COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

SURFSIDE CROSSING, LLC, Appellant, v. NANTUCKET BOARD OF APPEALS, Appellee, NANTUCKET LAND COUNCIL, INC., Intervener, NANTUCKET TIPPING POINT RESIDENTS Interveners.	Docket No. 2019-07

Objections to Proposed Decision

In accordance with G.L. c. 30A, s. 11(7) and 760 CMR 56.06(e)(9), Interveners Nantucket Land Council, Inc. ("NLC") and Nantucket Tipping Point Residents ("Abutters") jointly submit the following objections to the Proposed Decision dated July 7, 2022. To facilitate review, we have highlighted the portions of the Proposed Decision (attached) objected to.

1. Page 2 – "Surfside Crossing continued to pursue the 156-unit proposal". This statement is inaccurate and could be misleading because during the public hearing Applicant proposed alternative projects of 100 and 92 units. In any event, the 156 unit proposal made to the Board differed significantly from the 156 condo project considered by the Committee in the Proposed Decision. This current 156 condo project was never presented to or considered by the Board, as required by the Comprehensive Permit Regulations, 760 CMR 56.07(4).

2. Page 2 – "soon after the instant appeal was filed, the developer was in communication with the state MEPA Office". Developer's appeal was filed July 3, 2019. Under the Committee's regulation, an ENF was required to be filed within ten days by July 13, 2019. 760 CMR

56.06(4)(h) ("No later than ten days after filing of the initial pleading, the appellant shall file an Environmental Notification Form (ENF)"). Developer's ENF was not filed until March 13, 2020, eight months after the deadline required by the regulations. A motion to dismiss this appeal on that basis was denied in a written ruling dated July 13, 2020, and the parties reserve their rights to contest that ruling.

3. Page 3 – "On July 31, 2020, the presiding officer ruled that the changes were not substantial under the Committee's regulatory standard". Developer's initial application to the Board in April 2018 was for 96 condos and 60 single family houses for a total of 156 units. Then, two years later in April 2020 -- after the Board had already issued the permit – Developer changed the project to eliminate all single family housing and request 156 condos directly from the Committee. The Presiding Officer's determination that such changes were "insubstantial" – made following objection and briefing - deprived the Board from ever considering the Developer's actual 156 condo project. That ruling was in error under 760 CMR 56.07(4), and the parties reserve their rights to contest it.

4. Page 3, n. 4 ; p. 4, n. 8; p. 11, n. 14 – "Issues that are not briefed are waived." Other than prior rulings of the Committee, the sole case relied on for this proposition involved an alleged assault and battery by a police officer, not an administrative agency. See Cameron v. Carelli, et al., 39 Mass. App. Ct. 81 (1995). The ruling in that case turned on a rule of appellate procedure, Mass. R. App. P. 16(a)(4): "This rule of appellate procedure concerning the content of an appellant's brief is more than a mere technicality. It is founded on the sound principle that the right of a party to have this court consider a point entails a duty; that duty is to assist the court with argument and appropriate citation of authority." Id. at 85-86. The Committee's administrative proceeding -- which is subject to Chapter 30A, not the rules of appellate

procedure -- requires that “All evidence . . . shall be offered and made a part of the record in the proceeding”. G.L. c. 30A, s. 11(4). In reliance on the waiver rule of appellate procedure, and in derogation of Chapter 30A, the Presiding Officer appears to have ignored a “great deal” of unimpeached pre-filed testimony as “irrelevant” under the mistaken belief that it has all been waived. None of the issues raised at the hearing have been waived, and all of them should be considered as part of the record in this proceeding. Furthermore, the Abutters submitted written argument in a post-hearing memorandum filed May 18, 202.

5. Page 4 – “Each ruling limited the participation of the interveners to issues articulated in their pleadings.” Interveners object to their limited participation procedurally and substantively. Because the initial hearing occurred before intervention, Interveners had no opportunity to participate as full parties in the first hearing. Even after intervention, Interveners were limited in the second hearing to certain issues set forth in the Supplemental Pre-hearing Order. Counsel for NLC specifically objected to these limitations in filings dated August 18 and September 30, 2021. Counsel for the Abutters likewise specifically objected in their May 18, 2021 memorandum.

6. Page 6 -- “If the developer proves that the project is uneconomic, the burden then shifts to the Board to prove that there is a valid local concern which supports each condition and that that local concern outweighs the regional need for affordable housing.” Page 14 – “Since the developer has sustained its initial burden, the burden shifts to the Board to prove that there is a valid health, safety, environmental, or other local concern that supports each of the conditions imposed, and that such concern outweighs the regional need for low or moderate income housing.”

On July 14, 2022, after the Proposed Decision was issued, the SJC decided Zoning Bd. of Appeals of Milton v. HD/MW Randolph Avenue, et al., No. SJC-13221 (July 14, 2022) available at https://www.mass.gov/files/documents/2022/07/14/c13221.pdf. Unlike the standard articulated by the Presiding Officer, the SJC's recent opinion does not require a local concern to support each condition. Instead, the SJC's articulation of the applicable standard empowers the Committee to strike or modify conditions only insofar as necessary to make the project economic: "In the case of an approval with conditions, if the developer can prove that the imposed conditions render the project uneconomic, then the burden shifts to the local board of appeals to demonstrate that the conditions 'are consistent with local needs'; if the board cannot do so, then HAC may strike or modify the conditions 'so as to make the proposal no longer uneconomic.' G. L. c. 40B, § 23. See 760 Code Mass. Regs. § 56.07(2) (2018) (establishing burden-shifting framework)." Milton ZBA, slip op. at 4 (emphasis added). The Proposed Decision applies a standard that differs from the statute and regulations, as interpreted by the SJC.

7. Pages 7-10 – Developer failed to prove that 156 condos are necessary to make the project economic. The Presiding Officer determined that 59 units would be uneconomic, but never considered whether 92 units (or any other number) would "make the proposal no longer uneconomic" under the SJC's recent interpretation of the applicable statutory standard. G.L. c. 40B, s. 23. Developer had conceded in an April 10, 2019 memo during the public hearing that a 92-unit project would be financially feasible. (Ex. 73, p.2; 3/22/22 Tr. at 3-68) This error also impermissibly shifted the burden of proof on economics to the Board instead of the Developer, who bears that burden under the regulations. See 760 CMR 56.07(2)

8. Page 13 – "we find Mr. Feeley to be a credible witness and that his estimates concerning sales prices have not been rebutted." Mr. Feeley is the Developer, not an unbiased expert. According to the Board's disinterested expert, "whose qualifications are comparable to those of the developer's expert" according to the Presiding Officer (p. 12), Mr. Feeley understated the revenue from projected sales. That determination was supported by evidence of several recent sales above the Feeley estimates. The Proposed Decision ignores this evidence and simply credits the Developer's own self-serving testimony.

Moreover, Mr. Feeley testified that the project would be constructed over a period of at least five years, but the determination of project economics was made as of September 24, 2020, and no consideration was given to rising revenues after that date. (3/22/22 Tr. at 3-53, 3-57)

9. Page 15 – "Many of these [conditions] were to be applied to a 60-unit development, and are not relevant to the developer's original 156- unit proposal, nor to the current 156-unit proposal." This statement underscores the absurdity of the exercise of evaluating the 156 all condo project against the yardstick of the 60 mostly single family homes approved by the Board. The 156 condo proposal was never considered by the Board, which was deprived of any opportunity to craft conditions applicable to the current iteration of the project.

10. Page 16 – "the Board has conceded that the entire parcel need not be preserved as undisturbed open space, and that development at a density greater than the existing zoning is appropriate. . . . The Nantucket Land Council (NLC) takes a similar position". The parties do not concede this point. To the contrary, the reduction by 96 units (62%) was intended to preserve open space on the site without rendering the project uneconomic. Given its location and abundant natural resources, the site would best be preserved in its natural state, at least as much of it as possible without making any affordable housing infeasible.

11. Page 17 – "if the [municipal] plans pass these tests, their requirements or recommendations will not automatically determine the outcome of the case before us. Instead, we must then analyze the plans and their relationship to the proposed affordable housing." In the HAC's Middleborough decision from 2009, the Committee applied a straightforward three part test for determining whether municipal planning supersedes regional housing. In that case, all three parts of test were satisfied, so the Board's decision based on municipal planning was upheld. In this case, the Proposed Decision similarly finds that Nantucket's municipal planning efforts satisfy all three parts of the Middleborough standard. But then it grafts onto the established framework some further requirements that unsurprisingly were not met because none of the parties had notice of these brand-new additions to the test. To the parties, this felt like moving the goal after the ball was already in the air. But doing so is not just unfair, it is also unlawful in violation of Chapter 30A. An agency may engage in rule making through adjudicative decisions, but it cannot change those rules willy-nilly case by case. If as the Proposed Decisions states, Nantucket meets the Middleborough standard, then that is outcome-determinative as it has been for a dozen years (and perhaps decades with the Hingham, Pembroke and Barnstable decisions cited in the Proposed Decision at p. 16).

12. Page 21 – "Thus, although the development site in this case, like many undeveloped parcels in Massachusetts, is an attractive and useful natural resource, examination of the three Nantucket plans confirms that it is an appropriate site for development." The Proposed Decision treats one of the last wooded lots of mid-Island native habitat on Nantucket as if it were "like many undeveloped parcels" elsewhere in the Commonwealth. Nantucket is an island with precious few remaining open space parcels of this size. Given its isolated location, Nantucket itself should determine how best to effectuate its longstanding land use planning objectives that

balance the preservation of open spaces with its unique housing needs. The "regional need for housing" under Chapter 40B hardly seems relevant on an island thirty miles out to sea, particularly where an agency in Boston approves a project that was never presented to or vetted by the Island's own local Board.

13. Page 22 – "if the Board wishes to limit the size of a project or impose conditions based on considerations normally addressed by zoning, it must point to specific requirements contained in the town's bylaws." This statement misreads the law of the case in this matter. As the Proposed Decision acknowledges (p. 3, n. 6), the Superior Court overturned the Presiding Officer's ruling on NLC's intervention. The Court characterized the Committee's requirement to show a direct correlation to a local bylaw as "an unreasonably cramped reading" and a "cramped construction". Nantucket Land Council, Inc. v. Massachusetts Dep't. of Housing and Community Dev., et al., No. 2075CV0021, at 15-16 (Nantucket Super. Ct. June 22, 2021). The Court's decision was directed at NLC's standing to intervene, but its reasoning applies equally to any zoning board's power to condition a permit: "neither the statute or regulations articulates any requirement to point to specific local protection. . . . They do not require anything more than the general articulation of interests that appear in c. 40B, the Nantucket Bylaw and the Town's Subdivision Regulations." Id. at 16. The correlation requirement applied in the Proposed Decision flouts the Superior Court's reversal of that misreading of the statute and regulations.

14. Pages 22-23 – "the Board does not refer to any specific provision in the zoning bylaw of which the proposed setbacks are in violation" "the Board and NLC fail to point to any provision in Nantucket bylaws or regulations that prohibits the practice [of clear cutting]." The Proposed Decision impermissibly requires a direct correlation with a local bylaw in contravention of the

Superior Court's ruling in this case. By so doing, it fails to give the proper credence to local concerns about clear cutting, tree preservation and open space required by Chapter 40B.

15. Page 23-24 – "When vacant land is developed, the retention of part of it in its natural state is an admirable goal, and Nantucket deserves credit for having negotiated for it in some developments. But, just as a town must implement the general planning goals and objectives in a master plan by enacting specific zoning provisions, a town must enact specific regulatory requirements if there is to be mandatory implementation of its open-space goals and objectives in relation to specific development proposals." The Proposed Decision misapplies the ruling of the Superior Court in this case that held specific bylaws or local requirements were not a sine qua non for the protection of open spaces and natural habitats called for in municipal plans. The rigid interpretation requiring such a correlation also fails to balance local concerns as Chapter 40B mandates. If in fact there were prohibitions against clear cutting or development on vacant land, then there would be nothing to balance. The Proposed Decision avoids the balancing required by the statute under the guise that absent such a prohibition, it can simply sidestep the exercise.

16. Page 24, n. 26 – "That those developers chose to do so, presumably during negotiations for their comprehensive permits, in no way requires other affordable housing developers to do so –any more than developers of private housing are required to do so. Further, there is no claim that the protected areas are the "Open Spaces" for use by the general public as defined in the comprehensive permit regulations, 760 CMR 56.02." The Proposed Decision reads Open Spaces too narrowly under c. 40B, suggesting they merit preservation only if used by the general public. It also fails to balance Open Space against regional housing because, according to the Proposed Decision, affordable housing developers like this Developer are not required to do so. That is a misreading of the statute and regulations applicable to Chapter 40B.

17. Page 25 – The Proposed Decision disregards the municipal planning concerns detailed in Nantucket's Open Space Plan under the mistaken position that there was no local zoning bylaw or other regulation, rule or requirement to implement it. But that Plan was approved by the Planning Board and adopted by Town Meeting, so it was enforceable without any further codification. Municipal plans like Nantucket's Open Space Plan cannot be ignored in the design or siting of subsidized housing, even under Chapter 40B.

18. Page 29, n. 31 – "We hereby modify the provision to require payment [for traffic mitigation] into escrow upon issuance of the initial certificate of occupancy. The funds shall be repaid to the developer from escrow if the town has not begun construction of the traffic improvements within three years of issuance of the last certificate of occupancy." The Board objects to making the mitigation payment upon occupancy rather than upon issuance of a building permit. The reason traffic engineers look to 5-7 year horizons stems from the slow process of roadway upgrades, which typically require a multistep engineering process. If the Town receives the mitigation funds at the time of the building permit, it will be far more likely to have the roadway upgrades completed or well underway by the time of full occupancy.

The Board objects more strenuously to the provision that would escrow those mitigation funds and have them returned to the Application if not used timely. There is no provision in municipal finance that would allow such an arrangement, so the requirement to escrow and possibly return the traffic mitigation payment would effectively render it a nullity.

19. Page 29 – the parties object to the Presiding Officer's finding that Sherburne Commons Lane, "a private, unpaved, gated, emergency-access road" for another residential community, would also provide emergency access for this project. Fire safety was and is a major local concern of the Abutters, current residents of the neighborhood and future residents of the project.

The use of Sherburne Lane – a private, gated, unpaved lane – for emergency access is illusory. Moreover, unlike the firefighters, the Abutters have no right to make use of Sherburne Lane for their own egress in the event of a fire, a concern articulated in their prefiled testimony and in that of former Emergency Services Director David Fronzuto (Ex. 68, ¶¶ 12-13), which the Proposed Decision does not address.

20. Pages 30-31 – the Proposed Decision erroneously downplays the concerns of the Nantucket Fire Chief, and leaves undecided for a future proceeding the design changes he recommends: "revisions can be agreed upon by the developer's designers and the fire chief prior to construction without the involvement of the Board or this Committee". As the Authority Having Jurisdiction to administer the Fire Code on Nantucket, the Fire Chief, not the Board or even the HAC, is the enforcement authority for the Fire Code. 527 CMR 1.00:3.2.2 ("The AHJ who enforces this Code is the Fire Official.").

Moreover, the Fire Chief's testimony emphasized and affirmed the fundamental public safety hazards associated with the project as proposed, based upon its size, density (multiples of that of the abutting Sachems Path development), location (just south of the intersection providing the only access and egress for the entire neighborhood), and configuration (with a single ungated driveway and geometry that would prevent firefighter access to corners of several residential buildings), such that even recommended design changes would not fully resolve local concerns with fire safety. His conclusions that the project presents a "real and present threat" to project residents and neighbors and a "serious public safety concern" (Ex. 43, ¶¶ 14, 17) were amplified by the detailed testimony of former Nantucket Emergency Services Director David Fronzuto, whom the developer did not cross-examine (Ex. 68, ¶¶ 12-13).

21. Page 31 – the Abutters object to the Presiding Officer's statements dismissive of fire-related concerns with the extremely flammable pitch pine vegetation that dominates the site and surrounding land on the basis that "it is not raised in the Fire Chief's testimony, and we view it as speculative." The Proposed Decision does not dignify the uniquely relevant credentials and articulate testimony of Bruce Perry, whose prefiled testimony and supplemental testimony were submitted on behalf of the Board and the Abutters. Mr. Perry's longtime residence adjacent to the site, his training and extensive professional experience in management of controlled fires both on Nantucket and elsewhere, and his expertise in Nantucket ecology and plant species, combine to elevate his opinion that the particular vegetation (together with the strong prevailing winds at that location, also cited by the Fire Chief) amplifies the fire safety hazard which the oversized proposed development would present for the Abutters. (Ex. 46, ¶¶ 6-12; 63, ¶¶ 22-26)

22. Page 34 – "the conditions requiring that the developer construct a 12-inch gravity sewer are struck." The Proposed Decision suggests a possible resolution of the sewer issue based on the Board expert's recommendation, but like the fire safety issues the sewer issue remains unresolved. In the event the parties do not reach a negotiated resolution on these outstanding issues, the Proposed Decision should adjudicate them as they were squarely presented both before and at the hearing.

Among other documented local concerns, there was evidence that any rupture of the vulnerable force main to which developer would connect, or of others existing at the site, would release 30,000 to 60,000 gallons of raw sewage into the surrounding permeable soils before any repair, jeopardizing the Abutters' adjacent private wells and homes. (Ex. 63, ¶¶ 12-21) The Proposed Decision dismisses this position as "purely speculative" and erroneously asserts that it is made "simply because" developer's plans do not show any method to protect the force mains

during construction of the project and from utility line installation below and above the mains. (p. 34, n.36) In fact, prefiled testimony of the Board's sewer engineering expert, Daniel Sheehan (who has had a lead role in the engineering and monitoring of existing infrastructure in that Surfside neighborhood), confirmed that the force mains in question, vulnerable to begin with, have no shutoff valve to stem the flow of raw sewage in the event they are compromised, as one of them was catastrophically in recent years (Ex. 39, ¶¶ 15-17, 19-20). Moreover, the 30,000-60,000 gallon figure was the subject of testimony during the Board's hearing (Ex. 63, ¶ 12).

23. Page 41 – "The development, consisting of 156 total units, including 39 affordable units, shall be constructed substantially as shown on plans entitled 'Surfside Crossing a Proposed 40B Development in Nantucket, Massachusetts,' dated February 15, 2018, with revisions through February 28, 2020, prepared by Bracken Engineering, Inc. (Exhibit 3)" The Proposed Decision references the old plan set that was superseded by the all-condo 156 unit project submitted to the HAC on April 7, 2020. This discrepancy underscores the error from not remanding the substantially revised project to be considered by the Board in the first instance.

24. The Proposed Decision fails to mention Abutters' witness Diane Coombs, long-time Chair of the Nantucket Historic District Commission, who testified without meaningful rebuttal or contradiction that by statute no building can be built on Nantucket without compliance with a special act of the Legislature to preserve Nantucket's designation as a National Asset and historic district in the form of an 1840s whaling settlement, and that the proposed size and massing of 18 buildings approved in the Proposed Decision violate that Act. No part of the Proposed Decision addresses the inability to build this project with this configuration and layout on Nantucket. It would be like siting an apartment building in the middle of historic Sturbridge Village or amid

teepees at Plimoth Plantation, destroying the very thing that the statute is intended to protect. Contrary to the implication of the Proposed Decision, as a matter of law nothing in Chapter 40B repealed the statutory protections for Nantucket's historic uniqueness. (Exh. 64, *in passim*)

25. The Proposed Decision fails to cite or address the unrebutted testimony presented by Residents of David Fronzuto, long time Nantucket emergency management director, that the emergency response capabilities of an Island 30 miles out to sea cannot safely support a project of this size, density and location, with the result that the Proposed Decision erroneously applies mainland standards and cite mainland decisions but not those dealing with the realities of geography and physical features on the ground on Nantucket. Indeed, the draft decision contains revealing references to this project as occurring on the mainland in Falmouth.

26. These objections to the Proposed Decision are directed to the issues addressed therein, and are not intended to limit the scope of potential issues, including those raised in preliminary proceedings before the hearing, or issues that were not addressed in the Proposed Decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I served a copy this document on the other parties by emailing a copy to all counsel of record on this 21st day of July 2022.

/s/ Dennis A. Murphy

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July 21, 2022