



ZONING BOARD OF APPEALS

Public Meeting

2 Fairgrounds Road
Nantucket, Massachusetts 02554

www.nantucket-ma.gov

Commissioners: Ed Toole (Chair), Lisa Botticelli (Vice chair), Susan McCarthy (Clerk), Michael J. O'Mara, Kerim Koseatac
Alternates: Mark Poor, Geoff Thayer, Jim Mondani

~~ MINUTES ~~

Monday, May 20, 2019

4 Fairgrounds Road, Public Safety Facility Community Room – 12:00 p.m.

Called to order at 12:22 p.m. and Announcements made.

Staff in attendance: Eleanor Antonietti, Zoning Administrator; Terry Norton, Town Minutes Taker
Attending Members: Toole, Botticelli, McCarthy, Thayer, Mondani
Absent: O'Mara, Koseatac, Poor
Late: Mondani, 12:27 p.m.
Town Representative: George Pucci, K&P Law, P.C.; Ed Marchant, 40B Advisor

Agenda adopted by unanimous consent

I. APPROVAL OF MINUTES

Minutes for May 10, 2019: Ms. Botticelli – Size of lots page two: where it says 1250 square feet (SF) per bedroom; should read 7,500SF for duplex.

Motion to Approve as amended. (made by: Botticelli) (seconded by: Thayer) Carried unanimously

II. OLD BUSINESS

20-18 Surfside Crossing, LLC Surfside Crossing 40B Haverty/Reade

The Board will have deliberations regarding the application for a Comprehensive Permit in accordance with M.G.L. Chapter 40B. The Locus is situated at 3, 5, 7 and 9 South Shore Road and is shown on Assessor's Map 67 as Parcels 336, 336.9, 336.8, and 336.7 and is shown as Lots 4, 3, 2, and 1 on Plan Book 25, Page 50 as recorded at the Nantucket Registry of Deeds. The total lot area of the combined parcels is approximately 13.5 acres. Evidence of owner's title is recorded in Book 1612, Page 62 at the Nantucket Registry of Deeds. The property is located in a Limited Use General 2 (LUG-2) and within the Public Wellhead Recharge District.

Voting Toole, Botticelli, McCarthy, Thayer, Mondani

Alternates None

Documentation Working draft 40B Comprehensive Permit decision; architectural drawings.

Discussion **Pucci** – This work is prepared for discussion only and based on information brought up in the discussion. In it we talk about findings and public information. Section IV Subsection C is about project economics. You don't have Safe Harbor available, but a narrative is provided about the Town's efforts regarding Affordable Housing; you would have had Safe Harbor if it weren't for the appeal of a certain project. Regarding condition specific to this project, there will be additional conditions to the project; he has place holders in this draft.

Antonietti – There is a meeting scheduled for May 31 at 2 p.m.

Marchant – The date on page 1 at the end of second paragraph should read April 11.

Toole – Page 2, Section III, Summary Decision, asked if that is a suggestion to insert a number of units.

Pucci – That raises an issue about overburdening this site and the area. You were looking at the impact to reach a decision on the number of units; if you render an approval with conditions, I recommend giving a maximum number of units in your decision. If you are reducing the size or limiting the number of buildings, you might want to provide the applicant some flexibility as to which buildings he constructs.

Toole – We had 47 single-family units (SFU), 7 fourplexes and 4 duplexes. We would further define the maximum number based upon traffic, health and safety.

Marchant – You want to protect yourself with a maximum of units; but you might want to give a range of SFU, fourplex units, and duplex units.

Toole – Reviewed reasons for no eightplex units. The maximum-sized multi-family unit (MFU) will be a fourplex.

Marchant – It is important to have a defined term for the plan. On Page 2 you want to define the "comprehensive permit plan" since there have been so many plans submitted for this project.

Toole – Section IV, Affordable Housing Production Plan, that is great to have in there; we want to reference it. Section IV.B is a statement of fact from the record about failure to provide information to help this Board make an informed decision.

Pucci – He recommends this because a lot of things discussed in the hearing process called for more public hearing sessions.

Toole – Everyone feels the traffic issue isn't settled; a lot of issues weren't settled and would have been with further hearings.

Section IV.C, Applicant's Failure to Provide Information, there was no discussion of this; we never got to discuss what would render the project uneconomic.

Pucci – Another place it came up was the sewer; there was the statement the Board's option was too expensive. Alone or in the aggregate, a condition could be argued as rendering the project uneconomic.

Marchant – The developer's fee of 15% is considered economic; anything less is uneconomic.

McCarthy – An important point to bring up is that if they argue this is now uneconomic and still hang onto the year-round component, that's their choice. That has nothing to do with our role; it's an aspect of the program the Board couldn't address.

Marchant – The issue will come up at the Housing Appeals Commission (HAC); that's where the numbers will be presented. Had we sufficient time, we would be reviewing the conditions and they would be able to argue whether or not a condition makes the project uneconomic.

Pucci – He has a problem, as the Town's legal representative, about not raising the issue and allowing the applicant to treat the Public Hearing process as a sham so they could have a hearing with HAC making HAC the permitting agency. The Board's issue about year-round housing would be stated in subsection C.

Toole – Section IV.D, Overburdening Development Site and Adverse Impacts upon Local Health, all our conditions are related to that; in general, we think this development overburdens the site.

Pucci – It is important to have findings in support your argument. He will provide information based upon what's in the record.

McCarthy – Asked if it's possible to talk about the objections of the neighbors.

Pucci – There will be an appendix to the decision which will have the entire record; it's important to highlight some of the opposition to the project.

Marchant – It's also important to note how overreaching the 156-unit proposal was; that was a shock-and-awe proposal.

Toole – Section V, Requested Waivers and Exemptions, Number 3 is the one he has issues with. There has been no discussion of the waiver list as it relates to the economics of the project. Appendix C will be the list of requested waivers.

Mondani – Noted that with all the conditions, we are essentially denying the proposed project.

Pucci – This is a working draft; it isn't necessarily an approval. If you deny, you have a different burden of proof.

Toole – Section VII looks like a boiler plate addition; if they want more waivers, they can ask.

Marchant – This is important because if the developer didn't ask for a waiver but submitted plans indicating a condition requiring a waiver, you can add that.

Mondani – Going back to Section VI, Eligibility, the extension language, asked if we could clarify that sentence.

Marchant – A project eligibility letter (PEL) is good for 2 years but once the application is submitted, the PEL is moot. We don't want extraneous stuff in here; once they submit the Comprehensive Permit application, you're set. Endorsement comes at the final stage; once the appeal process is complete, the applicant must submit a final plan. We want to be able to say they can build a reasonable project consistent with what you are talking about. Mass Housing won't execute a regulatory agreement until it's ready to give final approval. The issue of limited-dividend status has been litigated at HAC. They just have to be a limited-dividend organization, which they'll do when they sign the regulatory agreement; they can't start construction until they receive final approval. Feels this is not a real issue.

Pucci – If you have a good-faith argument, it should be in there. He doesn't add extraneous information. Mr. Marchant can provide a red-pencil version of items he thinks should come out and the Board can make their decision.

Toole – It is okay with the Board for Mr. Marchant and Mr. Pucci to work out the issue of what should or should not be in the decision.

Mondani – His only comment on Section VII is that it defines the term.

Marchant – Noted that under Mass Housing, the Town is not a party to the regulatory agreement.

Toole – VIII, says if they want to make substantial changes, they need approval from ZBA.

Marchant – He'll talk to Mr. Pucci about this too. You might have someone lead to an argument about what is substantial. It might be adequate to reference regulations.

Toole – IX there are several points where the Board has 45 days to review something; the ZBA meets normally once a month and questions if that is adequate for the Board. It comes up in several spots.

Marchant – he would hold that in abeyance. Once there's a change, there is a time-schedule for that.

Toole – The response could be they have to come to a ZBA meeting.

Mondani – We don't have a final plan and are using bits of information, we need more time. He's has problems with the post issuance of material; asked what happens if this Board fails to approve this. We don't have a site plan.

Marchant – You need an updated phase and development plan or a plan on how residents will be protected. The Board can make the decision that information submitted was inadequate. We want to look at necessary supplemental information needed.

Antonietti – If they submit plans or documents, asked if it could be put under Other Business on the regular-meeting agenda to review that information.

- Toole** – Section VI. Site Specific Conditions, subsection 10 addresses the 50-foot frontage; only Lots 16 and 41 that are allowed smaller frontage. Asked if the Board talked about the 5-bedroom lots being wider.
Subsection 11 is no spas.
- Marchant** – You might want to detail reasons why: violation of distinguishing market rates from affordables at the curb as well as noise.
- Botticelli** – One is a pork-chop lot and the other is at the end of a cul-d-sac. She has the information to create a footprint/ground-cover chart.
- Toole** – Subsection 13, we all agree some buildings are not in keeping with the area. One of the models has a full basement unit and that is not permissible. None of the other projects have basement units; he believes none of the other projects have basement bedrooms.
- Marchant** – The issue with the 4- and 5-unit buildings is all the bedrooms were in the basement; you stated at least one bedroom has to be above grade.
- Pucci** – You’ve got commentary on the record about no basement units and basement bedrooms.
- Toole** – We can limit the groundcover to 30%; that would keep the buildings from getting larger. The 5-bedroom SFUs have two bedrooms in the basement.
- Botticelli** – She’d prefer smaller SFUs with basement bedrooms.
- Pucci** – Confirmed that the 8-unit MFUs are being eliminated.
- Toole** – There are 2 fourplexes and 4 8-unit MFUs on the plan; we are allowing 7 fourplexes.
- Botticelli** – Wants to limit the Recreation Building by groundcover under the Zoning Bylaw: i.e. 1,500SF groundcover as defined by the Zoning Bylaw; the total useable square footage is 4,000 SF.
- Marchant** – Suggested adding that the land freed up by the reduction in groundcover will be used as green space.
- Toole** – The Recreation Building was discussed at a hearing and we indicated it was too large; it came back in the same form without any dimensions. We want to limit its use with no outside rentals and no catering. We want to comment about the inappropriate size of the original design.
- Pucci** – It would be helpful if you forward issues like that to Ms. Antonietti who will forward it to me.
- Mondani** – He has a problem with limiting the pool hours; feels that should be up to the Homeowners Association (HOA).
- Toole** – Pools can be very noisy; the neighbors will notice this pool. The HOA might have a different “threshold for pain” than the neighbors.
- Mondani** – We addressed Americans with Disabilities Act (ADA) access with respect to the pool.
- Marchant** – This came up on another project so was addressed here. With the advent of Airbnb, adding rules like this will provide a safeguard. You can’t grant relief from any building code or ADA requirement.
- Botticelli** – Subsection 18, this addresses the lot sizes by building type. We need to structure this so that it’s clearer to follow; suggested breaking up into sections by housing type.
- Toole** – Subsection 18, that would be the proportion for everything. Subsection 19 for 5-bedroom homes, 20 for duplex, and 21 for fourplexes.
- Pucci** – Agrees the breakdown by unit type would be better.
- Toole** – Subsection 20 reads 7 parking spaces for fourplexes and 6 parking spaces for the duplexes and one per bedroom on the MFUs. We never addressed ancillary overflow parking; we should note that there is a minimum of overflow parking spots.
- Marchant** – Suggested a table with the minimum lot size, minimum frontage, and parking spaces. We singled out the SFUs as having a disproportionate distribution of bedrooms between affordable and market-rate; that should apply to all models.
- Pucci** – This is to the point they do not have any affordable 5-bedroom units; it might have to be more clearly worded.
- Botticelli** – It would be good to make the point that one parking space per bedroom is based upon a reasonable Island model.
- Toole** – We can discuss gutters in the Historic District Commission (HDC) discussion. It says all roof-water drainage must be channeled to on-site drainage systems; every roof plane will have to be guttered with downspouts.
- Botticelli** – On the buffers, we want a split rail fence defining the edge of the no-disturb buffer zones.
- Toole** – No additional construction or expansion or conversion of living spaces; no home-occupations. For commercial vehicles, you should be able to park your personal vehicle if it has commercial plates.
- Mondani** – Back to subsection 20, the approval of the maintenance plan, asked when that would be done.
- Marchant** – Prior to issuance of a building permit.
- Mondani** – Subsection 21, we have no landscape plan; we should reference the Nantucket Conservation Commission invasive species list. The State does define native plants as post glacial.
- Toole** – Subsection 27, Exterior Architectural Elements, we said no changes were allowed.
- Botticelli** – That’s good to have in here; we don’t want them coming to the ZBA for a color change. HDC is very conscious of where utilities and air-conditioning units (A/C) go in relation to the front of the building; none of that should be on the front façade.

Toole – We should define the “front” as what faces the street regarding utilities and trash and A/C. We don’t have a plan of how buildings are set on the lot. All units, market and affordable, should have central air, if the developers are providing it for the market-rate homes.

McCarthy – It would be helpful to have a Subsection 30 table listing utilities and amenities.

Marchant – All dwelling units with basements must have direct exterior access to the basement including a stairway. We want all structures to have that.

Toole – Referencing the plans is the way to go. The duplexes have no exterior basement access; their basements are not finished, as drawn they have no window wells or doors. All SFUs should have direct exterior basement access.

McCarthy – All dwellings units should have direct exterior access.

Discussion about exterior access of the fourplexes.

Toole – Subsection 35, his only comment on road materials is that it can be would be stone chip-seal or granite curbing and asphalt roadways or a combination. Should add that no garages are allowed. We should mention sheds have to be provided to all SFU units as shown on the plan.

Botticelli – Should note that sheds are not allowed on the MFU lots.

Toole – The next section should incorporate John Chessia’s conditions. The Fire Chief’s comments are included. He received the letter on May 15.

Members read the letter from the Fire Chief.

Toole – His thought is to incorporate all those concerns and conditions.

Botticelli – If they have to eliminate the one dead-end road, that impacts density.

Mondani – The concern about accessing the MFUs, asked if that still exists with the elimination of the condos.

Botticelli – Without a definitive plan, questions how the Board can assess accessibility of emergency vehicles.

Pucci – The applicant agreed for those to come in after closure of the hearings. Suggests the way of dealing with them is to add them to conditions; if that results in a new plan, so be it.

Botticelli – The Fire Chief has a concern about the availability of water to fight a fire; it’s on the same water main as the hospital and schools.

Marchant – The Fire Chief must sign off on the issuance of the building permit; the flow test has to be done prior to that.

Mondani – This letter is more than a checklist. The proposal places an undue burden on the Fire Department; they don’t know if they have sufficient water to fight a fire or can access all the buildings or evacuate the area in the event of a disaster.

Toole – This speaks to the lack of information.

Pucci – We would put conditions in per the Fire Chief’s recommendations. If you deny the project because you can’t condition it to meet local health and safety concerns, this letter would be referenced.

Botticelli – Some of the concerns can be conditioned out; however, the concern about parking in front of a structure and not being able to reach it is more critical and arises from the density.

Toole – We put the conditions in and if we still aren’t comfortable that we’ve met the health and safety needs of the neighborhood, we have grounds to deny it. There are some issues that the current plan doesn’t meet.

Pucci – The approval with conditions is going to dictate the number of units. The question is can it be conditioned per the Fire Chief’s comments; he also raised access of emergency vehicles and fire safety issues and questions if those be conditioned to satisfy those concerns.

Toole – Unless this is the “silver bullet” for a denial, we would direct Mr. Pucci to include the Fire Chief’s concerns as conditions. We would never address the water pressure issue; they have to prove that for the building permit.

Marchant – Had the public hearing been allowed to continue, this would have been negotiated.

Toole – We talked about public sewer, we are going to defer to the Town’s consultant and their recommended plan.

Pucci – There are quite a lot of conditions going into that in addition to Weston and Sampson’s recommendations.

Toole – Public water connection was addressed; there will be a bunch of conditions. One of the most important is providing Massachusetts DEP (DEP) approval to exceed with withdrawal limits. He thinks somewhere in the narrative or conditions there should be an emphasis on the Zone 2 issues; that is a different set of requirements. Local Requirements: fees and charges. We have not waived sewer connection fees in the past; they can go to the Select Board for that as other projects have.

Mondani – Confirmed the Board isn’t granting waivers to fees.

Marchant – Should have a simple, declarative statement that all fees and charges are not being waived.

Pucci – You don’t want to waive any related fees and charges; he thought he covered that under Section XLIV.

Marchant – It would be a good idea to include the bedroom *pro rata* in Section XLIX. There should be a different section on the HOA documents and condo documents.

Toole – Profitability outlines that any excess goes to the Town. He has some issues with marketability; asked if the Board will get to review the marketing plan.

Marchant – Part of the final approval is meeting the fair-housing marketing plan. They will hire a lottery agent and a monitoring agent; you can’t count these against Subsidized Housing Inventor without the fair-housing marketing plan. You don’t need to go into that.

- Toole** – Reviewed conditions to be met before construction begins. Final review of the approved construction plan, we aren't engineers or experts and 45 days isn't enough time for a peer review.
- Marchant** – 40B projects are based upon a preliminary plan; once there is final approval, the building plans are submitted to the building inspector, who reviews the plans for compliance. The ZBA doesn't get involved in that. If there is a building type not normally reviewed by the building inspector, then you might ask for a peer review.
- Botticelli** – Asked if a final site plan will come back to us and will we have the time to review that. Asked if we can change the 45 days.
- Toole** – He thinks 90 days is reasonable since it would be our first look at the plan. The Town has a contract with Ed Pesce, so he could review the site plan.
- Pucci** – That would not be a public hearing. The intent of this is for the Board to review compliance; there is a separate section on their getting the building permits.
- Toole** – His main concern was that 45 days isn't adequate; also, should we be approving the plans or the Building Department.
- Pucci** – The Building Department will review the final site plans.
- Marchant** – 90 days would be reasonable.
- Toole** – On the Bond, there is the estimated cost plus 10% for inflation; it seems low to him. He would think cost times 1.5 is more reasonable.
- Marchant** – He would go with the 1.5 as well.
- Toole** – There were certain projects where the line-item costs were capped. There's a line item in the original PEL for \$250,000; that should be capped.
- Pucci** – Suggested the Board vote to allow the Chair to work with counsel on the second draft to avoid duplicate conditions.
- Motion to Authorize the Chair to work with Town Counsel and consultants on the second draft.** (made by: Botticelli) (seconded by: McCarthy). Carried unanimously
- Toole** – Back to the Bond, 1.5 times the estimated cost. He's not sure the 5-year completion date will be adequate. We should Bond the landscape at \$100,000.
- Consensus agrees on a bond of 1.5 times the estimated cost.
- Toole** – If the Bond is given to the Town, asked if the Town is required to finish the project.
- Pucci** – No, the reason for the Bond is to protect the residents if the development is partially built out.
- Toole** – There are numerous conditions that must be met before construction of homes begins. Questions who reviews the Stormwater Management Plan.
- Antonietti** – The Planning Board reviews that.
- Toole** – The landscape plans must be submitted for our approval; his concern is that what we have seen is very basic, and they can't come back with a plan that is markedly different. We don't approve something if it is not on the plan we have. There's a lot we are supposed to approve; asked if the Board should be explicit about having 90 days to do any plan review. Asked Mr. Pucci to review the draft to ensure the Board has adequate time. Asked if there should be language on the existing sewer line easement protection plan to be reviewed. Cut and fills, he'd like to have some before and after approval of the average elevation and stating that the relative average grade can't be changed. It states irrigation for the whole subdivision will be provided by a private well; arguably that would be on the landscape plan or some plan. Reviewed conditions that have to be met for a building permit.
- Subsection 61.A states the Board will review complete plans before the Building Department issues a permit; he's okay with that but we need time.
- Marchant** – That's the building inspector's responsibility; you have to be confident that if he has questions, he will ask the Board.
- Pucci** – The intent of this is similar to the HDC review ensure it complies; the building inspector should be able to confirm they meet with the Comprehensive Permit. He'll revisit this section, but he wants to ensure the Board isn't giving away their right for input.
- Toole** – We need to review the final site plan, but we need adequate time.
- Marchant** – We need to get the HOA and Condos in here somewhere.
- Toole** – On limit-of-work fencing, he thinks the entire site should be enclosed in a chain-link fence. At a minimum we want a fence along Old South Road.
- Thayer** – He thinks the split-rail and silt fences should be adequate for delineating the limit of work.
- Toole** – We should condition a fence along Old South Road; there is a lot of activity going on here. We would want to have no parking or staging of equipment along Old South Road.
- Subsection 67 addresses pre-construction conditions.
- Marchant** – You should ensure that a lot can't be sold to a 3rd-party builder and no sale of vacant lots. Cost certification is integral to a 40B; unless the building is finished, you can't certify the cost.
- Toole** – Subsection 70, Zone 2 should be referenced so there is no confusion as to the level of compliance.
- Marchant** – Subsection 71 states on-street parking is prohibitive but states it is allowed; that language needs to be cleaned up.

Toole – They can't burn stumps or bury them.

Pucci – We need to decide what to do about Board review; that's where fees come in.

Thayer – Normally the Town doesn't review it; the applicant's engineer would review and sign off on it.

Pucci – He's seen it come up where a building inspector wants an engineering review.

Thayer – Asked if \$80,000 is sufficient to cover any fees.

Antonietti – Yes.

Toole – Subsection 88 states the applicant will complete construction within 3 years of issuance of the permit.

Marchant – You are subject to reasonable market conditions.

Pucci – They have the ability to obtain an extension; he'll review it with Mr. Marchant.

Toole – Subsection 90 is important about keeping the roads clean during construction.

Subsection 91 states no clear-cutting of the site; asked if there should be some review.

Thayer – That is where a phasing plan would be helpful.

Toole – No cutting in June or July should be added; they agreed to that.

Pucci – He didn't put that in because the permit is subject to Natural Heritage Endangered Species Program conditions. He can add it.

Toole – Subsections 92, 93, 94, and 95 all make sense. Subsection 96, Prior to Issuance of Occupancy, before they get a Certificate of Occupancy (CO), we need to review and approve the management plan within a reasonable time; that needs to be added. Performance guarantee, Subsection 101.B would change to 1.5 times. We have to talk about the waivers one more time.

Pucci – The waivers need to be cleaned up.

Toole – He'd like to discuss about the building permit applications being limited; if a condition isn't met, building permits and COs are held until all the infrastructure work is done. Without the benefit of a phasing plan, we are at a disadvantage. They should have to get a Form J on every building permit.

Antonietti – Explained how the Form J works.

Toole – Asked for a bullet-point outline. There should be something on releasing the lots before the building permits and the final COs aren't issued until conditions are met. Asked if there was discussion about a Bond for the landscape; he doesn't know how to come up with the number that is reasonable. There was nothing about traffic mitigation and we talked about that. One mitigation was a cash pay-up to the Town. We never discussed a bike path connecting the site to the Surfside Road intersection.

Pucci – He has to add additional conditions; that would be there.

Toole – On the HOA, the developer is responsible until the very end.

Discussion about how to condition the developer's responsibility for the site infrastructure and when the HOA takes over.

Toole – The more we deliberate, the more it becomes apparent we don't have all the information we need. We could simplify this further by not allowing any condos since we have no management plan on those. He doesn't know if we can get through this in just one more meeting. Asked when Draft 2 might be ready.

Pucci – Realistically it will be ready Wednesday, May 29.

Discussion about adding another meeting before the May 31.

Motion Continued to Tuesday, May 28 at 4:00 p.m. in 4 Fairgrounds Road, Public Safety Facility, Community room by unanimous consent.

Vote N/A

III. ADJOURNMENT

Motion to Adjourn at 4:02 p.m. (made by: Botticelli) (seconded by: Mondani) Carried unanimously

Submitted by:
Terry L. Norton