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COMMONWEALTH OF MASSACHUSETTS

NANTUCKET, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2275-00025; 2275-00026

CHRISTOPHER MEREDITH & others[1]

vs.

HOUSING APPEALS COMMITTEE & another [2, 3]

MEMORANDUM OF DECISION AND ORDER ON THE PARTIES' CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

The individual plaintiffs own properties on Nantucket, adjacent to the site of a proposed housing development granted a G. L. c. 40B comprehensive permit by the zoning board of appeals of Nantucket, which the developer, defendant Surfside Crossing, LLC, appealed to the defendant Housing Appeals Committee (HAC). The individual plaintiffs' action was consolidated with another challenge to the same permit by the plaintiff Nantucket Land Council, Inc. (NLC).[4] The matter is now before this court on the plaintiffs' appeals of HAC's decision striking several permit conditions and approving the developer's project alterations. The parties cross-move for judgment on the pleadings, disputing, *inter alia*, the merits of HAC's determination that project alterations were insubstantial changes that did not require remand to the board under the regulations. For the following reasons, the plaintiffs' motions are **ALLOWED**, the developer and HAC's cross-motions are **DENIED**, HAC's insubstantial change and permit decisions are **VACATED**, and the matter is **REMANDED**.

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[1] Linda Meredith, Jacques Zimicki, Joan Stockman, Marybeth Splaine, Jack Weinhold, Sean Perry, Bruce Perry, and Meghan Glowacki.

[2] Surfside Crossing, LLC.

[3] Consolidated with Nantucket Civil Action 2022-00026, *Nantucket Land Council, Inc.* v. *Housing Appeals Committee.*

[4] The matter was also consolidated with an appeal by the board, Nantucket Civil Action 2022-00027, which was later dismissed with prejudice by agreement. The board is no longer a party to the consolidated cases.

BACKGROUND

In April 2018, the developer submitted to the zoning board of appeals of Nantucket an initial proposal for a comprehensive permit pursuant to the Massachusetts Comprehensive Permit Act, G. L. c. 40B, §§ 20-23 (act), to construct a mixed market-rate and affordable housing development on a thirteen-acre South Shore Road site on Nantucket. The initial proposal consisted of a total of 156 units, split between sixty single-family homes and six multi-family condominium buildings containing ninety-six units.[5] Of the 156 total units, 25% were to be designated affordable. During the board's subsequent public hearings, the developer discussed alternate proposals for ninety-two and 100 units, respectively, but ultimately did not pursue those project designs. After the close of the hearing in 2019, the board issued a comprehensive permit that reduced the original project proposal to a total of sixty units, consisting of forty single-family homes and twenty condominium units.[6] The permit also included numerous other conditions that will be discussed *infra* as relevant. The developer thereafter appealed the permit decision to HAC.

In July 2019, shortly after the developer appealed, the plaintiffs moved to intervene in the HAC proceedings. HAC subsequently denied these motions on the basis that NLC's interests implicated Federal statutes rather than requirements of the act, and that the individual plaintiffs' interests were merely speculative.

In April 2020, the developer notified HAC of its intention to change the design of the proposed development from a combination of six multi-unit buildings and sixty single-family homes to eighteen multi-unit buildings with no single-family homes. The total number of

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[5] Thus, the original project proposal was comprised of approximately 38% single-family units and 62% multi-family units.

[6] This reduction in the total number of units altered the proportional representation of building types to approximately 66% single-family units and 33% multi-family units.

proposed units remained the same, but the change in building type was accompanied by a relocation of all or nearly all structures on the site, an increase in building height and number of parking spaces, "approach[to] open space" that was "quite different[]," and other design changes, which will be discussed in further detail below. HAC determined the developer had good cause for not originally presenting the proposed changes to the board and that such changes were not substantial, thereby denying the board's motion for remand to consider the project in a public hearing in the first instance.[7] A.R. 1045-1055. HAC reasoned that although a change in building type "generally" constitutes a substantial change under its regulations, in the circumstances of this project, the change was insubstantial and a remand to the board "would only result in delay." A.R. 1048-1049. HAC further reasoned that the remaining changes identified by the board as warranting a determination of substantiality were below the 10% change threshold identified in the regulatory examples of substantial changes or otherwise not of a similar type to such examples, and that the aggregate of these changes also did not warrant a determination of substantiality. A.R. 1049-1054. The hearing on the altered project proceeded with only the board and the developer as parties, and ultimately closed.

In June 2021, the Superior Court (Wilkins, J.) allowed the plaintiffs' motion for judgment on the pleadings on a separate action for interlocutory review of HAC's intervention decision, vacating the denial and remanding the matter to HAC. *Nantucket Land Council, Inc.* v. *Surfside Crossing, LLC*, Nantucket Civil Action 2020-00021, Paper 14 (June 22, 2021). HAC thereafter permitted intervention by these parties the developer's HAC appeal, but limited the scope of

[7] In response to this decision, the board filed a Superior Court complaint seeking a declaration that the proposed changes were "substantial" and an order of remand for a public hearing. *Town of Nantucket Zoning Bd. of Appeals* v. *Massachusetts Dept. of Hous. and Community Dev.*, Nantucket Civil Action 2020-00022. The court (Wilkins, J.) allowed the department's motion to dismiss the action without reaching the merits of the substantiality issue, reasoning that the complaint was premature where the board had failed to exhaust its administrative remedies by completing the HAC appeal process. *Id.*, Paper 12 (March 18, 2021).

their participation as follows. NLC's participation was limited to the consistency of imposed conditions and/or waivers with the Nantucket Open Space Plan and other open space concerns, including tree preservation, environmental monitoring, and protection of natural features. The individual plaintiffs' participation was limited to sewerage and other infrastructure vulnerability, traffic congestion, headlights and noise impacts, and historic district compliance, to the extent those issues impacted the plaintiffs, specifically. HAC reopened the evidence and held a supplemental hearing at which the plaintiffs participated within the above-specified parameters.

On the basis of the original evidence and that entered at the supplemental hearing, HAC issued a decision directing the board to issue a comprehensive permit for the altered project. Amongst other aspects, the HAC decision struck the board's original condition reducing the number of units from 156 to 60, as well as approved the conversion of the project from a 38% single-family, 62% multi-family mix to a 100% multi-family design with a resultingly altered layout on the parcel.

The parties thereafter cross-moved for judgment on the pleadings in the consolidated actions, disputing, *inter alia*, whether HAC erred in determining that the complete elimination of single-family homes from the project proposal and resultant layout changes, either alone or taken in conjunction with altered building height and open space layout, were nevertheless not substantial, thereby limiting review of the altered proposal to the *de novo* HAC hearings that the plaintiffs were permitted to participate in only after the delayed intervention, rather than review in public hearings before the board.[8,9]

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[8] In addition, the plaintiffs argue that HAC erred in determining that the altered proposal did not result in a building height or parking space increases equal to or greater than 10%, and did not decrease open space by more than 10%, which should also constitute a substantial change under the regulations; that HAC wrongfully determined that the developer's appeal to HAC need not be dismissed on the basis of the timing of the filing of its environmental notification form with the Secretary of the Executive Office of Energy and Environmental Affairs; that HAC erred in limiting the scope of the plaintiffs' participation in the evidentiary hearing, including limiting the issues upon which they could submit evidence, and precluding them from participation in the original hearing

DISCUSSION

Judicial review under the Administrative Procedures Act (APA) is narrow and deferential to the agency, *Buchanan* v. *Contributory Ret. Appeal Bd.*, 65 Mass. App. Ct. 244, 246 (2005); but it is not abdication, *Arnone* v. *Commissioner of Dept. of Soc. Servs.*, 43 Mass. App. Ct. 33, 34 (1997). A court may set aside an agency decision only if the court determines that the substantial rights of any party may have been prejudiced because the decision is in violation of constitutional provisions; in excess of statutory authority or jurisdiction of the agency; based upon an error of law; based on unlawful procedure; unsupported by substantial evidence; unwarranted by facts found by the court on the record as submitted; or arbitrary, capricious, or an abuse of discretion. G. L. c. 30A, §§ 14 (7) (a)-(g). Where the interpretation of a regulation is at issue, the court "interpret[s] a regulation in the same manner as a statute, and according to traditional rules of construction." *Zoning Bd. of Appeals of Hanover* v. *Housing Appeals Comm.*, 90 Mass App. Ct. 111, 117, rev. denied 476 Mass. 1107 (2016), quoting *Warcewicz* v. *Department of Envtl. Protection*, 410 Mass. 548, 550 (1991). Importantly, courts "ordinarily accord an agency's interpretation of its own regulation considerable deference," but "this principle is deference, not abdication, and courts will not hesitate to overrule agency

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proceeding; that HAC erred in rendering a decision without appropriately considering issues of open space preservation and historic district compliance; and that HAC's decision is contrary to substantial evidence in the record supporting various conditions as consistent with local needs, including those related to adequate sewerage, fire safety, water insufficiency in the event of an emergency, and light and noise impacts of the altered project configuration. For the reasons that follow, this court need not, and does not, reach these arguments where HAC's substantial change decision was an error of law requiring remand to the board.

[9] The developer also argues that the plaintiffs' motions should be dismissed because they lack standing to maintain this appeal. HAC does not join in this argument. NLC's standing as an entity aggrieved to appeal the grant of the permit is an issue that the Superior Court (Wilkins, J.) previously decided in a detailed memorandum of decision on the parties' cross-motions for judgment on the pleadings in NLC's separate action seeking interlocutory review of HAC's intervention denial decision. *Nantucket Land Council, Inc.* v. *Surfside Crossing, LLC*, Nantucket Civil Action 2020-00021, Paper 14 (June 22, 2021). The developer did not appeal this decision. The matter is *res judicata* as to NLC. Where the individual plaintiffs raise similar arguments to NLC's regarding HAC's substantial change decision, it suffices to say that the plaintiffs have sufficient standing for the reasons set out in the decision of the court (Wilkins, J.) in the prior NLC action and the arguments articulated in the individual plaintiffs' reply brief (Paper 19.4) in this action.

interpretations when those interpretations are arbitrary, unreasonable, or inconsistent with the plain terms of the regulation itself." *Id.* In short, "the interpretation of statutory and regulatory language and the validity of the agency's interpretation of its own regulation . . . are questions of law appropriate for [a court's] resolution." *Nuclear Metals, Inc.* v. *Low-Level Radioactive Waste Mgmt. Bd.*, 421 Mass. 196, 209 (1995).

HAC's authority is set out in the act, its enabling statute. The act "provides qualifying developers of low or moderate income housing with access to a single comprehensive streamlined permitting process and expected appeal before the housing appeals committee (HAC)." *Zoning Board of Appeals of Milton* v. *HD/MW Randolph Ave., LLC*, 490 Mass. 257, 258 (2022) (*HD/MW Randolph*). To that end, "the act establishes a straightforward appeals process for the applicant" wherein HAC reviews a local permitting authority's denial, or grant with "'conditions and requirements as to make the building or operation of such housing uneconomic,'" of a permit for such a project. *Board of Appeals of Woburn* v. *Housing Appeals Comm.*, 451 Mass. 581, 583 (2008), quoting G. L. c. 40B, § 22. In the event of a permit approved with conditions, the act permits HAC to review the permit and order the modification or removal of any such condition "only when the board's approval with conditions 'makes the building or operation of such housing uneconomic *and* is not consistent with local needs.'" *Board of Appeals of Woburn*, 451 Mass. at 584, quoting G. L. c. 40B, § 23. See 760 Code Mass. Regs. § 56.07(2) (2018) (establishing burden-shifting framework). In that way, "[t]he structure of the act 'reflects the Legislature's careful balance between leaving to local authorities their well-recognized autonomy generally to establish local zoning requirements . . . while foreclosing municipalities from obstructing the building of a minimum level of housing affordable to persons

of low income.'" *Id.*, quoting *Zoning Bd. of Appeals of Wellesley* v. *Ardemore Apartments Ltd. Partnership*, 436 Mass. 811, 822-823 (2002).

At issue in this case is HAC's interpretation of its regulations and decisional precedent to conclude that the altered project proposed during the pendency of the HAC appeal did not constitute a "substantial change" that would require a remand to the board to consider the altered project in the first instance. The regulations note that the act requires that a developer "present its application first to a [b]oard before appealing to [HAC]," and if a developer wishes, while the matter is under appeal to HAC, to "make changes in its proposal from its content as originally presented to the [b]oard, the [b]oard should have an opportunity to review changes that are substantial." 760 Code Mass. Regs. § 56.07(4)(b). A developer seeking to change the original proposal under appeal must notify HAC of the proposed changes, and the hearing officer must then determine if such changes are "substantial" or "not substantial." 760 Code Mass. Regs. § 56.07(4)(a). A "substantial change" requires remand to the local board for a public hearing on an expedited schedule only as to the aspects of the project affected by the proposed changes. *Id.* In contrast, a "not substantial" change that is accompanied by "good cause for [the developer] not originally presenting such details to the [b]oard" "shall be permitted if the proposal as so changed meets the requirements" of the act and associated regulations. *Id.* Subsection (4) does not directly define the term "substantial," and instead gives "some examples of what circumstances ordinarily will and will not constitute a substantial change of the kind described in" subsection (4)(a). 760 Code Mass. Regs. § 56.07(4)(b). Subsection (4)(c) lists several factors that "generally will be substantial changes," including a change in building type; increases of more than 10% in the height of buildings or number of housing units; a greater than 10% decrease in site size "in excess of any decrease in the number of housing units proposed";

and a change from one form of housing tenure to another (e.g. from rental to individual ownership structure). In contrast, subsection (4)(d) lists several factors that "generally will not be substantial changes," including a reduction in housing units, a decrease in unit floor area of less than 10%, a decrease in bedroom number within individual units, changes in color or style of building materials, and changes in financing programs if such changes do not affect any other aspect of the proposal.

In addition to the regulations described above, HAC has issued adjudicative decisions wherein it has adopted policies relative to the determination of substantial versus non-substantial changes.[10] HAC has noted that the list of examples in the regulations "is by no means . . . exhaustive" and that such examples "may not apply to a particular project set in a specific context." *VIF II/JMC Riverview Commons Inv. Partners, LLC* v. *Andover Zoning Bd. of Appeals*, Mass. Hous. Appeals Comm., No. 12-02 at *10 (HAC Feb. 27, 2013) (*VIF II/JMC Riverview*). "Where the regulatory *examples are not determinative*, the issue of whether proposed project modifications are 'substantial' is one that requires careful factual analysis" through examining the changes "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" (emphasis added). *Id.* Importantly, HAC "ordinarily will require [] a remand when the proposed changes cumulatively 'amount to a totally new or different proposal.'" *Hanover Woods, LLC* v. *Hanover Zoning Bd. of Appeals*, Mass. Hous. Appeals Comm., No. 11-04 at *10 (HAC Feb. 10,

[10] "There is no question that [HAC's] decisions, like department regulations, are entitled to deferential review. It is a recognized principle of administrative law that an agency may adopt policies through adjudication as well as through rulemaking,' . . . and 'the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency" (internal citation and quotations omitted). *Board of Appeals of Woburn*, 451 Mass. at 592-593.

2014), quoting *One Baker Avenue, LLC* v. *Kingston Zoning Bd. of Appeals*, Mass. Hous. Appeals Comm., No. 07-09 at *4 (HAC Apr. 5, 2013).

Here, this court concludes that HAC erred as a matter of law in interpreting its regulations and adjudicative precedent to determine that the proposed project changes are not substantial.[11] In so concluding, this court examines HAC's past decisions applying the "substantial change" standard, and the facts it relied upon in concluding that the altered project fell outside such standard. It is undisputed that the altered project completely eliminates one type of building, single-family homes, and increases the number of multi-family buildings from the originally proposed six to eighteen in the new, completely multi-family design. Further, as HAC recognized in its decision denying remand, this change in the type, number, and location of buildings resulted in a "revised proposal [that] approaches open space *quite* differently" (emphasis added). A.R. 1051.

In *Hanover Woods, LLC*, No. 11-04 at *9-10, HAC discussed its determination of substantiality for a project change proposed in the course of the developer's appeal of the board's approval of a permit for the original project, with conditions. HAC noted that a determination of substantiality was based on the altered project's increase in size from 152 to 200 units and a change of tenancy model from sale to rental. *Id.* Under the circumstances there, which HAC characterized as a proposal that "amount[ed] to a wholly new project," these changes "together were so substantial that the new proposal had to be remanded to the [b]oard for reconsideration." *Id.*

In contrast, in *CMA, Inc.* v. *Westborough Zoning Bd. of Appeals*, Mass. Hous. Appeals Comm., No. 89-25 at *20-21 (HAC June 25, 1992), HAC found that a project change proposed

[11] Where this holding is dispositive of the parties' cross-motions, the court does not reach the remaining issues raised by the plaintiffs' appeals.

during the pendency of an appeal of the permit conditions was insubstantial. There, a portion of the project site was separated out from the parcel and the total number of units was reduced. Notably, the developer maintained the same number of proposed buildings, merely reducing their size with "little change[] in appearance or . . . location." *Id.* at *3. HAC reasoned that the regulatory examples indicated that a reduction in the number of housing units ordinarily will be insubstantial, and found no reason to deviate from that general guidance where many of the board's concerns were "not significantly affected by the changes." *Id.* at *21. Likewise, in *Sherwood Estates* v. *Board of Appeals of the City of Peabody*, Mass. Hous. Appeals Comm., No. 80-11 at *3 (HAC Apr. 30, 1982), HAC determined that a proposed change of an under-appeal project's tenant type from solely elderly tenants to a mix of elderly and family tenants did not "amount to a totally new or different proposal" requiring remand to the board. In so concluding, HAC noted that "only parking requirements [had] changed," while "[t]he number and height of the buildings remain[ed] the same; the type of building [was] the same; the total floor space [was] the same; the size of the site [was] the same." *Id.* at *4.

Here, the administrative record is clear that the number, location, and size of *all* of the buildings on the site have changed in the altered proposal as a result of the complete elimination of the single-family building type from the project. The original proposal contained sixty-six total buildings, while the altered proposal contains the same number of total units in eighteen buildings. This altered configuration results in changes to roadways and traffic circulation, a reduction in total open space area with a reallocation of the majority of open space from private to community use, conversion of the majority of parking from a distributed pattern throughout the site in the individual semi-pervious driveways of single-family homes to a collected pattern

in twelve impervious parking lots largely located on the periphery of the development, and other site plan changes.

Nevertheless, HAC reasoned that the complete elimination of single-family housing from the project, and the increase in the number of multi-family buildings from six to eighteen, did not constitute a substantial change despite the inclusion of building-type change as an example of a substantial change in 760 Code Mass. Regs. § 56.07(4)(c). HAC's conclusion that the regulation's "general" principle did not apply was based on three factors. First, HAC reasoned that where "the original plans contained both types of housing, during its public hearings the [b]oard was able to evaluate the effects of both types of designs." A.R. 1048. Second, HAC noted that "this is not a situation where houses on relatively large lots are being replaced by large buildings," and instead was a change from "closely spaced cottages" such that "the overall density of units on the site remains the same." A.R. 1048-1049. Third, HAC concluded that the board had "clearly expressed its discomfort with the larger buildings" in its original permit conditions, which reduced the proportion of multi-family units from approximately 61% to approximately 33% of total units. A.R. 1049.

Notably, HAC did not discuss the difference in size, location, and number of the multi-family buildings considered in the original proposal as compared to the altered proposal, when reaching its conclusion that the board had already sufficiently considered the multi-family building type. Contrast *CMA, Inc.*, No. 89-25 at *3 (considering, *inter alia*, relevance of developer's maintenance of same *number* and *location* of buildings to determination that reduction in building size and unit number was insubstantial); *Sherwood Estates*, No. 80-11 at *4 (considering relevance of, *inter alia*, unchanged *number*, height, and type of buildings in determining insubstantial change from elderly-only to family-elderly tenant mix). Moreover,

beyond the board's reduction in the original project's relative proportion of multi-family units to single-family units, HAC did not identify support for its conclusion that the board had "discomfort" with larger buildings to the extent that it would likely *reject* such buildings in a project solely comprised of multi-family units rather than condition such a design appropriate to legitimate local needs, and thus that remand would only result in delay.[12] See *CMA, Inc.*, No. 89-25 at *20 (articulating policy to find changes insubstantial "[i]f the changes are *not so great* as to represent a totally new or different proposal, *and* if it seems unlikely that the local board will *reverse* its previous decision, [because] remand would only result in delay, and the merits are best resolved in the *de novo* proceedings before [HAC]" [emphasis added]).

In this specific context, it is exceedingly difficult to see how the regulatory example is *not* "determinative" of the substantiality of the change and how the altered proposal does *not* plainly "amount to a wholly new project" requiring remand for the board to consider, in public hearings, the impact of the number and location of the multi-family buildings on legitimate matters of local concern. See *VIF II/JMC Riverview*, No. 12-02 at *10; *Hanover Woods, LLC*, No. 11-04 at *10. This is so even where, as here, the court gives deference to HAC's technical expertise and its decisional policy of being "more amendable to determining that proposed changes are insubstantial" when raised during the pendency of a HAC appeal on the original permit conditions. See *VIF II/JMC Riverview*, No. 12-02 at *11 (justifying relaxed standard for preconstruction, versus post-construction, proposed changes because substantiality determination "is of only limited importance in this [pre-construction] context, because even if a proposed change is deemed to be insubstantial—and therefore deemed approved by the local board—the

[12] Notably, this is not a circumstance where a board entirely rejected a multi-family building type in its conditional approval of an original project.

modified project still has to be evaluated by [HAC] to ensure it is consistent with local needs").[13] Indeed, in its brief, HAC does not identify any prior decisions where a change in building type was held to be insubstantial despite the explicit regulatory example, particularly where such change results in a many-fold change in the total number buildings or the relocation of all such buildings on the site. Cf. *HD/MW Randolph*, 490 Mass. at 266 (noting "a consistent administrative adjudicatory interpretation of statutory and regulatory language is . . . entitled to deference").

In this context, HAC's decision relies on nearly unfettered discretion to interpret the term "substantial" in manner that is inconsistent with the explicit inclusion of building type as a regulatory example of substantial change, 760 Code Mass. Regs. § 56.07(4)(c), the regulatory acknowledgment that an applicant must present a project to the board in the first instance and the board must have "an opportunity to review changes that are substantial," 760 Code Mass. Regs. § 56.07(4)(b), and the act's "careful balance between leaving to local authorities their well-recognized autonomy generally to establish local zoning requirements . . . while foreclosing municipalities from obstructing the building of a minimum level of housing affordable to persons of low income." See *Board of Appeals of Woburn* v. *Housing Appeals Comm.*, 451 Mass. 581, 594 (2008). This is not a circumstance in which HAC properly may employ an "adjudicative interpretation [to] fill[] in a gap in the statutory and regulatory regime" in the "absen[ce of] a clear directive from the Legislature to the contrary," *HD/MW Randolph*, 490 Mass. at 266, as it would be where "[n]one of the examples listed in the regulations are similar enough to the

[13] The court need not, and thus does not, reach the question whether this policy exceeds HAC's statutory authority or conflicts with its promulgated regulations, either generally or in particular circumstances where intervention of interested non-municipal parties in HAC proceedings has been denied initially. However, the court notes that HAC's articulation of this policy in *VIF II/JMC Riverview* does not address the difference between a municipality's opportunity to address impacts of proposed changes during a *de novo* evaluation of an altered project by HAC, and the opportunity of interest non-municipal parties to address impacts of such changes during a public hearing of the board.

proposed [changes] to compel a result one way or another" and are thus "not determinative." See e.g. *VIF II/JMC Riverview*, No. 12-02 at *10 (addition of parking garage not similar to explicit regulatory examples of substantial or insubstantial changes). Where a listed example is *precisely* the type of proposed change at issue, and the specific context of that change results in a three-fold change in the number of total buildings and wholesale relocation of all buildings on the site, it is a facial error of law for HAC to conclude that such example is *not* determinative and the proposed change falls outside the meaning of "substantial" solely on the basis that the board previously considered a project containing less than 10% multi-family structures and conditioned its approval of that original project on an altered proportion of multi-family versus single-family units.

Accordingly, this court concludes that HAC's interpretation of its regulations, to determine insubstantial the proposed change from sixty single-family homes and six multi-family buildings to solely eighteen multi-family buildings, is so "arbitrary, unreasonable, [and] inconsistent with the plain terms of the regulation itself," that deference to such an interpretation would amount to impermissible abdication. See *Zoning Bd. of Appeals of Hanover*, 90 Mass App. Ct. at 117. On this basis alone, HAC's substantiality decision must be reversed regardless of any good reason by the developer to redesign the project during the appeal stage, and the altered project must be remanded to the board for an expedited hearing on the proposed changes in keeping with the dictates of 760 Code Mass. Regs. § 56.07(4)(a).

Nevertheless, for the purpose of completeness, this court further concludes that it was also plainly erroneous to conclude that the proposed changes were insubstantial when the changes in building type, number, and location were considered cumulatively with the increase in building height and decrease in total open space. Accepting as correct HAC's factual

calculations, the proposed changes increased the overall building height by either 7% or 8%, just below the regulatory example of a 10% increase in building height as a substantial change. A.R. 1049-1050. 760 Code Mass. Regs. § 56.07(4)(c)(1). Although a change in open space is not explicitly listed as an example in the substantial change regulation, HAC found that there was an 8% decrease in total open space and a "quite different" approach to organizing such open space in a central site for community active recreation rather than the allocation of the majority of open space as private space surrounding single-family units. A.R. 1051-1052. See *VIF II/JMC Riverview*, No. 12-02 at *13-14 (noting increase in lot coverage and intensity of use on site from construction of parking garage constituted substantial change despite lack of explicit inclusion in regulatory examples of substantial and insubstantial changes).

Considering these proposed changes in conjunction with the change in building type, number, and location, further demonstrates the unreasonableness of HAC's disregard of the explicit substantial change examples, and the inconsistency of this interpretation with the plain meaning of its prior adjudicative precedent regarding changes that "cumulatively 'amount to a totally new or different proposal.'" *Hanover Woods, LLC*, No. 11-04 at *10, quoting *One Baker Avenue, LLC*, No. 07-09 at *4. This error of law also requires reversal of the substantiality decision and remand to the board for consideration of the altered project in the first instance, pursuant to 760 Code Mass. Regs. § 56.07(4)(a).[14]

[14] I note that I, together with counsel, walked the site of the proposed housing development. However, what I saw was used only to assist me in understanding the arguments of counsel at hearing. My decision is the result of, and limited to, a review of the administrative record.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the plaintiffs' motions for judgment on the pleadings (Papers 18.1 and 19.1) be **ALLOWED** and the defendants' cross-motions for same (Papers 18.2 and 18.3) be **DENIED**. It is further **ORDERED** that judgment shall enter **VACATING** the July 31, 2020 decision of the Housing Appeals Committee determining the project changes proposed by Surfside Crossing, LLC are not substantial and the September 16, 2022 decision of the Housing Appeals Committee granting a comprehensive permit for the changed project. It is lastly **ORDERED** that judgment shall enter **REMANDING** the matter for further consideration consistent with the memorandum with respect to the requirement of 760 Code Mass. Regs. § 56.07(4)(a) that substantial changes be remanded to the zoning board of appeals of Nantucket.

January 2, 2024

Mark C. Gildea
Justice of the Superior Court