



**KOPELMAN AND PAIGE, P.C.**

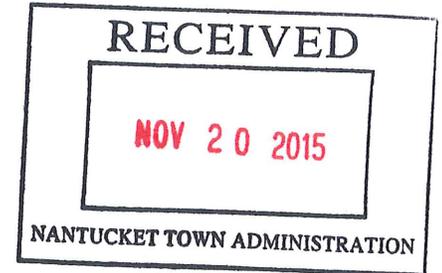
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November 18, 2015

**BY ELECTRONIC MAIL (rmason@mhp.net)**  
**AND FEDERAL EXPRESS**

Mr. Richard A. Mason, Director of Lending  
Massachusetts Housing Partnership  
160 Federal Street  
Boston, MA 02110



Re: Surfside Commons 40B – Project Eligibility Letter Application

Applicant: Surfside Commons LLC c/o Atlantic Development  
Project: Surfside Commons in Nantucket/56 rental units on 2.5 acres  
Location: 106 Surfside Road, Nantucket, MA

Dear Mr. Mason:

The Town of Nantucket (“Town”) received a copy of the November 9, 2015 correspondence from Attorney Schwartz on behalf of Surfside Commons, LLC (“Surfside”). (Unfortunately, the Town’s attorneys were not copied, as inaccurate e-mail addresses were used.) The Town Manager requested yesterday, when we learned of the letter from news accounts, that the following response to the points raised by Attorney Schwartz on behalf of Surfside be made.

**1. Sewer Extension Issue.**

Surfside asserts the 2008 “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 grant a sewer permit to extend sewer infrastructure outside of the sewer districts established 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 is authorized to permit such an extension under G.L. c.40B without Town Meeting action.

Surfside is incorrect.

Section 1 of the Act authorized Town Meeting to create a sewer system by adoption of by-laws that designate sewer districts. Section 10 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 (the section upon which Surfside relies) authorizes the 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 and 40R of the General Laws ... within such districts.”

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First, Surfside incorrectly concludes that Section 11 requires that affordable housing *shall* be “treated as “public service uses;” however, Section 11 specifically provides that the Town, through the definitions adopted by Town Meeting under duly promulgated by-law provisions, “*may* include ... affordable housing constructed pursuant to chapter 40B and 40R of the General Laws” within the definition of “public service uses.” (Emphasis added.) So, Section 11 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, as Surfside knows, there is not a duly promulgated by-law by which Town Meeting has included affordable housing constructed under G.L. c.40B within the definition of “public services uses.”

Certainly, the addition of language within the Act, to allow the Town to define affordable housing constructed under G.L. c.40B as “public services uses” allows the Town to provide a specific and exceptional category for such construction, but it does not compel the Town to do so.

Second, Surfside incorrectly concludes that Section 11 authorizes the Commission to extend the sewer system *outside* the sewer system, to serve public service uses; however, it does not. Section 11 specifically and expressly provides the Commission only with authority to “permit extensions, new connections or increases to the sewer system ... within such districts” as have been designated by Town Meeting under Section 1.

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

## **2. Water and Sewer Costs.**

Next, Surfside argues its failure to address sewer and water costs within its pro forma is not a fatal flaw because, it asserts, the Town should not assume that “the cost of extending the sewer line to the Project will be borne only by the Applicant rather than the Town.” Surfside argues that 760 CMR 56.05(8)(d) applies because the Town cannot require an applicant to “address a pre-existing condition affecting the municipality generally.”

Surfside is incorrect, again.

The extension of a sewer main to reach a property that is outside of the sewer system and its designated districts is not a pre-existing condition that a municipality is required to pay the cost of addressing. See Woodcrest Village Association v. Maynard, HAC No. 72-13, slip op. at 18-19

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(February 13, 1974)(Where there is no neglect by the Town, developer had to construct the new sewer line at its own expense).

Surfside cannot reasonably argue that any part of the cost to install new mains, which are proposed in order to reach new parts of the Town (and, in the case of the sewer main, to reach a property that is outside of the sewer district), should be borne by the Town. If the project were to go forward, Surfside would be required to bear the entire cost of this new infrastructure, which would be for its sole benefit.

### **3. Design Issues.**

Design issue concerns are central to Nantucket's viability as a tourist attraction, which is the life's blood of the Town's economy and design issues can and should be considered by MHP when reviewing this matter. Contrary to Surfside's statement, a "lengthy response on design issues" **IS** required. The "substantial modifications" that were purportedly made are insignificant and meaningless, neither addressing **ANY** of the significant issues raised (height, bulk, lot coverage, etc.) nor the absolute incompatibility of the proposal with its neighbors and overall setting.

Further, the speculative and unwarranted comparison to the *Hanover* case in Andover ignores the active implementation of Nantucket's current Master Plan, overstates that the Town is "relying" on it to deny the PEL when it is one of several compelling reasons to do so and cites housing statistics for a time period primarily **BEFORE** it was adopted. In fact the Town most recently voted several zoning changes (Articles 1 and 2: Special Town Meeting, November 9, 2015) that will allow Nantucket to meet or exceed affordable housing production goals within the planning time frame of the Master Plan (2009-2019). Key facts to local support of these (and other) articles were that: (1) the proposed site for both ownership (100 units) and rental (225 units) housing is located within the Town Sewer District as voted by Town Meeting (see Article 70, 2014 ATM), (2) the site complies with local design and layout issues including Historic District Commission (HDC) review, and (3) the site conforms with the well established principles of the Master Plan, none of which apply to the Surfside Commons proposal.

The Town, again, urges MHP to deny Surfside's application for a Project Eligibility Letter for the subject project.

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Thank you very much for your consideration.

Very truly yours,

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, representing the name Ilana M. Quirk.

Ilana M. Quirk

IMQ/bp

cc: Town Manager

Steven Schwartz, Esq.

536001/NANT40B/0005