



# ZONING BOARD OF APPEALS

## Public Meeting

2 Fairgrounds Road  
Nantucket, Massachusetts 02554

[www.nantucket-ma.gov](http://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 ~~

**Friday, April 19, 2019**

4 Fairgrounds Road, Public Safety Facility Community Room – 1:00 p.m.

Called to order at 1:11 p.m. and Announcements made.

Staff in attendance: Megan Trudel  
Attending Members: Toole, Botticelli, McCarthy, Koseatac, Thayer, Mondani  
Absent: O'Mara, Poor  
Town Representative: George Pucci, K&P Law, P.C.; Ed Marchant, 40B Advisor

Agenda adopted by unanimous consent

#### I. OLD BUSINESS

20-18      Surfside Crossing, LLC      Surfside Crossing 40B      Haverly/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, Koseatac, Mondani

Alternates      Poor, Thayer

Documentation      40B Comprehensive Permit application documentation.

Discussion      **Pucci** – The Board has 3 options: 1) approval as proposed; 2) approval with requirements and conditions; and 3) denial based on this not being consistent with local needs. Reviewed how the Department of Housing and Community Development (DHCD) defines local concerns and the State statutes regarding local concerns. Based upon the hearings there are two options: approve with conditions or deny.

**Marchant** – Based on his experience, there are two realistic options: approval with conditions and denial. Approval with conditions when appealed, places the burden of proof on the developer that the project is rendered uneconomic. The Housing Appeals Commission (HAC) defines uneconomic as a return lower than 15%; the return also cannot be higher than 20%. In a denial the burden of proof is on the Town in an appeal to prove there is a critical health or safety issue. Reviewed the benefits to the developer countered by the affordable housing requirements.

**Toole** – Questioned what the next steps would be if the board were to approve with conditions. Asked when the implied threat of reverting to the specific plan comes in.

**McCarthy** – Asked if being uneconomic is the only defense the applicant could use in an appeal.

**Pucci** – Reiterated the definition of uneconomic. The threshold question that the developer must prove to HAC is the project was rendered uneconomic by a specific condition. Further explained some conditions that could render the project uneconomic.

**Marchant** – Stated he believes that the developer will analyze all the conditions related to the economics. Explained the rule change regarding 3<sup>rd</sup>-party financial review of the conditions. The only *pro forma* was submitted for the 156-unit project.

**Pucci** – The issue about reverting to the 156-unit plan, Nantucket Land Council pointed out it was a customary practice to come in with a shock-and-awe project and then negotiate down to their actual plan; he doesn't take that plan seriously. For the developer to submit a 92-unit plan indicates that it is an economic plan. It would not be in the best interest of the applicant to claim that 92 units is not economic.

**Koseatac** – Asked how many of these projects Mr. Pucci has tried before HAC.

**Pucci** – Only a handful went to trial; many were negotiated through the appeals process. The majority of the 40Bs his firm works on are approved at the local level. He will provide the Board with a survey of HAC decisions.

**McCarthy** – She is not comfortable denying this; the Board should go through the process of creating a decision.

**Marchant** – Stated all 40B projects need to be cost certified by a DHCD approved Certified Public Accounting firm. There are rules that limit that the contractor is entitled to a 6%, a 2% overhead and a line item for general conditions of 6% and no greater than 14%.

**Toole** – Stated the Board will discuss any conditions it wants, and Mr. Pucci will be drafting the actual decision.

**Pucci** – He is also here to learn the consensus of the Board resulting from the deliberations, which could result in his drafting multiple decisions. The draft decisions would become part of the public record and be available for the Board to discuss.

**SEWER**

**Toole** – Weston & Sampson made the recommendation discussed the last meeting.

**Thayer** – The Town is very clear that the gravity sewer system and pump station at the treatment plant is the preferred system.

**Toole** – The gravity line is all part of the Town’s long-term plan.

**Thayer** – The option to have their own force main to the sewer treatment plant is the second option.

**Pucci** – We had a conference call Mr. Thayer took part between David Gray, myself, and the Weston & Sampson consultant on April 10, 2019. He provided all the information the ZBA needs to make a decision. We got it down to a point where Weston & Sampson could prepare a final recommendation; that was provided on April 11, 2019.

**Marchant** – It would be unusual for a board to go against the recommendation of a professional advisor. The gravity system would serve more than just this development; if that is your condition, you should include language that the total cost be allocated among the potential users. The other concern is the timing involved with being able to do a gravity system versus the force main built by the applicant.

**Toole** – If the developer is doing the whole thing, timing isn’t an issue.

Discussion about whether or not other residents would be required to tie in to it.

**Marchant** – If this is issued with conditions, he assumes the developer won’t be happy and this will come up at HAC. Your job is to create the conditions and give the decision you believe is correct. You might want a condition or statement that the ZBA did not require reduced-cost, year-round housing; it shouldn’t be useable for the argument the project was rendered uneconomic.

**Pucci** – Noted that the developer has made no claim that any condition or requirement would render the project uneconomic; they have to prove one or more conditions in the aggregate. Suggested that the deliberations follow a reasonable order. Discussing conditions does not mean it is a foregone conclusion the project will be approved. The decisions that end up being hotly disputed are those that don’t meet local needs. He’s optimistic for this project; you’ve had over a year of public hearings with a lot of meaningful information presented to the Board. You are the experts on how to condition a potential project. He expects a decision from this process that is “iron-clad” and tough to appeal.

**Mondani** – We have very strong health concerns about allowing the developer to do a tie in. If we include the gravity with a *pro rata*, that might make it more palatable.

The Board is in agreement to defer to the Town expert and require the applicant install the gravity sewer and other conditions as recommended by Weston and Sampson.

**Toole** – Sewer is a health and safety issue. Based on the recommendations of Weston and Sampson, the methods need to be clearly outlined on how to protect the entire length of the current shallow force mains across the property. A proposed protection plan should be submitted before the issuance of a building permit.

**TRAFFIC**

**Koseatac** – He has serious issues about traffic and archeology; in his opinion, the developer did a poor job of addressing those issues. The dates for the traffic study were not up to par.

**Botticelli** – She agrees; traffic issues have never truly been addressed and is a huge concern. The last traffic study assumed that the rotary would be placed at Fairgrounds and Old South Road and there would be Surfside area improvements, which were voted down. Feels the study didn’t take into account how people drive here. People are driving all day: going home for lunch and going to the beach

**Toole** – There’s nothing to say we’re restricting the development to 40-single family homes because we have health and safety concerns.

**Mondani** – Everyone has their anecdotal view of traffic; but the study is scientific using national numbers. He thinks challenging the study is a poor direction for the discussion. Our option is to have them do their *pro rata* share of road improvements.

**Koseatac** – The numbers don’t take into consideration the Fairgrounds/Old South Road intersection; that is backed up in the summer. If traffic was rated at a “D” or “F” before this project was proposed, doesn’t think we should bless it.

**Toole** – He doesn’t want to go into all the traffic studies. The numbers were very low, 5%. We might not agree with the study, but we must keep in mind the recommendations.

**Mondani** – We must look at this as possibly requiring improvements of the intersection.

Discussion about the Island driving habits and the impact the development’s additional traffic would have and if there should be a condition requiring mitigation.

**Marchant** – You can’t have different approaches to the two professional studies. This is a complicated issue and four entities were involved; it would be difficult to come up with a different position than what was recommended.

**Pucci** – Traffic does warrant further discussion. Recommended reviewing the record and the last report with a follow up discussion. Local testimony is also relevant as evidence, though it might not carry as much weight. Under Massachusetts law, expert testimony can be rejected, but you need a basis to do so: factual evidence or other expert opinion.

**Thayer** – There was also a recommendation about reconfiguring the sidewalks and crosswalks.

**Mondani** – Brought up the concern about emergency evacuation and lack of egress. This is a concern of his and is a serious health and safety concern.

**Toole** – This is a giant dead end with no other way out. The lack of a secondary egress is a huge health and safety concern. We could require the developer to create a secondary means of egress.

**McCarthy** – Her concern is the scale of this project and its impact.

**Marchant** – It is either safe or not; if it isn't safe for those living there, it isn't safe for anyone else to build there.

**Pucci** – You cannot solve pre-existing municipal infrastructure problems and concerns by way of the 40B. If you create a health and safety hazard based upon addition volume of traffic, that might be grounds to reduce the number of units or deny the project.

**Toole** – Further discussion on traffic will be tabled to next meeting to allow the Board to review the data.

#### **ARCHEOLOGY**

**Koseatac** – This is another area he feels the developer glossed over; they met the bare minimum on this. There is an Indian burial ground right next to this property.

**Pucci** – This is not under local purview; it is under state regulations. Recommend that the condition includes following the State regulations.

#### **MASSACHUSETTS ENDANGERED SPECIES ACT & MASSACHUSETTS NATURAL HERITAGE**

**Pucci** – The State regulates this and cannot delay the ZBA process because of it. Town and Nantucket Land Council filed an appeal to the State determination claiming it was inadequate because the State ignored important expert data. The Division of Fisheries and Wildlife and the developer's counsel filed a motion to dismiss the appeal. We've filed an opposition and are waiting on that. If it is found there is standing, it will go through a State appeals process. Then we have the right to appeal the order.

**Toole** – Board agrees based on the current state it is not enough to deny the project.

#### **SITE PLAN REVIEW**

**Toole** – Asked Ms. Botticelli to keep a record of the conversation by marking up the plan as relevant to the discussion.

**Botticelli** – No lot should be allowed to have under 50 feet of frontage.

**Toole** – Feels they should be required to comply with the minimum zoning requirement for frontage.

**Mondani** – Asked how to meet local needs.

**Pucci** – You cannot treat the 40B differently than other projects. It's inadequate to impose a frontage requirement unless there are reasons based upon local concerns. Density data would be relevant; if there is a place where relief was granted, there needs to be a reason. You also need the rationale behind requiring it for any or all lots. Health and safety is not the only relevant local concern; he can provide the Board with all relevant sections of applicable standards.

Discussion of the different zones around the island and what frontage is required; LUG-2 frontage is 150 feet.

**Toole** – There are 6 lots proposed that are less than 50 feet; lot 42 has only 12.99 feet.

**Thayer** – Lots 16, 20, 21, 31, 32, and 41 all have less than 50 feet of frontage.

**Botticelli** – Lots 20 and 32 are affordable.

**Koseatac** – That is not a fair *pro rata* share.

**Marchant** – You must address why, from a planning perspective, the lots should have a minimum of 50 feet of frontage.

Discussion about frontage and the impact of driveway placement on those with less than 50 feet.

**Botticelli** – Many lots have tandem or side-by-side parking so there are a lot of driveways from which people have to back into the street because there is no turn-around space. Asked if that is a safety concern.

**Pucci** – You must articulate the concern.

**Toole** – He believes in large districts, you have to be able to back out.

#### **SPAS**

**Toole** – 20 spas are identified, with none of the affordable units having them; that is another way to differentiate between the market-rate and affordable homes. They are not necessary and not allowed by right on a lot that is less than 5,000 SF. To him this equates to vinyl siding on the affordable houses and cedar on the market rate; they should not be a part of the plan.

**Koseatac** – If the market rate houses have them, everyone should have them.

**Marchant** – A requirement of the 40B development is that someone driving through should not be able to distinguish affordable units from market rate units. According to the plan, many will be visible from a public way.

**McCarthy** – In Beach Plum Village, the spas do differentiate between the two. All lots have sheds.

**Toole** – The spas should not show up on any plan.

**Thayer** – His concern is that not allowing spas would feed the argument the project is rendered uneconomic.

**Marchant** – That is a valid argument; you could require that 25% of the affordable units have spas.

**Pucci** – In the event of an appeal, the HAC will do an initial conference with the parties and counsel. They give the parties the opportunity to engage in mediation. Suggests not focusing on potential negotiating tactics.

**Toole** – We should put our best foot forward and Mr. Thayer's concern reflects not doing that. It is rationale that the units are clearly differentiated.

#### **ARCHITECTURE**

**Botticelli** – The architecture is not appropriate, especially Types “A” and “D”. The size of the buildings is an issue representing why this project doesn’t fit the neighborhood.

**Mondani** – Condos on a lot with less than 50-foot frontage does not meet zoning and shouldn’t be allowed.

#### **BASEMENT UNITS**

**Botticelli** – No other 40B developments (Ticcoma Green, Sachems, Beach Plum, etc.) have basement units.

Condition that no units are solely in the basement. The standard of reasonableness as a condition of local concern. At least one bedroom must be above grade.

**Toole** – The Condos are a huge profit generator for this project. The per-foot price of the condos is much higher than the single-family homes.

**Marchant** – It would be difficult to say no to Condos. During the hearings, the Board said this project would make more sense if it had all the same type of units on small lots. You had concerns about the condos. The workshops addressed that with the condo units being better integrated. This plan does that and introduces the duplex units. There is still concern about the design: volume and massing and the basement units. It does expand housing choices on the Island and offers a price point that can be afforded. He has serious doubts about the year-round program, and Tucker Holland had concerns about that program being achieved. It does impact the character; the negative impact on the character could be reduced if the buildings are of a smaller scale.

**Toole** – The eight-unit condos are completely out of character and could be reduced to fourplex with a certain amount of separation; that would be a reasonable condition. There should also be no units below grade in the fourplexes. Raising the floor from the ground is out of architectural character.

**Botticelli** – The height ranges for 28 to 31 feet; we don’t know how tall these would be. Asked if a condition of no basement units is reasonable.

**Pucci** – You are talking about local concerns; economics doesn’t enter into it.

**Toole** – Asked if it is a reasonable condition there be no more than one bedroom per unit in the basement.

**Marchant** – In buildings A & D, all have units in the lower (basement) level. The duplexes don’t have bedrooms in the basement, but they do have baths. Under 40B, 10% of the 3-bedroom units must be affordable; that includes the single-family units.

**Botticelli** – If there are no basement units, the building can be dropped 4 feet.

Consensus agrees the architecture of all buildings is inappropriate with “A” and “D” being the worst.

**Marchant** – The profit margin between the market rate and affordable units is huge. If the recreation building reduces in size, the space could become another building lot.

Condition: condos to be 6 fourplexes each on a minimum lot size of 20,000SF, including parking.

Condition: no basement units; at least one bedroom above grade.

Condition: no differentiated living situations, integration of the fourplex, duplex, single family units.

Condition: height restricted to 30 feet per the Nantucket Zoning Bylaw

Condition: 10% must be 3 bedrooms and 25% must be affordable. The 10% requirement has been exceeded.

#### **RECREATION BUILDING**

**Toole** – The building is too large at 6,000SF on the ground and there should be more green space. It scales at 12,000SF useable space. This is potentially a \$4M building.

**Koseatac** – This site doesn’t have a lot of green space; this building doesn’t need to be this big.

**McCarthy** – The mail boxes should not be in the building; they could be like they are at Sachem’s Path.

**Marchant** – Everyone has to have a place to receive deliveries; there should be flexibility to be able to lock the access to the building.

**Koseatac** – Property management has not been addressed.

Discussion about how much to reduce the size of the building and what to do with the freed-up space.

Condition: 1,500SF on the ground, 1,500SF basement, and 1,000SF 2<sup>nd</sup> floor with a maximum of 4,000SF usable space with the space given to become open green space.

Condition: no catering kitchen or commercial activity; it is for residents only; available to all residents; not for rent to outside parties.

Condition: the architectural plan should be reviewed and approved by the ZBA.

#### **BEDROOM COUNT AND PARKING**

**Toole** – Some of the 5-bedroom units have TV rooms which could potentially be a sixth bedroom; that adds to density and traffic issues. Some of these should be affordable or they should be limited. Lots with 5-bedroom houses need to be at least 6,000SF and have a minimum of 3 on-lot parking spaces, the curb cut is 15 feet wide.

**Botticelli** – The affordability should be consistent across all bedroom types

**Toole** – They didn’t ask for a waiver for wider curb cuts. Confirmed that if they don’t ask for a specific waiver, they must comply.

**Pucci** – The Board will specify any waivers that have been granted but then add that all other Zoning bylaws will apply.

**Marchant** – Developers will always fall back on the landscaping plan in the comprehensive permit. The plan must match the conditions.

**Toole** – Several lots don't meet the bylaw requiring driveway access be no closer than 25 feet to an intersection. If we approve the plan, those are good to go; we should not approve this plan.

**Pucci** – It would be helpful to go through the plan to ensure it complies with the bylaws; he can do that.

**Toole** – Ms. Antonietti sent all Board members an email with the link to the Zoning Bylaw Chapter 139. Chessia went through a lot of these; we should review his recommendations.

**Mondani** – He's not comfortable with approvals after the fact. Asked what happens when they don't comply.

**Pucci** – You have an enforcement issue and they won't get a building permit. K&P will provide a decision that will cover the ZBA concerns.

**Toole** – Read applicable driveway access regulation: Travel surface of a driveway should be a minimum of 10 feet in width and a maximum of 15 feet excluding corner rounding that have a radius of 2 feet. Residential access not exceeding a width of 20 feet excluding corner rounding could be permitted subject to conformance to standards.

#### **SUBSURFACE DRAINAGE AND GUTTERS/DOWNSPOUTS**

**Toole** – A large part of their recharge plan is single-family homes, which have individual subsurface infiltration systems on the lots. The houses should have gutters and downspouts, which aren't shown on the plans.

**Thayer** – None of the multi-unit buildings shown subsurface drainage; they should be guttered and go into their own subsurface drainage systems as well.

**Toole** – A further condition should be that gutters are cleaned twice a year.

**Mondani** – The HOA should oversee that.

**Marchant** – You will want to see the HOA documents - when they are drawn up to ensure they comply - and the HOA budget.

#### **BUFFER ZONES**

**Toole** – The buffer along South Shore Road is 50 feet and using 20 of that for drainage. At one point it was 70 feet. Buffers along the rest of the perimeter have not changed.

**Botticelli** – They should be required to maintain a 50-foot, non-disturb buffer with native vegetation along the South Shore Road. They apparently plan on keeping only 28 feet of the vegetation along the road.

**Thayer** – That front buffer will be cleared during construction and there is no landscaping plan; it says only vegetation to be augmented.

**Botticelli** – Condition: Keep the 50-foot undisturbed buffer and shift drainage.

**Koseatac** – Concerned the 25-foot buffer along other lines is not sufficient, considering abutter concerns.

**Toole** – A split-rail fence should be set along the interior line of the 25-foot perimeter buffers, not the property line, and placed before construction.

**Botticelli** – The pump station is eliminated because we are requiring the gravity line.

**Toole** – There should be a condition of no future building.

#### **GENERAL CONDITIONS**

\* No additional parking, no expansion beyond the exterior walls, no habitable use of attic space without relief.

\* Lots with 5-bedroom houses to be 6,000 SF.

\* Condo units to have at least one bedroom above grade.

\* No customary home occupations: need to reference the Bylaw.

\* No commercial vehicles, no boat storage, no recreational vehicles, and no unregistered vehicles.

\* HOA cannot make modifications to the referenced Comprehensive Permit.

\* Every single-family home, both market and affordable, must have exterior basement access.

\* After occupancy, the HDC should review future minor changes, after review of the Comprehensive Permit. Any changes of massing need relief from ZBA.

\* HVAC must be the same in both market-rate and affordable units.

\* Specifications should be provided for affordable vs market, further review to be conditioned.

#### **WATER**

**Pucci** – You will have to review what was provided by the water company.

#### **BONDING**

**Toole** – Look at the Bylaw when reviewing a waiver. They are seeking a waiver on Bonding. The engineering of the plans is beyond our scope: Parking Calculations, Storm Water Calculations, Lighting Plan, Materials, Pool.

**Marchant** – The performance bond should be on the infrastructure, not the buildings.

**Toole** – The bond is \$10M, which is 1.5 times the projected infrastructure costs.

#### **FIRE SAFETY**

**Toole** – We have not received any materials for review

#### **SNOW REMOVAL**

**Toole** – There is nothing in the application materials about this; it is a legitimate concern and reasonable condition. There is apparently no place to put snow.

**Thayer** – Suggested a condition that all snow is to be removed from site.

**Marchant** – That is something that could be included in the HOA documents. You can designate an area and obligate the developer to provide an area; it could be conditioned that area to be approved by the building inspector.

**DUMPSTER AREAS**

**Toole** – He questions the adequacy of two little dumpster areas. They appear to be for the condos only.

**Botticelli** – For the single-family dwellings, trash pick-up is the responsibility of the homeowner.

Condition: Must be kept out of view

**LIGHTING PLAN**

**Toole** – We haven't talked about that.

**Marchant** – They have to submit a lighting plan for review.

**DECIBEL REVIEW**

**Mondani** – Asked for a review of the type of noise that could be created; we never got anything on that.

**Marchant** – You can ask them to meet the local regulations.

**Toole** – All the houses show HVAC, we can be clear that no HVAC or equipment will be in the setback. Also, though the houses all show basement access, feels that should be a clear condition.

**Marchant** – It is legitimate to require the affordable units have the same central air as market-rate houses. You want the affordable units to be treated reasonably.

**LANDSCAPING**

**Toole** – We could go over this in greater detail. He counted 143 trees on the plan, but there are only 111 on the list. Also, there is a Bylaw that stipulates the circumference of trees; they didn't ask for a waiver, but some trees are smaller than that. Need to come up with hours of operation of the pool.

**Toole** – There is a Bylaw that subdivisions provide public park space; they are asking for a waiver. We need to discuss that. Multiple times they have said the landscape maintenance will be handled in house per the applicant

**Pucci** – There are regulations limiting the types of fertilizer that can be used.

**Toole** – We will need to see a fertilization plan or condition it.

**CONSTRUCTION METHODOLOGY**

**Toole** – We talked about protecting the sewer easement. There should be stringent dust control measures.

**McCarthy** – About phasing, they agreed early on not to cut trees during the bat mating season; we need to condition that.

**Toole** – It is reasonable to restrict construction to Monday through Friday from 7:00 a.m. to 7:00 p.m., Saturday from 7:00 a.m. to 1:00 p.m. and no work on Sundays.

**SEDIMENT AND EROSION CONTROL**

**Toole** – Chessia's report talks about an extra binder course for heavy equipment. We need to make sure they have a plan in place; we can condition it that it has to go to the Town Engineer for review.

**Toole - Announced: deliberations will continue on Friday, May 10, 2019 at 2:00 p.m.**

**II. ADJOURNMENT**

**Motion to Adjourn at 5:41 p.m.** (made by: Koseatac) (seconded by: Botticelli) Carried unanimously

Submitted by:

Terry L. Norton