Planning and Land Use Services

Building ▪ Health ▪ Historic District Commission ▪ Planning Board ▪ Zoning Board of Appeals

S T A F F R E P O R T

Date: **May 9, 2016**

To: **Zoning Board of Appeals**

From: **Eleanor W. Antonietti**
Zoning Administrator

Re: **May 11, 2016**

1

I. APPROVAL OF THE MINUTES:

Pages 5 - 10

- April 14, 2016

II. OLD BUSINESS:

See Packet Parts I & II and Pages 10 - 19 of this Staff Report

- 04-16 Donald J. Mackinnon, Trustee of Nantucket 106 Surfside Realty Trust – *a/k/a* SURFSIDE COMMONS 40B 106 Surfside Road Mackinnon
Extended Close of Public Hearing deadline September 30, 2016 (180 days from Initial Public Hearing with Extension)
Decision Action deadline November 10, 2016 (40 days from close of Public Hearing)
Conflicts: Geoff Thayer *Sitting Members*: ET LB MJO KK SM absent/will read in for May hearing

FROM 1/14/16 STAFF REPORT:
The application requests numerous and wide-ranging waivers, from zoning standards, various permitting requirements, and financial obligations to the Town. The Board will need to get clarification on these waivers (i.e. Building Permit; Water Commission; Sewer Commission; DPW permits & fees; HDC approval …). Approval will require substantial modifications as to matters of density, massing, design, screening, layout, parking configuration, all of which relate to the public health and welfare and overall safety of the community. The ability to connect to the local sewer, which may not even be able to support the proposed density, is the lynchpin to any approval. Town Counsel and the applicant disagree as to whether or not Town Meeting approval is required. We expect further testimony and written opinions from Town Counsel on this subject.

There are **OPTIONS TO BE EXPLORED RELATIVE TO VARIOUS DESIGN CONCERNS.**

2 Fairgrounds Road Nantucket Massachusetts 02554
508-228-7215 telephone 508-228-7298 facsimile

- HEIGHT The applicant could, for example, alter the design by creating garden-level apartments as opposed to full-basements. This would potentially minimize the mass of the building above 30-feet. They could also taper the roofline of dormers at a 30 foot height while allowing gable pitch above the 30-feet, or propose a mansard roof. In short, there are alternative designs to mitigate height that may be contemplated and suggested by the Board.

- DENSITY
  - The pool and fitness club, currently proposed as a separate building, could be incorporated in one of the apartment buildings at basement level. This would allow buildings to be more centrally located and increase buffers to surrounding properties.
  - Interior layout could be reduced by consolidating interior space (removing dens or 2nd full-bathrooms or walk-in closets). There could be more micro-units, or a different mix of units to accommodate smaller households.

- AESTHETICS
  - Balconies are a problematic design feature, although less so on the rear of the building where they are less visible. They are not found in any residential-style or multi-family buildings on island. An alternative could be a simple community outdoor space or perhaps roof decks.
  - The window and door arrangements are disorganized. There is a double gable facing Surfside Road. The rear façade of the 13-unit building seems to have more architectural continuity and should perhaps be replicated with the other buildings/elevations where possible.

- SCREENING Perimeter planting should be detailed with species comprised of a mixture of deciduous and coniferous plants to maximize a solid screen to abutting properties. Would solid board fencing on north and south perimeter be suitable screening, or would that involve too much maintenance ?

- PARKING Where possible, some of the parking could be located underground to move some of the surface-level parking from site.

- ON SITE TRAFFIC FLOW A one-way loop to keep incoming traffic separate from outgoing traffic could improve flow, site lines and visibility. Adding another access on west side of 13-unit building could be efficient.

- TRAFFIC MITIGATION
  - The community would benefit from a bike-path extension from Fairgrounds Rd. to front of this site to eventually connect to future bike path on northern side of Boulevard a bit further down Surfside Rd.
  - TRAFFIC STUDY (SEE Pages 51 – 73 of Packet Part II). Specifically, se Page 71 (or Page E-20 of the Traffic Study) regarding the deficient intersection. The Board could ask the applicant to pay for 3% (approximately $30,000) of the cost of installing a round-about at the Fairgrounds and Surfside Rd. intersection.

- MISCELLANEOUS
  - Storage units will need to be restricted to residents only.
  - There is only one Dumpster which may not be adequate for the proposed density.
  - Are there elevators?

The Board will need to make a motion to formally request (in a letter signed by Chairman Toole) WRITTEN COMMENTS AND RECOMMENDATIONS FROM OTHER TOWN BOARDS which should include:

2 Fairgrounds Road Nantucket Massachusetts 02554
508-228-7215 telephone 508-228-7298 facsimile

- DPW
- Planning Board
- HDC
- Board of Water Commissioners
- Board of Health

Staff has obtained funds from the applicant and set up an Engineering Escrow account (53G) to cover costs of Peer Review. Therefore, the Board will need to officially request:
PEER REVIEW FROM:

- Traffic Study consultant to Town, Tetra Tech
- Engineering consultant, Ed Pesce
- 40B consultant, Edward Marchant

Staff has obtained Town approval of a Request for Legal Services from Town Counsel. Therefore, the Board will want to request:

WRITTEN OPINION FROM Town Counsel on various matters, most prominently that of the sewer connection process.

UPDATE:

This application was continued from January to April hearing. A SITE VISIT took place on March 29th at which the applicant prepared the site with 'height balloons' and stakes and gave a detailed description of how the buildings will be situated on the locus.

REVISED LIST OF WAIVER REQUEST:

3

An updated list was received from the Applicant on 4/6. (See Pages 28 - 32 for red-lined version and Pages 33 - 36 for clean version in Packet Part I.) Essentially, the revisions involve refinement and specification of waivers from Zoning By-law Sections :

- 139-16.A Intensity and dimensional requirements
- 139-17 Height limitation – proposed height is 55 feet
- 139-18 Parking – dimensional requirements as to parking space length
- 139-19 Screening requirements
- 139-26 WAIVER REQUEST eliminated

SEWER WAIVER:

There is a Memo (See Pages 148 - 152 in Packet PART II) received from the Applicant on 4/6 regarding the requested Waiver to allow applicant to connect to the existing sewer line *via* a new force main to be installed along Surfside Road & Fairgrounds Road. Applicant seeks to bypass the requirement to be able to do so by virtue of **both** approval at a Town Meeting and by the BOS acting as the Sewer Commission. Applicant asserts that, "Pursuant to Chapter 40B, the ZBA has the authority and exclusive jurisdiction to grant the Waiver" [….] "by issuing a comprehensive permit." Essentially, the applicant affirms that to deny the applicant the right to connect to the sewer district through a Waiver of the above-referenced statutory requirement would undermine the purpose and intent of Chapter 40B "*to reduce regulatory barriers that impede the development of [affordable] housing*."
There is also a legal opinion letter (See Pages 15-19 the end of this Staff Report) provided by Town Counsel on April 13th written in response to the above-referenced Memo.

PEER REVIEW TRAFFIC REPORT:

The TRAFFIC ASSESSMENT prepared by Bristol Traffic & Transportation Consulting LLC may be found on Pages 57 - 79 in Packet Part I.
The traffic study peer review should be completed in time for the meeting in June. There is additional information being requested of the applicant's traffic consultant (Bristol), and the peer review consultant

(Tetra Tech) requests approximately 3 weeks to complete their review following receipt of the requested information.
A traffic engineer from Tetra Tech did attend the Site Visit on 3/29, accompanied by Transportation Planner, Mike Burns who also gave her a tour of the area. There has been discussion of an option proposed by the Fire Dept for a 2nd driveway access that would also incorporate a one-way circulation pattern within the development. This was in response to the concern that Fire Dept vehicles would not be able to make turns within the development given the 2-way flow and narrow turning radii. There is also a concern regarding parallel parking within the circulation aisles if parking was ultimately inadequate for the site. Perhaps recommending "no parking" signage or pavement markings within the development could address this concern.

WRITTEN COMMENTS & RECOMMENDATIONS FROM OTHER TOWN DEPARTMENTS:
Comments from Town Departments, Boards, and Commissions are included in your packet (See Pages 130 - 147 in Packet PART II). The letter submitted and signed by the BOS recommends that a Comp. Permit for the project be granted with certain conditions and goes on to raises 7 salient points:

1. Sewer District Issues
2. Sewer Costs
3. Water Infrastructure
4. Wellhead Protection District Issues
5. Public Safety Issues
6. Design Issues
7. Other Important Issues

Since the April 14th hearing, comments were received from the Historic District Commission and the Nantucket Historical Commission (See Pages 143 - 147 in Packet PART II). Staff has not yet received comments and recommendations from the Planning Board, ConCom, or the NP&EDC.

4

APPLICANT'S REPLY TO COMMENTS & RECOMMENDATIONS FROM TOWN DEPARTMENTS:
Applicant emailed a Memo (See Pages 10-14 the end of this Staff Report) received, 4/11. This Memo succinctly addresses the first 6 of the above-referenced points outlined in the BOS letter.

POWER POINT PRESENTATION:
Applicant will be making another Power Point presentation at the hearing. The specific 'slides' are included in your packet and may be found on Pages 153 - 186 in Packet PART II.

OTHER:
No additional Abutter comment has been received but Staff has assiduously sought to keep them apprised of all new submissions or relevant information as it becomes available. This takes place through email and by posting all relevant documents on a dedicated page of the Town website.

See Packet Part III

Pages 12 - 42

- 10-16 MHD Partners Real Estate, LLC 4 Goose Cove Lane Brescher
Action deadline June 8, 2016 *Sitting Members*: ET LB MJO KK GT
Applicant is requesting Variance relief pursuant to Zoning By-law Section 139-32 from the intensity regulations in the Village Height Overlay District (VHOD). Specifically, applicant intends to relocate an existing cottage from another property onto the subject premises, a vacant oversized lot. In 2009, the VHOD was adopted and the structure, which is 25.5 feet above average mean grade, was rendered pre-existing nonconforming. The maximum allowable height in the VHOD is 25 feet pursuant to Section 139-12.K(1). The structure, upon being relocated, will continue to be nonconforming with respect to height but will conform to all other intensity regulations of the Village Residential zoning district. The Locus is situated at 4 Goose Cove Lane, is shown on Assessor's Map 59.4 as Parcel 30, and as Lot 894 upon Land Court Plan No. 3092-119. Evidence of owner's title is registered at Certificate of Title 25954 on file at the Nantucket County District of the Land Court. The site is zoned Village Residential (VR) and is sited within the Village Height Overlay District (VHOD).

This is similar to the application submitted in 2013 and again in 2015 for 47 Monomoy Road, with the important exception that this applicant is requesting relief before the relocation, whereas that applicant requested relief to validate the excess height after moving the dwelling from Baxter Road. No changes to the structure are proposed as part of this application. Once a structure is relocated – and this one will be moved from 43 Tennessee Avenue to one of the vacant lots in a 4-lot subdivision called Goose Cove located off of South Cambridge Street – it loses any pre-existing nonconforming status. If the Board is inclined to grant any relief, variance relief is the only option. Staff notes that the height of the structure is 25.5 feet and as such a *de minimis* difference as to the 25 feet allowed. Furthermore, this lot has a challenging shape and topography (it used to contain 2 tennis courts from the defunct Island Racquet Club) and has wetlands to the rear.

VARIANCE CRITERIA

The decision would have to meet the threshold (established by MGL 40.A § 10 and locally per Section 139-32.A)which requires that the Board:

> *[…] specifically finds that owing to circumstances relating to soil conditions, shape or topography of such land or structures but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of this chapter would involve substantial hardship, financial or otherwise, to the petitioner or appellant, and the desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such bylaw.*

UPDATE:

The Board asked that the applicant furnish a Topographical plan to clarify the siting of the proposed Move-On structure as well as some proof of the historical elevations. The Board expressed concerns that the applicant was "manipulating the grade" by filling the lot to bring the existing elevation 6 up to a plateau at elevation 12, and in so doing, was not meeting the intent of the by-law regarding height.

Pursuant to Section 139-17.A:

5

> *Building and structure height is measured as the average height of all sides of a building or structure from the average mean grade to the highest point of the building and/or structure. There shall be only one highest point for each building and/or structure. No one building and/or structure side shall exceed 32 feet*.*

*Pursuant to Section 139-12.K describing the VILLAGE HEIGHT OVERLAY DISTRICT:

> *The purpose of this overlay district is to establish reduced building heights in certain locations in the Country Overlay District.*
>
> *(1) Notwithstanding the provisions of Section 139-17, the maximum height permitted within the Village Height Overlay District shall be 25 feet.*

Applicant has complied with the Board's requests by submitting 1) various letters addressing the Board's expressed concerns – including a letter from the surveyor – and, 2) multiple plans showing topographical data, past and present. (See Pages 32 – 42 of **Packet Part III**).

Staff is familiar with the site and on April 6th took some photos of the now vacant and partially filled lot (See Pages 27 – 31 of **Packet Part III**).

III. NEW BUSINESS:

See Packet Part III

Pages 44 - 67

- 11-16 John N. Sullivan and Marie T. Sullivan 5 Appleton Road Sullivan

Action deadline August 9, 2016 *CONFLICTS*: SM JM MJO

Applicant is seeking relief by Special Permit pursuant to Zoning By-law Section 139-16.C by reducing the side yard setback from ten (10) to five (5) feet in order to validate the siting of the existing main dwelling and to site a proposed 400 square foot garage within the ten (10) foot northerly side yard setback. The Locus is situated at 5 Appleton Road, is shown on Assessor's Map 66 as Parcel 390, and as Lot 19 upon Land Court Plan 13554-D. Evidence of owner's title is registered on Certificate of Title No. 22449 at the Nantucket County District of the Land Court. The site is zoned Residential 10 (R-10).

See above description for relief requested. Pursuant to Section 139-16.C(1) setback waivers:

> *The Board of Appeals may grant a special permit to reduce the 10 foot side yard setback and the 10 foot side and rear yard setback in R-10 […] to 5 feet.*

The house was constructed in 1987 at which time the north elevation was sited 15± feet from the northerly side yard lot line. Applicants bought the property in 2006, prior to the 2012 zoning change (ATM; March 31, 2012; Article 44 changed the locus from RC-2 to R-10). This change reflects the primarily residential nature of the west side of Appleton Road. (The east side is zoned RC-2, R-5, and R-20.) In January, 2013, applicants filed a Building Permit (No. 319-13) to build a 270± SF addition. The northwesterly corner of the house, as so altered, is shown on a 2014 As-Built to be 7.4 feet from the northerly side yard lot line as a result of this alteration. The Building Permit was granted a CO. Due to this oversight, it was necessary to re-notice this application to validate the intrusion of the main dwelling – in addition to the relief sought for the proposed new construction of the garage.
Applicant states that there is no other suitable place to add this 400 SF garage. The additional relief sought pertains to setbacks from the same (northerly) lot line. Staff suggests a boilerplate Condition that no further construction may take place within the required northerly side yard setback without further relief from the Board. Staff recommends approval with that condition.

- 12-16 Amos B. Hostetter, Jr., Stephen W. Kidder, & Michael J. Puzo, Tr., A & B Realty Trust
  Action deadline August 9, 2016 53 Baxter Road Reade
  CONFLICTS: MP

Pages 68 - 88

Applicant is seeking relief by Special Permit pursuant to Zoning By-law Section 139-33.A to alter the pre-existing nonconforming dwelling and garage by relocating them on the lot to increase the distance from the coastal bank, while maintaining the nonconforming front yard setback distances and creating no new nonconformities. The Locus is situated at 53 Baxter Road, is shown on Assessor's Map 49 as Parcel 17, and upon Land Court Plan 20574-A. Evidence of owner's title is registered on Certificate of Title No. 23030 at the Nantucket County District of the Land Court. The site is zoned Sconset Residential 20 (SR-20).

6

Applicant seeks to move the 2 structures on the lot further away from the Sconset bluff. The garage is currently sited 3.8 feet from the front yard lot line abutting Baxter Road and the dwelling is sited 21.6 feet therefrom. The minimum front yard setback distance in SR-20 is 30 feet. As so altered, the front yard setback intrusions will not change and, as such, will not be made more nonconforming. The applications for HDC approval were opened on May 3rd and are being held for revisions. Staff does not have access to the minutes of the HDC meeting in question at this time.

- 13-16 Anjonic Real Estate 13 Company, LLP & Maureen Dunphy, Tr., One Kite Hill Lane Realty Trust
  1 Kite Hill Lane Brescher
  Action deadline August 9, 2016 *CONFLICTS*: *NONE KNOWN*

Pages 89 - 117

Applicant requests special permit relief pursuant to Zoning By-law Section 139-33.A to alter the pre-existing nonconforming dwelling and, to the extent applicable, Modification of prior Special Permit relief in order to expand the basement beneath the existing front porch. The pre-existing nonconforming side and rear yard setbacks will remain unchanged. The Locus is situated at 1 Kite Hill Lane, is shown on Nantucket Tax Assessor's Map 42.4.4 as Parcel 63. Evidence of owners' title is in Book 1484, Page 185 and Book 1517, Page 231 on file at the Nantucket County Registry of Deeds. The property is zoned Residential Old Historic (ROH).

This applicant is returning before the Board to seek approval for a fairly minor modification to the original Special Permit, granted in late 2015, or new Special Permit relief, if necessary. The previous proposed alterations remain unchanged except that the applicant seeks to expand the basement beneath an existing front porch to house mechanicals and a laundry room – therefore, non-habitable space. Furthermore, this proposed alteration is entirely outside of the pre-existing nonconforming side yard setback intrusions.

See Packet Part III

- 14-16 17 OSR, LLC 17 Old South Road Dale
  Action deadline August 9, 2016 *CONFLICTS*: LB

Pages118 - 155

Applicant is seeking relief by Variance pursuant to Zoning By-law Section 139-32 from the provisions of Section 139-16 to allow placement of a seasonal awning within the ten (10) foot front yard setback. The awning would be located over an existing outdoor dining area in the front of the structure associated with the operation of the restaurant known as Fusaro's. The Locus is situated at 17 Old South Road, is shown on Assessor's Map 67 as Parcel 41.2, and as Lot 4 upon Plan File 44-Q. Evidence of owner's title is in Book 1496, Page 25 on file at the Nantucket County Registry of Deeds. The site is zoned Commercial Neighborhood (CN).

There are numerous letters (See Pages 140 – 155 of **Packet Part III**) submitted in strong support of this application. The Board previously approved similar relief to allow a seasonal awning for the now-defunct Cinco Restaurant on Amelia Drive (See Pages 147 – 150). The area of Old South Road where Fusaros is located is a predominantly commercial corridor. Fusaros is one of a minority of popular year-round family restaurants. There is no other siting, given the location of the parking to the rear of this long rectangular lot, where an outdoor patio, and therefore a protective awning, may be located. The applicant purchased the awning at significant expense and acquired HDC approval before being told by the Building Department that he would require relief. He had seen the vast majority of restaurants in and out of town with awnings and did not realize, until it was too late, that such an awning, in his case, would require relief due to the setback issue. This is a Variance due to the creation of a front yard setback nonconformity by virtue of the awning – considered a "structure"* – being sited over a brick-patio approximately 5 feet into the 10 foot front yard setback. The locus does and will to continue to comply with all other dimensional provisions applicable in the Commercial Neighborhood district. Staff recommends approval.

7

**DEFINITION OF STRUCTURE pursuant to Section 139-2.A*
Anything constructed or erected, the use of which requires a fixed location on the ground. "Structure" shall be construed, where the context allows, as though followed by the words "or part thereof" and shall include, but not be limited to, buildings, retaining walls which support buildings, platforms, steps, antenna towers, steel storage containers, lighthouses, docks, decks, chimneys, tents, and game courts. "Structure" shall not include retaining walls not exceeding four feet in height for landscaping purposes, fences, rubbish bins, and a maximum of two aboveground propane tanks not to exceed 120 gallons each.

- 15-16 Madaket Wheelhouse, LLC 13 Massachusetts Avenue Cohen
  Action deadline August 9, 2016 *CONFLICTS*: *NONE KNOWN*

Pages156 - 168

Applicant is seeking relief by Special Permit and Variance pursuant to Zoning By-law Sections 139-33.A and 139-32 in order to alter the pre-existing nonconforming dwelling and garage. Applicant proposes to build two dimensionally compliant additions to the dwelling and to enclose an outdoor shower to be sited .5 feet from the westerly lot line, increasing that pre-existing nonconforming side yard setback encroachment. Applicant also proposes changes to the garage consisting of moving, expanding, and converting it into a secondary dwelling. The Locus is situated at 13 Massachusetts Avenue, is shown on Assessor's Map 60 as Parcel 75, and as Lots 12-15, Block 29 upon Land Court Plan 2408-Y and unregistered land lying north of said Lots. Evidence of owner's title is registered on Certificate of Title No. 25696 at the Nantucket County District of the Land Court and in Book 1494, Page 39 on file at the Registry of Deeds. The site is zoned Village Residential (VR).

The property is improved with a dwelling and garage structure which are pre-existing nonconforming as to both side yard and front yard setbacks, but is conforming in all other respects. Applicant proposes to alter and expand both structures with small additions. The garage will be relocated such that the eastern side yard setback intrusion will be eliminated and the front yard setback intrusion will be reduced. The front yard setback cannot be cured due to the 10 foot scalar separation requirement for second dwellings.

See Packet Part III

The structures, as so altered, will not be any closer to the lot lines than they currently are, except for one of new outdoor shower enclosures – considered a "structure" – which will make the existing westerly side yard setback nonconformity worse. There are two new outdoor showers proposed, one on either side of the dwelling. The one on the east will be sited compliantly. The one on the west will be sited as close as .5 feet from the westerly lot line. Applicant states that the siting is restricted by wetland regulations.
A direct abutter submitted an email specifically in opposition to the above-referenced outdoor shower portion of the application. The comment was received today (after the deadline) due to delayed receipt of the notice because of an address change. The comment is:

I live at 15 Massachusetts Ave in Madaket and our property abutts #13 We would like to protest the location of the new outside enclosed shower that the owners are planning to build right at our property line , which is too much of an encroachment to our property . This is also a noise nuisance for us and we want it relocated to the eastern side of the renovated dwelling.
Thank you for your consideration of this issue Carol Shiff

I m sending you this email today , which is beyond the requested submission date of May 4 , because we moved our permanent residence to Bethesda Md.in April, and our mail was forwarded to us here , and we just TODAY received the Public Notice from the NT Zoning Board Because of these circumstances I hope you will be able to submit our concerns and comments to the Board at the May 11th meeting.
Many thanks for your assistance.
Carol Shiff

This is both a Special Permit, to alter pre-existing nonconforming structures, and a Variance (new outdoor shower enclosure) request. A favorable decision as to the latter would have to meet the threshold which requires that the Board:

[…] specifically finds that owing to circumstances relating to soil conditions, shape or topography of such land or structures but not affecting generally the zoning district in which it is located, a literally enforcement of the provisions of this chapter would involve substantial hardship, financial or otherwise, to the petitioner or appellant, and the desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such bylaw.

8

Pages169 - 207

- 16-16 Todd W. Winship & Elizabeth W. Winship and Bess W. Clarke, Tr., Sixteen Monohansett Road Trust 16 Monohansett Road Brescher
Action deadline August 9, 2016 *CONFLICTS*: MP

Applicant is seeking relief by Variance pursuant to Zoning By-law Section 139-32 for a waiver of the ground cover ratio provisions in Section 139-16. Specifically, applicant seeks to validate enclosure of pool cabana breezeway which resulted in total ground cover ratio of 4.2% where 4% is maximum allowed. The Locus is situated at 16 Monohansett Road, is shown on Assessor's Map 79 as Parcel 143, and as Lot 29 upon Plan File 11-A. Evidence of owner's title is in Book 1503, Page 322 on file at the Nantucket County Registry of Deeds. The site is zoned Limited Use General 2 (LUG-2).

Applicant is seeking relief by Variance for a modest (180± SF) ground cover overage. The locus is compliant in all other respects. The conversion of the structure – approved and built in 2005 as a "pool house/cabana" – into an enclosed structure resulted in a ground cover of 4.2% where 4% is allowed. The lot is oversized and is improved with 2 dwellings and the subject 3rd structure, as well as a small shed which, being under 200 SF, does not contribute towards ground cover. The applicant, who has a handicap which requires constant care, intends to convert the "pool cabana" into a tertiary dwelling to provide housing for a live-in home health aide, if Variance relief is granted to validate the ground cover excess.

- 17-16 Nantucket Memorial Airport

WITHDRAWAL AS A MATTER OF RIGHT AND WITHOUT PREJUDICE

Pages 208 - 209

The application was for a Variance to allow the installation of a tent for more than 30 days. Staff sought a legal opinion as to municipal use exemption for the applicant. The Legal opinion is in your packet on Page 209. It confirmed that the airport's proposed use is exempt and does not, therefore, require relief.

IV. OTHER BUSINESS:

- 66-00 Abrem Quarry (40B)
  Discussion of draft Monitoring Services Agreement between Nantucket Zoning Board of Appeals and Nantucket Housing Authority and NHA Properties *d/b/a* Housing Nantucket.

See Packet Part IV

See Packet Part IV for related materials. This came about as a result of a request for action to be taken to address some grievances by residents the Abrems Quarry 40B. In the process of trying to ascertain who the appropriate monitoring agent actually is, Staff determined that there was a necessity to make a concerted effort to evaluate the recorded documents in order to establish who the monitoring agent is and should be going forward. The Legal opinion, dated April 12th (See Pages 9 – 12 in Packet Part IV), found that NHA Properties, d/b/a HousingNantucket, is and should continue to be the Monitoring Agent. The attorney further asserted that "the form of monitoring services agreement attached to the Regulatory Agreement calls for no payments for services to come from the town. If this provision changes in your agreement, it may implicate requirements under G.L. c. 30B. for procuring services."
In response to this finding, Anne Kuszpa of HousingNantucket, who has been fielding the complaints which generated this request, submitted a draft Monitoring Services Agreement to Staff (See Pages 14 – 18) on April 13th. Staff in turn solicited comments and edits from Town Counsel (See Pages 20 – 25). One concern Town Counsel has is "that Housing Nantucket has proposed collecting a "re-sale fee" of 2.5% of the max sale price. The recorded Deed Riders call for a re-sale fee of ¾ of 1% of the max re-sale price." The Board will need to make a determination as to how to handle this particular matter. There is some urgency to finalizing this Agreement and getting it recorded at the Registry of Deeds to make it a valid document.

V. ADJOURNMENT.

2 Fairgrounds Road Nantucket Massachusetts 02554
508-228-7215 telephone 508-228-7298 facsimile

Memorandum in response to

comments & recommendations contained in Town/ BOS letter presented on 4/7/2016

Sent on 4/11/2016 by Applicant

goulston&storrs
counsellors at law

TO: Nantucket Zoning Board of Appeals

FROM: Goulston & Storrs PC

DATE: April 11, 2016

SUBJECT: Surfside Commons (the "Project")

Members of the Zoning Board of Appeals:

On April 7, 2015, Surfside Commons LLC (the "Applicant") received a copy of the letter from the Town of Nantucket Board of Selectmen ("BOS") to the Nantucket Zoning Board of Appeals (the "ZBA"), dated April 6, 2016, regarding "Surfside Commons 40B Comments" (the "Letter").. As the Letter was filed on the very last day that the ZBA had requested that comments be submitted for its consideration at the upcoming hearing on April 14, the Applicant did not have an opportunity to review it and submit a detailed response prior to the ZBA's deadline for comments. However, the Letter raises a number of very important issues and takes certain positions with which the Applicant firmly disagrees. Therefore, on behalf of the Applicant, we are taking the opportunity to submit this supplemental memorandum for the ZBA's consideration. Our intention is not to respond in detail to all of the specific points made in the Letter, but merely to respond on a general level to some of the issues raised therein.

1) **Sewer Issues**. At the ZBA's first hearing on this matter, the ZBA requested that each of counsel for the Applicant and counsel for the ZBA submit its legal analysis as to whether the ZBA has the authority to permit (i) the extension of the Nantucket municipal sewer system (the "Sewer System") and (ii) the connection of the Project to the Sewer System. This firm responded by memorandum to the ZBA dated April 6, 2016. To date, we have not seen any submission made to the ZBA by its counsel.

However, the BOS has set forth its legal analysis in the Letter, which reaches the conclusion that the ZBA does not have such authority and that the Applicant must seek "legislative action" (presumably meaning Town Meeting approval) to add the Project site to the Town's sewer district. In reaching this conclusion, the Letter does not analyze any aspect of the relevant statutes, ordinances or regulatory provisions, but cites only a single authority:

> "[T]he ZBA does not have jurisdiction to extend a municipal sewer district to the Property as the ZBA cannot take the Town Meeting action that is mandated by the General Court as required in order to extend a sewer district. Zoning Board of Appeals of Groton v. Housing Appeals Committee, 451 Mass. 35, 41 (2008) (G.L. c. 40B provides no authority for the Housing Appeals Committee to override the requirement for town meeting authorization as established by the Legislature)."

Goulston & Storrs PC • Boston • DC • New York • Beijing
400 Atlantic Avenue • Boston, Massachusetts 02110-3333 • 617.482.1776 Tel • 617.574.4112 Fax • www.goulstonstorrs.com

The Letter totally misstates the holding of the Groton case. The issue in that case was whether the comprehensive permit granting authority "may require, as a condition to the grant of a comprehensive permit for an affordable housing development project, that a municipality convey an easement on its land to the project's developer." 451 Mass. at 36. The Supreme Judicial Court found as follows:

> "[Chapter 40B] does not authorize the committee, directly or indirectly, to order the conveyance of an easement over land abutting the project site of a proposed affordable housing development. On review of a board's denial of an application for a comprehensive permit, the committee has "the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application." G. L. c. 40B, § 21. See Dennis Hous. Corp. v. Zoning Bd. of Appeals of Dennis, 439 Mass. 71 , 77 (2003). An order directing the conveyance of an easement, however, cannot logically or reasonably derive from, or be equated with, a local board's power to grant "permits or approvals." The phrase "permits or approvals," read in the context of the entire Act, refers to building permits and other approvals typically given on application to, and evaluation by, separate local agencies, boards, or commissions whose approval would otherwise be required for a housing development to go forward .... To obtain approval to develop a site (whether for affordable housing or another use), a developer would not usually be required to obtain easements from abutters, and a local board would have no authority to direct an abutter to grant an easement." 451 Mass. At 40.

In the case of the Project, the Applicant does not require any approval by Town Meeting for an easement or any other real property right. Instead, what the Applicant requires is clearly a permit or approval to connect to the Sewer System. As demonstrated in our April 6, 2016 memorandum, in this regard, Town Meeting is nothing other than a "local board", whose authority is subsumed within the ZBA's exclusive jurisdiction as the comprehensive permit granting authority. Therefore, the Letter reaches an incorrect conclusion as to the ZBA's authority as a matter of law.

The authority of the ZBA to approve the Project's connection to the Sewer System is not a minor legal skirmish. It is, rather, a threshold issue that is at the heart of the viability of the Project. The Letter requests to the ZBA that "any grant of a comprehensive permit ... be conditioned upon the requirement that the Applicant seek and obtain the necessary legislative action to add the Property to a municipal sewer district." In other words, the Letter requests that the ZBA determine that the Project be made subject to an approval to be granted by Town Meeting, a result that is precisely what G.L. c. 40B ("Chapter 40B") was intended to avoid. Any decision by the ZBA to condition the Project on the requirement to obtain Town Meeting approval will be an illegal condition under Chapter 40B and its implementing regulations, and will result in the appeal of such decision by the Applicant to the Housing Appeals Committee.

2) Sewer Costs. The Letter appears to urge the ZBA to reject the Applicant's request for a waiver of sewer fees that might be applicable to the Project and states that the "Applicant should be required to pay attendant sewer costs and fees." The Letter, however, does not specify what these costs and fees should be. According to information received from the Project's civil engineer, the sewer connection fee as shown under Section 200-26 of the Town's Wastewater Systems Regulations Governing the Use of Common Sewers is $2,000 per unit. Based on this, the connection fee would be $112,000 ($2,000/unit x 56 units = $112,000). The Project's engineer also reports that the Town in some cases also imposes sewer privilege fees and capacity

utilization fees. If applicable, it is our understanding that these fees can typically take the form of a betterment charge and be paid over 20 years. We note that 760 CMR 56.05(8)(d) prohibits the imposition of costs that "are not generally imposed by a Local Board on unsubsidized housing" or that are "disproportionate to the impacts reasonably attributable to the Project." Accordingly, any imposition of sewer fees on the Project needs to be done in a manner which is fully consistent with the manner in which other non-Chapter 40B projects have been treated. Further, to the extent proposed sewer fees are not reasonably related to the Project's potential impacts on the Sewer System, the Applicant's waiver request must be granted. Such a waiver would be especially warranted in this case, where Section 11 of Chapter 396 of the Acts of 2008 treats Chapter 40B projects in the Town as "public services uses".

3) Water Infrastructure. The Letter similarly states that the "Applicant should be required to pay all attendant water connection costs and fees". The Applicant will be extending the Town's municipal water main to serve the Project and is prepared to provide stubs for water service for all other properties that abut the new water main extension. This is a significant public benefit for the Town as a whole, and justifies a waiver of water fees for the Project.

4) Wellhead Protection District Issues. The Project engineers have provided for a stormwater design that will comply with all applicable state standards and requirements. Lot coverage is consistent with many other Mid-Island developments undertaken in recent years that have been permitted The Project will not have any adverse impact on the Town's aquifer. Stormwater calcuations have been provided. Additional details as may reasonably be requested by the ZBA to demonstrate this compliance can be provided as the hearing progresses.

The Project does not require a water compliance finding under ZBL §139-12B.3, as the Project does not exceed the thresholds set forth in ZBL §139-12B.2(s).

5) Public Safety Issues:

a. Police Issues. Public safety has been at the forefront of the Project's design and the Applicant intends that an on-site manager will be available to prevent and address any issues. As "crime prevention" is outside the scope of the ZBA's review under Chapter 40B, the Applicant respectfully declines the suggestion that any peer reviewer be hired in this regard.

b. Parking. The Applicant is proposing a ratio of parking of almost 1.8 spaces per unit for residents and visitors, which in the Applicant's experience, is more than sufficient parking for residents and visitors.

c. Recreation. The Project provides onsite recreational opportunities for children and is easily accessible from the bike path, which provides access to numerous recreational activities on Nantucket.

d. Fire Issues. The Project will comply with all applicable state and local requirements relative to life safety and emergency vehicle access, and will be fully equipped with sprinklers.

6) Design Issues. Much of the Letter is spent decrying the appropriateness of the location and design of the Project. While the Town has not been at all successful in addressing the dire

need for multifamily rental development and for affordable housing of any kind, it has approved projects with comparable density in other areas within the Town.

With regard to the appropriateness of the site, the Applicant rests on the finding in the Project Eligibility Letter ("PEL") from the Massachusetts Housing Partnership:

> "The site of the proposed Project is generally appropriate for multifamily residential development. The location provides access to the mid-island commercial and municipal services area with significant employment opportunities. There is a seasonal bus route with a stop within walking distance of the site."

With regard to the Project's design, we again cite to the PEL:

> "The proposed conceptual Project design is generally appropriate for the site. The site design incorporates clustering of the buildings to the rear and sides of the site to minimize their visual impact. Building side yard setbacks from adjacent properties are 15', the same as required in the underlying zoning district. The buildings have been situated to present the programmed activity spaces visibly to the main road so as to create a welcoming, residential entrance. The building exteriors have features to visually reduce the mass and scale. The design incorporates projected bays, trim accents at the windows, and material and textures to visually reduce the mass of the building."

The BOS' general approach to the Project is revealed by its approvingly citing the following from the provisions of the County Overly District:

> "[t]he purpose of the Country Overlay District is to discourage development…" (emphasis added)

This demonstrates that the Board's issue with the Project is not really with the Project's design, but rather its very existence as a proposal. This is precisely the attitude and approach that Chapter 40B is intended to counteract.

106 SURFSIDE RD.

40B

Town Counsel Response to Applicant Memo dated 4/6/2016

FILE NO. 04-16

KOPELMAN AND PAIGE, P.C.
The Leader in Public Sector Law

101 Arch Street
Boston, MA 02110
T: 617.556.0007
F: 617.654.1735
www.k-plaw.com
Ilana M. Quirk
iquirk@k-plaw.coM

April 13, 2016

Nantucket Zoning Board of Appeals
Nantucket Town Hall
16 Broad Street
Nantucket, MA 02554

Re: Surfside Commons 40B – Sewer Connection Authority of the ZBA under St. 2008, c.396

Dear Members of the Zoning Board of Appeals,

You requested an opinion regarding the April 6, 2016 Memo by counsel for Surfside Commons, LLC ("Surfside"). First, Surfside asserts the "Act Authorizing the Establishment of the Nantucket Sewer Commission and Sewer Districts in the Town of Nantucket" (St. 2008, c.396) ("Sewer Act") authorizes the Nantucket Sewer Commission ("Commission") to allow an extension of sewer infrastructure outside of the sewer districts established by by-law under the Act by Town Meeting, without any further Town Meeting action, if the extension is for affordable housing constructed under G.L. c.40B; and, therefore, the Zoning Board of Appeals ("ZBA") is authorized to approve such an extension under G.L. c.40B without any further Town Meeting action. Second, Surfside asserts that, even if Town Meeting action were necessary under the Sewer Act to approve a sewer extension, then Town Meeting is a "local board" within the meaning of G.L.c.40B, §§20-23; and, therefore, the ZBA may sit as Town Meeting under the authority granted under G.L. c.40B; and take action to approve an extension of sewer infrastructure outside of the established sewer district.

In my opinion, each of the two opinions asserted by Surfside is incorrect for the reasons set forth below.

First, in my opinion, the Sewer Act by its plain language does not authorize a local board to approve an extension to the sewer system for affordable housing constructed under G.L. c.40B, unless Town Meeting previously defined affordable housing constructed under G.L. c.40B as a "public service use," which Town Meeting has not done.

Section 1 of the Sewer Act authorized Town Meeting to create a sewer system by adoption of by-laws that designate sewer districts. Section 10 of the Sewer Act provides that "owners of land not within the sewer districts defined and established pursuant to section 1 … shall not be permitted to connect to the town's sewer system, except as provided for under this act." Section 11 of the Sewe4r Act (the section upon which Surfside relies) authorizes the Sewer Commission "to permit extensions to … the sewer system, subject to capacity, to serve … public service uses **as defined by the municipality**; provided, however, that such uses **may** include, but shall not be limited to, affordable housing constructed pursuant to chapter 40B … of the General Laws …." (Emphasis added.)

Surfside asserts that Section 11 requires that affordable housing constructed under G.L.c.40B ***shall*** be "treated as "public service uses;" however, Section 11 contains no such command. To the contrary, Section 11 specifically provides that the Town, through the definitions adopted by Town Meeting (whether under a duly promulgated by-law provision or a resolution), "***may*** include … affordable housing constructed pursuant to chapter 40B and 40R of the General Laws" within the definition of "public service uses." (Emphasis added.) If "shall" was intended, that word would have been used.

In other words, Section 11 of the Sewer Act does **not** state that "affordable housing uses "***shall*** be included" in the definition of "public services uses," only that such uses "***may*** be included" by Town Meeting within that definition; and there is not a duly promulgated by-law (or resolution) by which Town Meeting has included affordable housing constructed under G.L. c.40B within the definition of "public services uses" under the Sewer Act.

Certainly, the addition of language within the Sewer Act, to allow Town Meeting to define affordable housing constructed under G.L. c.40B as a "public services use" does allow Town Meeting to provide for a specific and exceptional category for such construction, but the language does not compel Town Meeting to take that legislative action and Town Meeting has not taken that legislative action.

Surfside argues that the "legislative history" for the Sewer Act (i.e., Surfside's assertion that the "public service use" language was added to the bill to address affordable housing issues) warrants a conclusion that the Sewer Commission and, so the ZBA sitting as the Sewer Commission, may extend the sewer district without further legislative action by Town Meeting. This is incorrect also, in my opinion,

The plain language of Section 11 of the Sewer Act provides that the Sewer Commission may "permit extensions to … the sewer system, subject to capacity, to serve … **public service uses as defined by the municipality**; provided, however, that such uses may include, but shall not be limited to, affordable housing constructed pursuant to chapter 40B … of the General Laws….." When the plain meaning of a statute is clear and unambiguous, as this language is, the interpretation of the statute does not turn on extrinsic sources, unless a literal construction would yield an absurd or unworkable result. Commonwealth v. Perella, 464 Mass. 274, 276 (2013). The statutory language itself is the" primary source of insight." Id (citing Commonwealth v. Millican, 449 Mass. 298, 300-302 (2007). The fact that the language added is discretionary in nature (i.e., the use of the word "may" rather than the word "shall") is all the legislative history necessary. Town Meeting has not defined the term "public services uses" as including affordable housing constructed under G.L. c.40B.

As a result, legislative action by Town Meeting is required under the Sewer Act in order to connect any property to the sewer system that is outside of the sewer districts already designated by Town Meeting.

Second, in my opinion, Town Meeting is a legislative body and is not a local permitting board for purposes of G.L. c.40B and, therefore, the ZBA may not sit as Town Meeting under G.L. c.40B and take legislative action that is reserved to Town Meeting to enact a by-law to extend the sewer district to Surfside's property.

Certainly, the ZBA sits, under G.L. c.40B, as any local board that has "supervision of the construction of buildings or the power of enforcing municipal building laws"; however, the legislative action that Town Meeting to adopt by-laws (such as the by-laws contemplated under the Sewer Act) is not an action that involves the supervision of the construction of buildings.

It is settled that Town Meeting has two functions: (1) to take part in the election process; and (2) to act "as the legislative arm " of the Town. Opinion of the Justices to the Senate, 358 Mass. 838 (1971). Town Meeting does not issue land use permits or approvals and is not a "local board" within the meaning of G.L. c.40B, §20. Zoning Board of Appeals of Groton v. Housing Appeals Committee, 451 Mass. 35, 38 (2008)(G.L. c.40B cannot be used to compel the grant of an easement by a municipality, which would require town meeting action). "The phrase "permits or approvals," read in the context of the entire Act, refers to building permits and other approvals typically given on application to, and evaluation by, separate local agencies, boards, or commissions whose approval would otherwise be required for a housing development to go forward." Id. G.L. c.40B, §20 and §21 refer to specific local boards that grant land use permits and the ZBA's jurisdiction under G.L. c.40B is "necessarily limited to the types of concerns and powers of these boards" and while the list of specific boards is not exhaustive, the jurisdiction of the ZBA is limited to the functions that local boards exercise when issuing permits in relation to the "height, site plan, size or shape, or building materials" of a project. See, Zoning Board of Amesbury v. Housing Appeals Committee, 457 Mass. 748, 755-756 (2010).

Finally, while it is true that, under 760 CMR 56.05(7), the ZBA may grant a waiver from "Local Requirements and Regulations, " that term, under 760 CMR 56.01, is defined as the existing legislative actions "which are more restrictive than state requirements;" but, here, the relevant by-law that created the existing sewer districts is **pursuant to a state law** and, so, the bylaw is not more restrictive than state requirements allows. Even more to the point, however, Surfside does not seek a ***waiver*** of the relevant by-law that Town Meeting adopted under the Sewer Act to create the existing sewer district, rather, Surfside is requesting the ZBA to take new legislative action that is necessary under the Sewer Act in order to extend the sewer district to include Surfside's property. The ZBA does not have that authority.

So, in my summary, it is my opinion that the Zoning Board of Appeals does not have the authority, sitting as the Sewer Commission, to extend the existing sewer district, which can be accomplished only by Town Meeting by by-law under the Sewer Act, to include Surfside's property; and, furthermore, G.L. c.40B does not confer Town Meeting's legislative power to enact or amend a by-law to extend the sewer district under the Sewer Act to include Surfside's property because Town Meeting is not a Local Board under G.L .c.40B, §20 or §21.

Very truly yours,

Ilana M. Quirk

IMQ/ao
cc: Town Manager
552879//NANT40B/0005