

**TO:** Nantucket Zoning Board of Appeals  
**FROM:** Goulston & Storrs PC  
**DATE:** April 11, 2016  
**SUBJECT:** Surfside Commons (the "Project")

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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)."

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 calculations 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 Overlay 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.