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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 Sewer 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.)

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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.

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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.

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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

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