

TO: Nantucket Zoning Board of Appeals
FROM: Goulston & Storrs PC
DATE: April 6, 2016
SUBJECT: Surfside Commons (the "Development")

1. Background

On December 18, 2015, Surfside Commons LLC (the "Applicant") submitted to the Nantucket Zoning Board of Appeals (the "ZBA") an application (the "Application") for a comprehensive permit for a rental development consisting of 56 units (the "Project") pursuant to M.G.L. c. 40B §§20-23 and its implementing regulations at 760 CMR 56.00 *et seq.* (collectively, "Chapter 40B") on a site on Nantucket (the "Town") located at 106 Surfside Road (the "Site"). The Project will be served by the Town sewer system and will involve the extension of the existing sewer line via a new force main to be installed along Surfside Road and Fairgrounds Road. The Site is not currently located in a Town "sewer district" established under Chapter 396 of Acts of 2008 (the "Act"). Among the waivers requested from the ZBA in the Application is a waiver of all requirements of the Act for extension of the Town's sewer district and approval of the Project's connection to the Town's sewer system (the "Waiver"). At the first hearing on the Application on January 14, 2016, the ZBA requested a memorandum from counsel for the Applicant and the ZBA regarding the ZBA's authority to grant the requested Waiver. This memorandum responds to that request on behalf of the Applicant.

2. Summary

Pursuant to Chapter 40B, the ZBA has the authority and the exclusive jurisdiction to grant the Waiver. Both Town Meeting and the Town's Board of Selectmen ("BOS") acting as the Town's Sewer Commission (the "Sewer Commission") are "local boards" as such term is defined in Chapter 40B. Moreover, the Act itself contemplates that projects proposed in the Town under Chapter 40B would not be required to seek either Town Meeting or BOS approval.

3. Summary of the Act's Relevant Provisions

Section 1 of the Act provides in pertinent part that the Town "acting by and through the Nantucket sewer commission may lay out, plan, construct, maintain and operate a system or systems of common sewers for a part or whole of its territory, as may be from time to time defined and established by adoption by town meeting of one or more by-laws as a designated

sewer district under the jurisdiction and control of the sewer commission No other sewers shall be constructed in any public roads or ways of the town which are not within the limits of such designated sewer districts and which are not under the control of the sewer commission.”¹.

The upshot is that under the terms of the Act, in general, if a property in the Town is not located in a sewer district, in order for any improvements on that property to be connected to the Town’s sewer system, two things need to happen: 1) the Town Meeting must vote to create a new sewer district or extend an existing sewer district to include the property; and 2) the BOS must approve the extension and connection of that property to the Town’s sewer system.

However, Section 11 of the Act (“Section 11”) reads as follows:

“Notwithstanding anything to the contrary contained herein, the board having charge of the maintenance and repair of sewers may at any time permit extensions, new connections or increases in flow to the sewer system, subject to capacity, to serve municipal buildings or public restrooms or other 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 chapters 40B and 40R of the General Laws, without thereby creating any entitlement on the part of any person to connect to such sewer system, and subject to capacity, in order of application, may permit or if in the public interest, may require, extensions, new connections or new flow to the sewer system within such districts.” (emphasis added)

The legislative history of the Act is instructive as to the meaning and intent of Section 11. As originally filed by the House, Section 11 did not include the clause: “or other 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 chapters 40B and 40R of the General Laws” (the “Language”). In an October 9, 2008, message to the House, the Governor stated that as originally written, “the bill raises concerns that affordable housing developments could be denied access to sewer connections”. As a result, the final version of the bill included the Language, which amended version was approved by the House on December 4, 2008, and signed by the Governor on December 17, 2008.

4. Town Meeting and the BOS are “Local Boards” under Chapter 40B.

Under Section 21 of Chapter 40B, a zoning board of appeals has the exclusive jurisdiction to issue a comprehensive permit pursuant to a single application “in lieu of separate applications to the applicable local boards.” The zoning board of appeals shall “have the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application.”

¹ It is our understanding that the Town has not established an independent sewer commission under the Act, and instead the BOS acts as the Sewer Commission.

Under 760 CMR 56.02, “local board” is defined as:

“any local board or official, including, but not limited to any board of survey; board of health; planning board; conservation commission; historical commission; water, sewer, or other commission or district; fire, police, traffic, or other department; building inspector or similar official or board; city council or board of selectmen. All boards, regardless of their geographical jurisdiction or their source of authority (that is, including boards created by special acts of the legislature or by other legislative action) shall be deemed Local Boards if they perform functions usually performed by locally created boards.”
(emphasis added)

There is no language in the Act indicating that the legislature intended that the Act exclude either Town Meeting or the Town Sewer Commission from the definition of a “local board” under Chapter 40B, the definition of which includes boards of selectmen. As the Supreme Judicial Court found in Dennis Housing Corp. V. Zoning Bd. of Appeals of Dennis, 439 Mass. 71 (2003):

“[t]he ‘local boards’ whose ordinary jurisdiction may be exercised by the [ZBA] under [Chapter 40B] are defined as ‘any town or city board of survey, board of health, board of subdivision control appeals, planning board, building inspector or the officer or board having supervision of the construction of buildings or the power of enforcing municipal building laws, or city council or board of selectmen.’”

Town Meeting and the BOS acting as the Town’s Sewer Commission, whose approval would otherwise be required to extend the Town’s sewer district to include the Site and connect the Project to the Town’s sewer system, are clearly “local boards” under Chapter 40B. This is true even though the Act specifically mandates approval by Town Meeting and the Sewer Commission, because in this regard the Act is a “special act of the legislature” under which the bodies in question are performing “functions usually performed by locally created boards”. It follows that the provisions of the Act authorizing the Town Meeting to approve new sewer districts and extend existing sewer districts, and granting the Sewer Commission the power to permit extensions, new connections or increases in flow to the sewer system are “Local Requirements and Regulations”, as defined in 760 CMR 56.02. These requirements are within the exclusive jurisdiction of the ZBA in the Chapter 40B context. See, e.g. Board of Appeals of Wilmington v. Wilmington Arboretum Apts. Associates Limited Partnership, 39 Mass. App. Ct. 1106, (Mass. App. Ct. September 8, 1995), with Judgment after Rescript dated October 24, 1995.

5. Specific Language of Section 11 of the Act

The language of the Act itself provides further support that the ZBA has the exclusive authority to grant approval for the sewer extension to serve the Project. As quoted above, Section 11 states that “the board having charge of maintenance and repair of sewers” may grant

approval for extensions to serve public service uses, specifically including “affordable housing constructed pursuant to chapter[] 40B”. Based on the definition of “local board” and the relevant case law referenced above, there can be no doubt that the “board having charge of maintenance and repair of sewers” is a local board. Therefore, this board’s authority is subsumed within the ZBA’s authority under Chapter 40B. It inexorably follows that the comprehensive permit issued by the ZBA is the sole approval necessary to connect the Project to the Town’s sewer system.

6. Conclusion

Under Chapter 40B, the ZBA has the exclusive jurisdiction and authority to allow the Project to connect to the Town’s sewer system by issuing a comprehensive permit. No other approval is required, neither from the Town Meeting to create a new sewer district or extend the existing sewer district, nor from the BOS acting as the Sewer Commission to connect to the Town’s sewer system. Nothing in the language of the Act conflicts with this, and in fact, Section 11 of the Act confirms this conclusion. Any other conclusion would result in the ability of the Town to stymie any Chapter 40B project proposed to be undertaken in the Town outside a current sewer district, which would be in direct conflict of the purposes of Chapter 40B “to reduce regulatory barriers that impede the development of [affordable] housing.”