

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

_____)	
SURFSIDE CROSSING, LLC,)	
Appellant)	
)	
v.)	
)	No. 2019-07
NANTUCKET ZONING BOARD)	
OF APPEALS,)	
Appellee)	
_____)	

Record of Overruled Objection

At a hearing on July 9, 2024, the Hearing Officer Werner Lowe overruled the Intervenor Residents objection to the proposed remand order, and required that for the Intervenor Resident’s objection to be preserved for the record, Intervenor Residents had to submit the objection in writing to preserve same for the record.

This is to comply with the instructions of Hearing Officer Werner Lowe of July 9:

At the hearing of July 9th, Intervenor Residents’ counsel objected to a draft order prepared by the Hearing Officer because the same did not comply with the Memorandum of Decision, and Court Order issued by the Superior Court on January 2, 2024, and failed to comply with applicable regulation cited and incorporated into the Memorandum of Decision and Order.

That overruled objection is recorded below for the record:

The objection is that the Order proposed by the Hearing Officer does not comply with the Court Decision and Order and the applicable regulation cited and incorporated therein.

The Court’s Memorandum of Decision stated at page 15:

“Considering these proposed changes in conjunction with the change in building type, number, and location, further demonstrates the unreasonableness of HAC’s disregard of the explicit substantial change examples, and the inconsistency of this interpretation with the plain meaning of its prior adjudicative precedent regarding changes that “cumulatively ‘amount to a totally new or different proposal ... This error of law also requires reversal of the substantiality decision and remand to the Board [of Appeals] for consideration of the altered project in the first instance, pursuant to 760 Code Mass Regs. Section 56.07(4(a)”

The Court’s Order states:

*“It is lastly **ORDERED** that judgment shall enter remanding the matter for further consideration consistent with the memorandum [of decision] with respect to the requirement of 760 Code Mass Regs. Section 56.07(4)(a)...”*

The Housing Appeals Committee did not appeal the foregoing rulings, nor sought permission from the Superior Court to change or modify these rulings.

760 Code Mass. Regs section 56.07(4)(a) requires as follows:

“If the presiding officer finds that changes are substantial, he or she shall remand the proposal to the Board [of Appeals] for a public hearing to be held within 30 days and a decision to be issued within 40 days of termination of the hearing as provided in M.G.L. c. 40B, section 21.”

Please note the use of the word “shall.”

Instead of complying with the Court Memorandum of Decision, the Court Order, and 760 Code of Mass Regs section 56.07(4)(a), instead, in overruling the objection made by Intervenor Residents, the hearing officer presented a remand order of his own making, with a hearing date (Para. 1) to start to be held within 2 and one half months (September 30), not 30 days (August) as provided in the regulation as incorporated into the Court Order, and with the new addition of an entirely brand new item (Para 2) , a limitation on continuation of hearings, which has no counterpart nor authorization at all in 760 CMR 56.07(4)(a) or in the Court Order. The proposed remand order presented by the Hearing officer states that the Remand Order directs the parties to conduct a hearing “in keeping with the dictates of 760 Code Mass Regs section 56.07(4)(a)” but that is an impossibility as the parties cannot both comply with the proposed remand order and 760 Code of Mass Regs section 56.07(4)(a) at the same time.

As Intervenor Residents’ counsel stated while making the objection, Para. (1) of the proposed order with a hearing date to start to be held within 2 and one half months, not 30 days, and with the addition of an entirely new item in Para. 2 of the proposed order of a limitation on continued hearing sessions, which has no counterpart nor authorization at all in 760 CMR 56.07(4)(a), does not comply with the Court Order and the applicable regulations. The way to handle the facts presented that the Board of Appeals has new members who have never seen this project before is done through continued hearings rather than trying to overload the Board at the initial hearing, which is logically the way the applicable reg. leaves open for remanded substantially changed proposals by not including in the regs. authorization to limit the time for continuation of hearings.

At the July 9th hearing, the Hearing Officer responded to the objection by expressing his opinion regarding the usefulness from his perspective of creating the entirely new item in Para. 2 for the remand order, but this personal opinion is a matter that the hearing officer should be presenting to the authority that issued the regulation that the hearing officer apparently believes is defective by omitting the language in the regs. he believes should be there, or should have sought clarification from the Superior Court, and not have sought unilaterally to impose that personal opinion on the Residents and public of Nantucket through this remand order.

Para. 3 of the proposed order is in compliance with the Court Order, and is the only item in the proposed order so complying.

Para. 4 should have merely quoted and tracked the language of 760 Code of Mass Reg 56.07(4)(a) regarding the aspects of the new proposed project at issue in the hearing, leaving it to the Board of Appeals to decide the specific details of the testimony that would comply with 760 Code of Mass Reg 56.07(4)(a). During this portion of the hearing the Hearing Officer indicated a serious level of pre-judgment and micromanagement of the testimony and evidence the public could present that he would entertain, even before hearing what the public at a public hearing will present and in so doing disclosed a level of pre-judgment, partiality and bias to which Intervenor object for the record.

In the circumstances of this remand, where the Superior Court of Massachusetts, acting through two different judges (Wilkins, J. on intervention ruling; Gildea, J. on substantial change ruling), have previously ruled on two separate occasions that the views adopted at HAC in this matter contain errors of law, intervenor Residents submit this proposed order is yet a third example of an error of law following a pattern of errors, and should not have been presented by the Hearing Officer, nor should not have been adopted, and instead, the remand order should comply with the Court's decision and should simply track the language of 760 CMR section 56.07(4)(a).

The Residents, the public of Nantucket and the public of the Commonwealth are entitled to a competent impartial remand order containing no errors of law.

This is to record for the record, that the above objection was presented and overruled by the Hearing Officer on July 9, 2024.

Dated: July 15, 2024

Respectfully submitted,

Intervenor Residents Meredith et al,
By their attorney,

/s/ Paul R. DeRensis

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