



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 ~~

Friday, May 31, 2019

4 Fairgrounds Road, Public Safety Facility Community Room –2:00 p.m.

Called to order at 2:09 p.m. and Announcements made.

Staff in attendance: Megan Trudel, Administrative Specialist; Terry Norton, Town Minutes Taker
Attending Members: Toole, Botticelli, McCarthy, Thayer, Mondani
Absent: O'Mara, Koseatac, Poor
Town Representative: Ed Marchant, 40B Advisor (by phone); George Pucci, K&P Law, P.C.

Agenda adopted by unanimous consent

I. APPROVAL OF MINUTES

1. May 20, 2019: Held by unanimous consent.

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, Mondani, Thayer

Alternates None

Discussion **Toole** – This is to discuss the 2nd iteration of the draft decision. He'll go through it page by page.

Marchant – On Page 2 at the top, insert a reference to the marked-up version of the architectural plans.

Pucci – He will include the comments on the plans, which are dated 4/11/2019, as conditions within the decision.

Toole – On Page 3, asked Mr. Pucci to include a narrative about the Town's efforts regarding affordable housing.

Pucci – Normally he would have bullet points resulting from agreements made with the developer, but this project didn't go down that way; therefore, he included a mixed narrative and findings explaining the Board's stance regarding the final decision. This draft includes Mr. Marchant's input from our discussion yesterday (May 30). If the Board thinks the language is too argumentative, he can change that. If after this meeting a member sees something they want changed, he recommends that come direct to counsel. He hopes to have a final draft to Board members by close of business on Wednesday, June 5. You should anticipate the vote being Friday, June 7.

Toole – He will bump the June 7 meeting to noon. Asked if there is room or reason to have a narrative or discussion about the relative units and/or bedrooms per acre (relative density) as related to other developments.

Pucci – Yes, he'd put it in this narrative section.

Discussion about developments to which the density of Surfside Crossing would be compared. Mr. Toole will send the information to Mr. Pucci.

Toole – Asked if something about traffic should be included given there was a lot of discussion and recommendations from experts.

Pucci – He would recommend having that in the narrative due to its importance to the residence of the South Shore Road area. He mentioned there was information that wasn't provided but he doesn't want to overdue that point since it isn't relative to the organizations that would be involved in an appeal.

Toole – He didn't see much about the Zone 2 Watershed area; that's important as it colors the decision requiring gutters discharging into their own subsurface recharge areas.

Mondani – It also relates to the proximity of the abutters' wells to the property line.

Toole – Asked if there should be a condition about going through the Massachusetts Natural Heritage process; it was part of the discussion and we were stonewalled in terms of access.

Mondani – Noticed that language was deleted which specifically related to those regulations.

Thayer – Part of the Zone 2 discussion should include that the landscaping packages should conform to the Mass DEP and local fertilizer and pesticide regulations. There should be some sort of management plan.

Toole – Agrees.

- Pucci** – That would be tied to the Zone 2 section narrative. There is a lot that would come from the Chessia recommendations.
- Mondani** – On the force main failure, he'd like that beefed up some because it is clearly a public health issue and the reason for the Board supporting the gravity line recommendations from the Sewer Department. There is nothing addressing the Town water's permit.
- Pucci** – He does intend to deal with that in the placeholder under additional conditions relating to water. There were definite concerns about water withdrawal capacity even at the point of the next 5-year increase. Nantucket has a unique situation (the sole-source aquifer). Sometimes people have a litigation strategy of imposing something to cause a delay; that isn't a good strategy normally used by any of his clients, i.e. this Board.
- Toole** – Acting as the Water Commission, we could require clarity. A 40A development would get a water hook-up permit.
- Pucci** – If there isn't a reasonable chance of your condition being upheld, you're facing the Housing Appeal Committee (HAC) making the decision instead.
- McCarthy** – She would like a little more narrative about the failed force main.
- Toole** – We are into the section on waivers and exemptions. Nr. 3 talks about the lack of explanation for requesting the waivers. Eligibility mostly has to do with legal requirements.
- Pucci** – Those conditions are coming from Ed Marchant.
- Toole** – On page 10 Nr. 9 allows 60-days for the ZBA to review plans and documents, if we get these documents two days before a meeting, they can't be discussed until the following meeting; he would prefer 90 days.
- Next, we get into site specific conditions.
- Pucci** – He was trying to put in what types of housing buildings and dimensions and the final number of units. Normally you would approve a set number of units with dimensions on the buildings; you are doing less of a redesign of the project that way leaving the developer options on the number of and types of buildings within those requirements.
- Marchant** – On Page 11 under "H" insert the word "stairway" after "exterior." We don't want a bulkhead to qualify.
- Toole** – The plans show exterior stairs, not bulkheads. Asked if the plans are sufficient to ensure all houses get stairs instead of bulkheads. They agreed to the exterior stairs.
- Pucci** – Some redundancy is good so exterior basement stairs should be mentioned. In the decision he doesn't like to refer the any plans other than the comprehensive permit plans.
- Toole** – He thought the decision was no air-conditioning units (A/C) or mechanicals to be located on the street-front elevation.
- Marchant** – 11.Z.3.I, it should be four parking spaces for each fourplex.
- Toole** – We decided 3 spaces per unit with six spaces per duplex.
- Botticelli** – They have to be on the duplex lot; that should be noted.
- Marchant** – In C.4 minimum parking, it states 7 spaces for each fourplex building.
- Botticelli** – The same note would be on the "H" units.
- Toole** – Lot 41 is the only lot permitted to have less than 50-foot frontage. The local concern is that this is a 2-acre zoning district and we are allowing lots as small as 5,000 square feet. Looking at the landscaping plan with sheds, you can barely fit the shed in.
- Botticelli** – Increasing the frontage would increase the lot sizes and reduce the density.
- Marchant** – The past standard was 8 units per acre including the roadway; 5,000 square feet (SF) is a lot size Nantucket has used before and it requires fewer changes in this site plan; recommends keeping that and bumping the 5-bedroom lots up to 6,250 SF and 50-foot frontage. Under 10.F, embellish the statement about being impermissible due to distinguishing market-rate units.
- Toole** – Under 11.B.4 it should state no living space in the duplex basement. If they don't show build-out in the basement, they don't get to build it out.
- Discussion about the fourplexes, their floor plans and basement bedrooms.
- Pucci** – If your concern about the fourplexes is the impact on abutters, green space, and the buffer zone, that impact should be consistent with the possible increase in the number of single-family units (SFU).
- Marchant** – He's no fan of the fourplex units particularly with the basement areas; the only good thing is it provides more housing choices in terms of studios and 1-bedroom, 2-bedroom, and 3-bedroom units that don't cost \$1M or more. You could stipulate they can't be on one big lot, but he doesn't know how to say that. At some point today, you'll be talking about the number of units; the fourplexes make it easier to approve the higher number of units. He doesn't know if it will help to put them on separate lots; for him the design is the basic problem.
- Toole** – If we deny this or wholesale redesign it, that shifts the burden of proof to the ZBA. He doesn't think the Board wants to go that route.
- McCarthy** – We are requiring all other units to have parking on the lot and made the lots larger for the 4- and 5-bedroom houses; we should make the lots larger for the fourplex buildings.
- Toole** – You have to allocate a certain amount of property for the fourplex and include the parking on that lot; 10,000 SF is reasonable; it's four houses in one.

Marchant – You are allowing 1500 SF per bedroom; he thinks that’s reasonable. The distinction on the fourplex is those are condominiums; separation between buildings or having parking within “X” feet of the unit and a certain amount of open space around each building makes sense.

Fourplex buildings to be on a lot with a minimum size of 88,000SF and no more than 7 fourplexes and a minimum separation between buildings of at least 30 feet and total of 27 parking spaces on the lot.

Toole – He thought it would be adequate to reference the plans and note that the buildings can’t change shape or size. They can’t add garages or a 6-bedroom unit; though they can come back for modification to the comprehensive permit.

Pucci – He doesn’t like documents with an excessive number of attachments; it becomes confusing. You need to be clear what plan you are referring to and it should be attached to the decision.

Marchant – Suggested a table stating the groundcover for each building could be included in the decision with a condition that there will be no expansion of these buildings.

Toole – We talked about the recreation building; his only comment is that the recreation buildings in all other developments are tiny by comparison: Nashaquisset is 1,800 SF; the others are 900 SF. Asked if members think 1,500 SF is sufficient. It’s still huge compared to any other building in the development. Suggested cutting it down more: 1,000 SF on the ground and in the basement and 800 SF useable 2nd-floor space.

Thayer – The parking calculations for the recreation building don’t make sense; this isn’t a commercial building. He thinks 8 parking spaces is sufficient.

Toole – The 143 trees are listed or shown on the plan, but the plant list has 111; there should be 143 street trees as shown on the landscape plan 01 in the comprehensive permit plan. The trees must comply with the zoning bylaw regarding caliper and the non-invasive species list.

Botticelli – Asked under 17.B to add “... prior to start of work.”

Thayer – There should also be an attachment showing the location of the silt fence during construction.

Pucci – That is referenced.

Toole – There were no major concerns about the maintenance barn except the height; our discussion reduced it to 23 feet and no 2nd-floor windows. Lighting must comply with Town Code. The buffer zone we’ve talked about and the split-rail fence. Parking, asked if the 188 spaces refers to parking that is not on the building lots; he’ll get that information. The applicant agreed to the gutters and subsurface drainage – ref. page 13 Nr. 20. The house plans don’t show gutters, but the site plan shows the individual sub-surface discharge. He wants the condition included but the wording to indicate it wasn’t imposed by us but part of the applicant’s presentation.

McCarthy – Suggested, “... as presented to the Board by the applicant.” They agreed to it.

Pucci – He’ll include it, but it doesn’t legally preclude them from challenging it.

Thayer – Bracken’s stormwater report clearly states that roof runoff will be discharged into individual subsurface drywells.

Toole – We’ll keep it as a redundancy. On Page 14, Nr. 24, no boats, commercial vehicles, and unregistered vehicles are to be parked in the development; he has commercial plates on his truck and thinks they should be allowed to park their personal work vehicles.

McCarthy – She did a draft condition that she will give to Mr. Pucci.

Toole – We should also include snow removal can’t be dumped in the buffer zone. For additional conditions related to building heights, he’ll send annotated architectural plans about the building to Mr. Pucci.

Fire stuff is taken from the Fire Chief; no members are disputing it.

We then get into the Public Sewer.

Pucci – What’s in the draft is the preferred alternative and related conditions from Weston and Sampson; we need to add David Gray’s material about how it will be conditioned.

Toole – We talked about going with the Town’s preferred gravity sewer system.

Marchant – Weston & Sampson initially submitted 4 options: options 1&2 were nixed, option 3 was a dedicated force main with a pump station on site, option 4 was the gravity. Suggested language that allows the dedicated force main option as an alternative subject to approval of the Sewer Department or the Town’s Engineer; that would make this decision more reasonable since a 40B can’t be treated differently from a 40A development. If we end up with an economic argument, the gravity would be more expensive.

Thayer – He thinks that is reasonable since an on-site force main with a pump to the Surfside Treatment Plant would be a normal request but note that the Town’s preferred option is the gravity.

Toole – Giving them the option is better; the sewer connection fees are not waived but they can go to the Select Board to get the fees waived. We’ve talked about water already.

Pucci – A lot of this draft decision is a combination of a format followed for 40Bs and revisions suggested by Mr. Marchant.

Toole – His only comment is Page 19 Item 63 addressing profitability, profits to be returned to the Town; in the past we’ve stated any profit is to be used to further the Town’s efforts to address affordable housing.

Mondani – Under marketing, asked if this falls under the Housing and Urban Development (HUD) interstate land fail act.

Marchant – He doesn’t know anything about that. They have to sign a HUD agreement for affordable sales.

Toole – Conditions on commencement of the project: final plans with 90 days to review them.

- Marchant** – Under 66A third line “without” should be “with.” Asked if the Board really needs 20 copies of the plans; it depends on who would get a copy.
- Pucci** – It’s not just for the Board members; copies are needed for other entities.
- Toole** – In his estimation, you submit review plans for the Board members to review; then there are the final plans.
- Marchant** – The final plans will reflect changes resulting from your established criteria. Because of the uncertainty and premature closing of the hearing, we didn’t reach the point of an agreed-upon plan.
- Toole** – The regulatory agreements will be reviewed by Massachusetts Housing. Page 22 “F”, NPDES Stormwater Pollution Prevention Plan, it doesn’t say who approves the plan.
- Pucci** – He will check on who approves that plan and include the name.
- Toole** – Page 22 now G, it just asks for a submittal of the landscape with nothing about reviewing them.
- Pucci** – It says, “review and approval.”
- Marchant** – Asked if the Town will accept responsibility for the water or sewer lines or do they remain private.
- Thayer** – He thinks the Town takes over that, but the maintenance of the roadways remains private.
- Pucci** – That came up under Nr. 93 on page 31; he lists what will remain private and left a placeholder about the water and sewer.
- Toole** – He doesn’t think the Town should have to take over sewer and water, especially if there is a pump station involved. Mr. Gray said the Town would take it over, but he thinks it should be left as a choice for the Town. On Page 23, he doesn’t see the “review and approval” language under “K”.
- Pucci** – He will include “... to be reviewed and approved by the Board or its designee.”
- Marchant** – Page 24 S, asked about the binder core for the road.
- Thayer** – Planning Board usually requires as 1.5-inch binder and 1.5-inch top; we might want something more substantial: 2.5-inch binder and 1.5-inch top.
- Toole** – There’s a placeholder about irrigation by private well; questions if it is an important condition.
- Thayer** – Feels it more responsible to require they produce their own irrigation water.
- Toole** – He doesn’t know how to stipulate protection of the sewer line running under the property.
- Thayer** – They need to come up with some method that protects the sewer lines running under the property; that management plan should be approved by the Sewer Director and/or Town Engineer.
- Toole** – Protection of private wells during construction speaks to filtration fencing to keep the water on the property. They’ve offered up an organic fertilization plan. Asked if it’s reasonable to have a subsection that notes what they have offered up as self-imposed conditions.
- Marchant** – That’s helpful for the building inspector so he knows what’s required prior to issuance of a building permit. 69.A, asked if ZBA wants to be involved in every building permit.
- Toole** – In Rugged Scott, the ZBA Chair had to sign off every building permit application; it shouldn’t come back to the Board.
- Marchant** – As long the building inspector and Zoning Enforcement Officer see that it complies with the Comprehensive Permit, they can sign off; if it doesn’t, they come to the Board.
- Pucci** – It pertains only to the first building permit, “...on which the first permit request is filed and before it is issued.”
- Toole** – At the end of construction, the HDC signs off on the building permit; what we did for Sachem’s Path, we assigned that task to the HDC Compliance Coordinator. Asked that it say, “...the Board or its designee.” Next is building construction in general: in a normal subdivision, a certain number of lots are released on day-one; wants the Form J language included; Ms. Antonietti has to get that to Mr. Pucci. Asked what a reasonable landscape escrow might be.
- Marchant** – Sachem’s was \$500,000 or \$12,500 per unit; the landscaping for this is more elaborate. The PEL noted \$2M for the 155-unit plan.
- Toole** – We’ll go with \$12,500 per units; that’s a total of \$1.2M. Explained the escrow is in the event the developer abandons the project and landscape isn’t finished; the escrow will cover finishing up the landscaping. Let’s go with \$1.5M. The developer is responsible for the Homeowner’s Association (HOA) duties until all the homes are sold; the Sachem’s Path owners had issues with the developer toward the end, but he prefers the developer be involved until the very end.
- Marchant** – It’s good to keep the applicant on the hook; the Board doesn’t want to deal with an HOA and homeowners. As it is written for Sachem’s Path or Rugged Scott is good language.
- McCarthy** – Sachem’s Path Condition 18 addresses the HOA establishment and says, “...upon completion of the sales of the first 16 homes...” it was formed at first then, but it didn’t take over management of the roads, open space, and mailboxes until after all the infrastructure was completed. It became responsible for the cost of maintaining roads for the homes in place at its establishment.
- Toole** – We have no say-so in the plans for this. With Sachem’s Path we had some control during Phase II. We don’t want people paying to repair roads being used by heavy equipment.
- Marchant** – That might be the language; we spent a long time talking about this. The applicant should be responsible for any issues that come up. Control over decision making will be defined in the HOA and condominium trust; we need to establish how costs will be allocated between those two entities and allocated for the affordable homes. until project completed. Most developers want to maintain control as long as possible.

- Toole** – Asked if all this stuff can be done by Tuesday morning so that Mr. Pucci has adequate time to incorporate it. Mr. Marchant will find the right HOA language. Page 27 Nr. 73, no lots sold to 3rd party builders and no sale of empty lots.
- Thayer** – Nr. 71 talks about the hay bales and erosion fence; they should submit an erosion control plan before any work takes place. We want the limit of work identified and the split rail fence installed along with siltation fence and wattles.
- Pucci** – He will address all of that in paragraph 71.
- Toole** – Page 28 Nr. 78, stormwater management must meet Massachusetts Department of Environmental Protection regulations; asked if the Zone 2 should be referenced there.
- Pucci** – He'll make sure.
- Toole** – Page 29 Nr. 86, the HDC Compliance Coordinator would sign off prior to issuing a Certificate of Occupancy (CO).
- Pucci** – Nr. 86 is about submitting the roadway as-built plans; it isn't talking about the CO.
- Toole** – Nr. 87 No temporary COs. Page 30 Nr. 88, states the applicant must comply with all Zone II water protection requirements; would like more language, "...as defined in (XYZ)." Under ADMINISTRATIVE page 30 Nr. 89 the statement of cost and who pays it, noted that in the Milton decision that was thrown out.
- Pucci** – The Milton Decision is an HDC ruling, not binding precedence.
- Toole** – Nr. 93, everything stays private.
- Marchant** – Asked if there should be something about the sewer and water lines, "...unless accepted by the Town."
- Pucci** – He has a lot of commentary from the hearings on this; he'll be working on it.
- Marchant** – On Nr. 96, the three years is not reasonable because the project won't be done in three years; you can keep the three years but should add that it can be extended without cause for a reasonable denial. On Nr. 94, if the Town is going to accept water and sewer, asked if inspections should be included here.
- Thayer** – The Planning Board representative would normally inspect all that; it should be included somewhere. The developer does get charged for those inspections.
- Toole** – We need to add language about an engineering inspections escrow. Page 32, all construction vehicles etc. are to be limited to the site and can't park on a public way.
- Marchant** – In 101, it should be mentioned the cross-country sewer easement.
- Toole** – They shouldn't be stockpiling any hazardous materials; they shouldn't be on top of the easement; that's all part of the protection plan we need to see.
- We need to add the HDC compliance at the end; other than that, we're pretty much through.
- Pucci** – He has the HDC Compliance Coordinator in Para. 105 or 106.
- Toole** – Let's talk about the number of units. None of us are comfortable with the fourplexes but...
- McCarthy** – She isn't comfortable with the fourplexes but doesn't want to be unreasonable and put it in jeopardy.
- Toole** – It would be good to have the maximum unit number in the decision; it can be further described by building type. Another thing we need to figure out is the amount of green space shown on the 92-unit plan now and condition that it cannot be less; he thinks in that case we have to reference the plan.
- Discussion about the maximum number of types of units: 8 duplexes; 4 fourplexes; 40 single-family units.
- Toole** – Their matrix is heavily weighted to the 5-bedroom units; asked if a certain percentage has to be 3 bedrooms.
- Marchant** – 10% have to be 3-bedrooms; the state has a requirement for 3-bedroom units. As long as they don't reduce the amount of green space and meet the separation requirements, they can build 72 units.
- Thayer** – He always felt that would be the final number of units. The developer made it clear he felt the 5-bedroom units are important.
- Toole** – The 5-bedroom houses are not *pro rata*; there are no affordable 5-bedroom units. We need to order that 25% of each type is offered for affordable; we've been adamant about that from the beginning.
- Pucci** – It is less bad for them to require 25% of the 5-bedrooms be affordable than eliminating them completely.
- Toole** – If we are going to allow a 4-bedroom house, one bedroom should be in the basement.
- Botticelli** – We did not allow basement bedrooms in any other developments. If they don't have bedrooms in the basement, the question becomes the need for exterior stairs; bulkheads are okay in the event of no basement bedroom.
- Marchant** – If it's an issue of uneconomic, not being allowed basement bedrooms will become a huge part of their argument.
- Botticelli** – Suggested requiring affordable pro rate of building types but allow them to have basement bedrooms. Then the basement access is required as shown. The plans show the number of basement bedrooms. We restricted the size of the window wells in the undesignated spaces, so they can't be used for egress.
- Toole** – We are limiting the maximum number of 5-bedroom SFUs to 16, 25% of which must be affordable. This assumes you can fit everything in with all the other criteria. The density is 17 bedrooms per acre, which is still significantly higher than any other development. He thinks this is a reasonable consideration; it's a 10% reduction from the original plan.
- ARCHITECTURE
- Botticelli** – The Fourplex from and HDC perspective, we can say these are approved except for the right elevation; the 45-foot long façade is inappropriate, and the little gable detail is inappropriate.
- Toole** – They could do like the hospital and add a pergola to break up the elevation; it still allows light to reach the window well.

Botticelli – They could add out a roof. This has cottage corners; it should have a shingle flare and a pergola on the right elevation would break up the façade. We didn't have the design for this building before the hearing was closed; her assignment will be to work on it.

Mondani – He hasn't made his decision but feels like throwing up his hands: cutting off the hearing, incomplete plans, etc. He wants to talk about which way the Board will vote. This developer's precedent on similar projects isn't the greatest.

Pucci – Burden of proof for a denial falls on the ZBA and is very different.

Toole – To him, denying this would be personally easy; however, the ultimate result could be much worse than an approval with conditions.

Mondani – He thinks we might have a better chance at winning a HAC appeal than people think; cited his reasoning.

Pucci – The burden of proof for a denial couldn't be sustained as it stands; under that, they don't have to prove your conditions render the project uneconomic. If HAC rules in their favor, they will permit as the developer wants. Granting with conditions gives you a fighting chance to litigate your local concerns. The risk, which is a certainty, of denial is that HAC will condition the permit and you won't like what they permit; they would get the 100-unit plan, which is a complete application.

Toole – A local-concern smoking gun for denial might be that the wastewater treatment plant doesn't have the capacity to meet the needs of this development.

Marchant – He thinks the proposal as discussed is reasonable. You've worked hard and made your best judgement, which is all you can do. The alternative is to put HAC in control.

Toole – Asked for a draft decision for an approval with conditions as well as a draft decision for a denial. Mr. Koseatac has missed a number of the deliberations; he's comfortable with the members attending today being the voting members.

McCarthy – She thinks a denial would be irresponsible given the risk.

Botticelli – She agrees.

Toole – Asked if anyone wants to entertain the notion of another meeting to discuss this issue specifically; almost a pre-vote.

Pucci – It would be hard to get it noticed in time. Besides, that's what the next Friday meeting is for.

Toole – Reminded everyone to get their stuff to Pucci ASAP.

Motion **Motion to Continue to June 7, 2019 at 12:00 p.m. at 4 Fairgrounds Road, the Public Safety Facility Community Room.** (made by: Botticelli) (seconded by: Mondani)

Vote Carried unanimously

III. OTHER BUSINESS

1. None

IV. ADJOURNMENT

Motion to Adjourn at 6:24 p.m. (made by: McCarthy) (seconded by: Mondani) Carried unanimously

Submitted by:

Terry L. Norton