setback along the easterly property line to 12 feet. The 20 Lot Plan proposes a total impervious area of approximately 52,065 square feet,

a reduction from the 61,547 square feet proposed under the 38-unit amended plan. Finally, as noted above, the 20 Lot Plan proposes a single access to the project from Brook Lane ending in a turnaround. Although the Board had expressed concerns with a dead-end street when originally proposed as part of the 32-unit original plan, the Developer argues the length of the proposed dead-end roadway has been reduced from approximately 991 feet to 800 feet. After reviewing specific, individual changes, the presiding officer may review whether all proposed changes, in the aggregate, are sufficient to constitute a substantial change. *See Nantucket, supra*, slip op. at 10. I agree with the Developer that each of these individual additional proposed changes on their own do not constitute a substantial change, and some may address concerns raised by the Board, but taken together with the change in building type, a remand is appropriate.

IV. CONCLUSION

Accordingly, for the reasons discussed above, the Developer's request for a determination that its proposed changes are not substantial is denied. The Board's request for remand is granted.

Nevertheless, while the proposed change in building type may be substantial and require a remand, it is clear from the history of these proceedings that the Board is familiar with the project site as well as the issues raised by the proposed development. Many of the project details have been previously reviewed in the context of the original 32-unit and amended 38-unit proposals. Therefore, the Board must consider that "[o]nly the changes in the proposal or aspects of the proposal affected thereby" are subject to review on remand. *See Hanover Woods, supra*, No. 2011-04, slip op. at 5, citing 760 CMR 56.07(4)(a). Also, given the extensive proceedings already conducted in this matter before the Board, lengthy further review is not necessary.

With these considerations in mind, the parties are directed to submit a draft joint remand order for the Committee, specifying the specific matters to be addressed on remand; setting out a proposed timeline for the public hearing on remand, including a deadline by which the hearing must be held and decision issued, to be no later than 120 days of the date of the issuance of the joint remand order, the Board's filing of the remand decision with the Committee, and the Developer's filing of any appeal of the remand decision. Finally, the joint order shall provide that the Committee will retain jurisdiction over this matter once remanded. The draft remand order shall be filed no later than January 25, 2023.

Housing Appeals Committee

January 11, 2023

Caitlin E. Loftus
Presiding Officer