

COMMONWEALTH OF MASSACHUSETTS  
HOUSING APPEALS COMMITTEE

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

**SUPPLEMENTAL PRE-HEARING ORDER**

**I. INTRODUCTION**

1. Pursuant to 760 CMR 56.06(7)(d)(3), this order supplements the Pre-Hearing Order issued in this case on September 24, 2020. It results from various orders and pleadings, from a draft circulated to the parties, and from discussions at a supplementary Preliminary Conference of Counsel held on December 3, 2021. The parties in this matter are the appellant, Surfside Crossing, LLC (the developer); the appellee, Nantucket Zoning Board of Appeals (the Board); an intervener, the Nantucket Land Council (NLC); and eighteen intervening residents (the Residents).

2. For good cause, any party may at any time request modification of this order. Any such request for modification of Stipulations, Issues in Dispute, or Proposed Witnesses shall be by written motion as provided in 760 CMR 56.06(5)(a) and (c). A request for modification of Exhibits may be made orally during an evidentiary session of the hearing, provided that five days prior notice has been given to opposing counsel.

**II. STIPULATIONS**

There are no supplemental stipulations.

### III. MOTIONS AND ORDERS

As further specified in the pleadings on file with the Committee, since the issuance of the original Pre-Hearing Order, the parties have moved and the Committee has ruled as follows:

1. Order on Remand – issued July 30, 2021
2. NLC’s Response to Order on Remand [and Motion to Intervene] – filed August 18, 2021 – GRANTED September 10, 2021
3. Order in Response to Residents’ Statement – issued September 10, 2021
4. Residents’ Renewed Motion to Leave to Intervene... – filed September 30, 2021 – GRANTED November 9, 2021

Should this matter be subject to appeal to the courts, the parties reserve their rights with regard to motions that have been ruled upon.

The parties reserve the right to file motions to strike objectionable portions of pre-filed testimony if necessary.

### IV. SUPPLEMENTAL ISSUES IN DISPUTE AND BURDENS OF PROOF

1. Pursuant to 760 CMR 56.07(1)(a), the central issue in this case is whether the decision of the Board was consistent with local needs.

2. The sole issues in dispute as raised by the interveners on which they have the burden of proof are as follows:

#### **Intervener NLC’s Case**

3. If Appellant sustains its burden that the Decision approved by the Board renders the Project uneconomic, NLC will prove that valid health, safety, environmental, open space, or other local concerns support the Board’s Decision. Subject to NLC’s objections set forth in the August 18, 2021 Response to Order on Remand, Intervener cites the following local bylaws, regulations, or other municipal planning requirements to support the Board’s Decision:<sup>1</sup>

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<sup>1</sup> Issues concerning Nantucket’s Housing Production Plan or planning policies unrelated to open space are beyond the scope of NLC’s intervention since NLC’s interests are not “special and different from the concerns of the rest of the community.” *See Sudbury Station, LLC v. Sudbury*, No. 2016-06, slip op. at 5 (Mass. Housing Appeals Comm. Ruling on Motions to Intervene... Apr. 24, 2018), *citing Jepson v. Zoning Bd. of Appeals of Ipswich*, 450 Mass. 81, 88-89 (2007).

- a. Conditions imposed consistent with Nantucket's Open Space Plan and other open space planning local concerns: ## 7, 10, 12, 13, 14, 17, 20, 32, 38, 83, 89;
- b. Conditions related to open space preservation, tree preservation to limit clear-cutting, and environmental monitoring: ## 20, 69, 75, 97(h & i), 139;
- c. Waivers related to open space preservation, tree preservation/replacement and protection of natural features: § 2.06b(14), 3.02, 3.05, 4.16 of the Nantucket Subdivision Rules and Regulations; Nantucket Code c. 132, §§ 1-8 (Trees and Shrubs).

### **Intervener Residents' Case**

4. If Appellant sustains its burden that the Decision approved by the Board renders the Project uneconomic, the Residents will prove that valid health, safety, environmental, open space, or other local concerns with regard to the following issues:<sup>2</sup>

- a. Sewerage Connection and Infrastructure Vulnerability, as it affects those Residents who have asserted that they will be harmed,
- b. Firefighting Access and Safety and Water Supply for Firefighting, as it affects those Residents who have asserted that they will be harmed,
- c. Traffic Congestion, as it affects those Residents who have asserted that they will be harmed,
- d. Impact of Headlights and Noise, as it affects those Residents who have asserted that they will be harmed.
- e. Nantucket Historic District Compliance, with respect to issues raised in the Pre-Hearing order issued September 24, 2020 as they affect any Resident who is the owner of an adjoining property or the owner of property within the same historic district as property within one hundred feet of said property lines.

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<sup>2</sup> The following issues are beyond the scope of the Residents' intervention as they are not concerns special and different from the concerns of the rest of the community: "Water Supply Generally," "Traffic Engineering [and Traffic] Access" (as distinct from traffic congestion), and "Open Space." See *Sudbury Station, LLC v. Sudbury*, *supra*.

## V. SUPPLEMENTAL EXHIBITS

### Admitted March 4, 2021 (Tr. I, 181)

47. Certified List of Sales, Beach Plum Village (1 p.)

### NLC's Exhibits Admitted into Evidence

- 47A. Sachem's Path Conservation Restriction 9.14.2005 (63 pp.)  
 48. 125 Tom Nevers Conservation Restriction 9.14.2005 (67 pp.)  
 49. Nantucket Code c. 132, §§ 1-8 (Trees and Shrubs) (2 pp.)

### Residents' Exhibits Admitted into Evidence

50. Town's Water Management Act/Water Withdrawal Permit, Amendment dated 5/8/12; *original Permit dated January 31, 1992* and Draft Permit renewal and related Findings dated 3/10/21 (24 pp.).
51. Town's application dated 2/29/16 for new Water Management Act Permit, and Town's Application dated 11/24/10 for Renewal of Water Management Act Permit (48 pp.)
52. Administrative Consent Order with EPA Concerning Town's Clean Water Act Violations, dated 10/26/16 (8 pp.)
53. Public Records regarding number of Nantucket Fire Department and Police Department calls to the areas of Surfside Road and South Shore Road south of their intersection with Fairgrounds Road – for the period June 1 to August 31, 2021 (12 pp.)
54. Public Records regarding actual sewage flow rates at the Surfside Wastewater Treatment Facility – by day, for the period June 1 to August 31, 2021 (3 pp.)
55. Public Records regarding the physical capacity rates of the Surfside Wastewater Treatment Facility – applicable to the period June 1 to August 31, 2021 (3 pp.)
56. Permit or other Public Records reflecting the permitted (legal) capacity rates of the Surfside Wastewater Treatment Facility – applicable to the period June 1 to August 31, 2021 (2 pp.)
57. Nantucket Historic District Commission Recommendation to the Nantucket Zoning Board of Appeals, 106 Surfside Road 40B Application, dated 7/17/18 (8 pp.)
58. "Well Placement Plan in Nantucket, Mass., Scale: 1" = 200', Date: Sept. 9, 1996" prepared by John J. Shugrue for Jacques Zimicki, dated 9/9/96 (1 sheet)
59. DEP Individual Groundwater Discharge Permit (Application/Permit No. 200-3; Effective Date: December 19, 2019; issued date November 19, 2019 (15 pp.)

## **VI. SUPPLEMENTAL WITNESSES**

### **For NLC**

1. Cormac Collier, former Executive Director, Nantucket Land Council
2. Linda Holland, former Executive Director, Nantucket Land Council
3. Sarah Bois, PhD, ecologist
4. Virna Gonzalez, Sachem's Path Homeowner
5. Sunny Daily, Sachem's Path Homeowner's Association
6. Danielle O'Dell, wildlife ecologist – Pre-filed testimony shall be limited to issues not addressed in previous testimony.
7. Emily Molden, Executive Director, NLC – Pre-filed testimony shall be limited to issues not addressed in previous testimony.

### **For the Residents**

1. Bruce Perry, co-owner, 16 South Shore Road – Pre-filed testimony shall be limited to issues not addressed in previous testimony.
2. Diane Coombs, member, Nantucket Historic Commission
3. Richard Ray, former Nantucket Health Director
4. Christopher Meredith
5. Jack Weinhold
6. Jacques Zimicki

### **NLC anticipates recalling the following witnesses<sup>3</sup> for cross-examination<sup>4</sup>:**

1. James Feeley, Managing Partner, Surfside Crossing, LLC
2. Brian T. Madden, Wildlife Scientist

### **The Residents anticipate recalling the following witnesses for cross-examination:**

1. James Feeley, Managing Partner, Surfside Crossing, LLC
2. Brian Madden, Wildlife Scientist
3. David C. Gray, Sr., Director, Nantucket Sewer Department

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<sup>3</sup> Andrew Vorce and Leslie Snell were listed by the Board in the original Pre-Hearing Order as witnesses, but offered no testimony. Therefore, they are not subject to cross-examination.

<sup>4</sup> Witnesses may be cross-examined without regard to the scope of their testimony on direct, subject to the presiding officer's discretion. *See* Mass.R.Civ.P. 43(b).

**VII. SCHEDULE FOR PRE-FILED TESTIMONY AND HEARING**

1. Pre-filed direct testimony of all witnesses presented by NLC and the Residents shall be filed on or before January 14, 2022.
2. Rebuttal testimony by the Applicant shall be filed on or before February 11, 2022.
3. Rebuttal testimony by NLC, the Residents, and the Board be filed on or before March 11, 2022.
4. A teleconference regarding scheduling of cross-examination of witnesses shall take place at 10:00 a.m., Thursday, March 17, 2022.
5. The supplemental oral portion of the hearing for cross-examination of witnesses shall be conducted remotely by video communication, and shall convene at 10:00 a.m. on Wednesday, March 23, 2022, and, if necessary, shall continue on consecutive days thereafter.

Housing Appeals Committee

A handwritten signature in blue ink, appearing to read 'Werner Lohe', written over a horizontal line.

Werner Lohe  
Presiding Officer

Date: December 7, 2021