

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

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

DETERMINATION OF INSUBSTANTIAL CHANGE

I. PROCEDURAL HISTORY

In April 2018, Surfside Crossing, LLC applied to the Nantucket Zoning Board of appeals for a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23 to build affordable housing on a 13-acre site on South Shore Road in Nantucket. Surfside Crossing’s original application was to build 156 units of housing: 96 condominium units in multi-family buildings and 60 single-family homes. Alternative proposals for 92 and 100 units, with varying design elements, were also discussed during the local hearing before the Board, but ultimately, Surfside Crossing continued to pursue the 156-unit proposal. In June 2019, the Nantucket Board of Appeals granted a comprehensive permit with conditions to build a development reduced in size to 60 housing units: 40 single-family homes and 20 condominium units. On July 3, 2019, the developer appealed the Board’s decision, and on July 23, 2019, this Committee opened its hearing with a conference of counsel pursuant to 760 CMR 56.06(7)(d)(1).

On April 7, 2020, pursuant to 760 CMR 56.07(4), Surfside Crossing notified the Committee of its intention to change its design to one in which all 156 units would be condominium units in multi-family buildings, and asked that the presiding officer determine that those changes are not substantial, which would permit the appeal hearing

to move forward based upon the modified design. The Board objects, and requests that the matter be remanded for further local hearings.

II. STANDARD FOR DETERMINATION OF SUBSTANTIALITY UNDER THE COMPREHENSIVE PERMIT REGULATIONS AND PRECEDENTS

When a developer involved in an appeal to the Committee desires to change its proposal from the application that it originally made to the Board, it is for the presiding officer to determine whether the changes are substantial. 760 CMR 56.07(4)(a). If the changes are substantial, the matter is remanded to the Board for further local hearings; if they are insubstantial, the appeal before the Committee proceeds based upon the modified proposal. *Ibid.* To assist the presiding officer in making the determination, the regulations provide five examples of changes that “generally” will be considered substantial and five that generally will not. *See* 760 CMR 56.07(4)(c) and (d). These provide guidance without establishing hard and fast rules. *Lever Development, LLC v. West Boylston*, No. 2004-10, slip op. at 5 (Mass. Housing Appeals Comm. Dec. 16, 2005).

The changes proposed by the developer are to be examined with consideration to “the adverse impacts, if any, [they] could have on residents or on the surrounding area.” *LeBlanc v. Amesbury*, No. 2006-08, slip op. at 12 (Mass. Housing Appeals Comm. Sep. 27, 2017 Ruling). Whether the modification is requested after a permit has been finalized and therefore will undergo no further review, or whether it is requested during the course of a pending appeal before the Committee, as is the case here, has bearing on whether a condition should be considered substantial. That is, when the proposal’s consistency with local needs will be evaluated during the *de novo* hearing before the Committee, the presiding officer may be more amenable to finding a change insubstantial, and choose to proceed without remand in the interests of efficiency. *VIF II/JMC Riverview Commons Investment Partners, LLC v. Andover*, No. 2012-02, slip op. at 16 (Mass. Housing Appeals Comm. Feb. 27, 2013). “[I]f it seems unlikely that the local board will reverse its previous decision, remand would only result in delay, and the merits are best resolved in the *de novo* proceedings before this Committee.” *CMA, Inc. v. Westborough*, No. 1989-25, slip op. at 20 (Mass. Housing Appeals Comm. Jun. 25, 1992).

III. THE CHANGES PROPOSED IN THIS CASE ARE NOT SUBSTANTIAL.

I have reviewed the following documents through which the parties have presented their arguments regarding the changes in the proposal:

Original Bracken Engineering, Inc. Plans – (Surfside Crossing, a Proposed 40B Development in Nantucket, Massachusetts, Permitting Set, February 15, 2018) (11 sheets)

Lotting Plan (for single-family homes) (sheets 3 and 4 of 11)

Layout Plan, Multi-Family Parcel (sheet 5 of 11)

Schematic Landscape Plan (sheet 11/11)

Notification Letter - Surfside Crossing, LLC's notification of change letter from P. Haverty, Esq., (April 7, 2020), with attachments:

March 23 Workshop/APD Plan Comparison and Plans (March 23, 2020) (59 pages)

SCN Development Landscape Plans (March 6, 2020) (sheets L100 to L105)

Revised Bracken Engineering, Inc. Plans - (Surfside Crossing, a Proposed 40B Development in Nantucket, Massachusetts, Permitting Set, February 15, 2018, revised through February 28, 2020) (9 sheets)

Layout Plan (sheet 3 of 9)

Requested Waivers – HAC Modification Submittal... (9 pp.)

May 13 Board Letter - Board's letter of response from J. Witten, Esq. (May 13, 2020)

May 23 Surfside Crossing Letter - Surfside Crossing, LLC's letter of response from P. Haverty, Esq., (May 23, 2020) with attachments:

May 22 Workshop/APD Letter (5/22/20) (1 page with 5-page Height Comparison appendix)

Memo on... Landscaping History (May 22, 2020)

May 26 Surfside Crossing Letter - Surfside Crossing, LLC's letter of response from P. Haverty, Esq., (May 26, 2020)

June 3 Board Letter - Board's letter of response from J. Witten, Esq. (June 3, 2020)

June 16 Surfside Crossing Letter - Surfside Crossing, LLC's letter of response from P. Haverty, Esq., (June 16, 2020) with attachments:

June 8 Workshop/APD Letter (5/8/20) (1 page with 11-page Height Comparison appendix)

Bracken Engineering, Inc. Layout Plan (Revised Parking June 15, 2020; "Exhibit 3")

June 23 Board Letter - Board's letter of response from J. Witten, Esq. (June 23, 2020)

June 30 Surfside Crossing Letter - Surfside Crossing, LLC's letter of response from P. Haverty, Esq. (June 30, 2020)

July 2 Board Letter - Board's letter of response from J. Witten, Esq. (July 2, 2020)

The development site remains unchanged, as does the number of housing units proposed by Surfside Crossing. But the design of the housing has changed in a number of ways. Below are specific issues which the Board has addressed in arguing that the changes are substantial changes.

Building Type – The most significant difference between the original plans and the current proposal is that the original plans included both multi-family condominium units and single-family homes, while the current plan is all multi-family units.¹ Originally, there were six multi-family buildings containing 96 condominium units and 60 single-family homes; the homes occupied roughly two thirds of the site, and the larger buildings about one third. *See* Original Bracken Engineering, Inc. Plans, Schematic Landscape Plan, sheet 11/11. The current plans are for 18 multi-family buildings occupying the entire site. *See* SCN Development Landscape Plans (sheet 1); Revised Bracken Engineering, Inc. Plans (sheet 3).

Quite frequently, proposed homeownership developments are either all single-family homes or all condominium units. In nearly every such case, the architectural relationship of these two types of buildings to the surrounding neighborhood is quite different. Therefore, a change from one type to the other requires a reevaluation of the appropriateness of the development's design. Thus, a "change in building type" "generally will be [a] substantial change." 760 CMR 56.07(4)(c)(4). In this case, however, because the original plans contained both types of housing, during its public hearings the Board was able to evaluate the effects of both types of designs. It had additional opportunities for evaluation since alternative designs for 92 and 100 units that also included large condominium buildings were presented. *See* May 22 Workshop/PD Letter, appendix pp. 2, 3, 4. Further, this is not a situation where houses on relatively large lots are being replaced by large buildings. Rather, the original plans showed closely

¹ A change from one form of housing tenure to another is generally a substantial change, but since both single-family homes and multi-family condominium units are homeownership units, there is no change in this regard. *See* 760 CMR 56.07(4)(c)(5).

spaced cottages, and in the modified plan, the overall density of units on the site remains the same.

In addition, in rejecting the original proposal, in which nearly two thirds of the units were in condominium buildings, and approving a development in which only one third of the units were in condominium buildings, the Board clearly expressed its discomfort with the larger buildings. Thus, as noted in *CMA v. Westborough, supra*, it is unlikely that it will reverse its previous decision and approve an all-condominium development, and therefore remand would only delay the Committee's *de novo* hearing, which will determine whether the all-condominium proposal is consistent with local needs.

For these reasons, I find that the change to all multi-family units is not a substantial change.

Building Heights – The Board also argues that the buildings in the modified proposal are significantly higher than those in the original plans, specifically that the buildings were originally a little under 30 feet high, and are now about 40 feet high. May 13 Board Letter, p. 2; June 3 Board Letter, p. 2.

The modified proposal has three types of residential buildings and a community building. The heights of the roof ridgelines vary since some parts of the residential buildings are one and a half stories above grade and others two and a half stories. In addition, there is basement living space with walk-out patios below grade.

On the modified plans, the highest roof ridgelines appears at first glance to be 40'2".² March 23 Workshop/APD Plan Comparison and Plans, pp. 22, 33. This is misleading, however, since those plans show clearly that that height is measured from what is labeled "basement grade" (six inches below the basement floor).³ The plans then label the ground level of the surrounding landscape on the site as "grade," which is shown

² The plans for residential building types A1 and A2 show roof ridge heights that vary from 30'11" to 38'2" to 40'2". March 23 Workshop/APD Plan Comparison and Plans, pp. 22, 33 and May 22 Workshop/APD Letter, attach. p. 4. The roof ridge heights shown for buildings type B vary from 30'11" to 38'2" to 39'9". March 23 Workshop/APD Plan Comparison and Plans, p. 43. The community building's highest ridge height is 30'0", and it has two cupolas, the tops of which are 35'1". Workshop/APD Plan Comparison and Plans, p. 54.

³ The design of the below-grade space and the reason for confusion can be seen most clearly in the March 23 Workshop/APD Plan Comparison and Plans, pp. 22, 23, 24, 26, 27.

as 10'0" above basement grade. Thus, the actual height of the buildings at their highest point is 30'2" above grade.

The Board states that the maximum height of the buildings in the original application was 27'11". May 13 Board Letter, p. 2. Accepting this figure, the increase to 30'2" is an increase of 2'3", or 8%. Surfside Crossing maintains that the original height was actually 30'0", and provides a very general architectural sketch to document that claim. May 22 Workshop/APD Letter, attach. p. 2. If this figure is correct, the increase is only a negligible two inches. A third calculation to compare the heights is to use the methodology prescribed by the Nantucket zoning bylaw. Neither party describes that methodology in detail, but Surfside Crossing concedes that the difference calculated in that manner is on the larger side—an increase is from 30.7' to 32.7'. May 22 Workshop/APD Letter, attach. p. 1. This is a 7% increase.

The comprehensive permit regulations suggest that an increase in height of more than 10% is generally a substantial change. 760 CMR 56.07(4)(c)(1).

I find that the increase in height of buildings in the modified proposal is not a substantial change.

Perimeter Buffer Area – The Board inexplicably argues that in the new plans there is a “decrease in perimeter buffer areas from 31,090 to 56,151 square feet,” which results in “an almost nonexistent buffer area.” May 13 Board letter, p. 4. Surfside Crossing confirmed that those measurements are correct. May 23 Surfside Crossing Letter, p.1; March 23 Workshop/APD Plan Comparison and Plans, p. 2. The Board has failed explain how an *increase* in area can result in a *decrease* in the buffer areas, but merely repeats its claim that the buffer areas are “almost nonexistent.” June 3 Board Letter, p. 4.

That the buffer has actually increased is confirmed by the plans. The original plans show only ten-foot-wide and fifteen-foot-wide vegetated buffers between the single-family homes and abutting properties, and a 16-foot side setback for the condominium buildings. Original Bracken Engineering, Inc. Plans, sheets 3, 4, 5. The modified plans show a majority of the condominium buildings set back twenty-five feet from the property line, with the remaining half dozen set back between twenty-seven and forty-four feet. Revised Bracken Engineering, Inc. Plans, sheet 3.

I find that the increase in the buffer areas to 56,151 square feet is not a substantial change.

Usable Open Space – Naturally, the reconfiguration of the site so that it is all multi-family buildings requires changes in usable open space, that is, common areas around the large buildings and yard areas around the original single-family homes. The open space will decrease from 275,065 to 252,215 square feet. March 23 Workshop/APD Plan Comparison and Plans, p. 2. This is a decrease of 22,850 square feet or 8%. In challenging the new plans, the Board argues that this “diminishes recreational opportunities for residents, including passive recreation.” May 13 Board Letter, p. 3. Except to note the reduction in area dedicated to open space, the Board has not provided any detail with regard to exactly how residents will be affected. The plans themselves provide points of comparison, however.

In the single-family portion of the original plans, in addition to showing usable yards for the single-family homes, there was a double-lot “playing field,” a single-lot of “community gardens,” a half-lot “playground,” and three smaller lots (where there is a sewer easement) that are a “dog run” and simply “open green space;” in the condominium area, there is a swimming pool, a small “park, ” and a bocce court and “open green space (where the sewer easement is). Original Bracken Engineering, Inc. Plans, Schematic Landscape Plan, sheet 11/11.

The revised proposal approaches open space quite differently. There is landscaped open space around each of the buildings, but all of the open space for active recreation is at the center of the site. There is a large, open lawn area surrounded by plantings and a path, a playground in the same area, a half-court basketball court, a swimming pool⁴ with surrounding patios, and a large community building. SCN Development Landscape Plans, sheet L100, L101.

⁴ The plans show the new pool as 52 feet long. SCN Development Landscape Plans, sheet L101. The original pool appears in the plans to be a little over 40 feet long. *See* Original Bracken Engineering, Inc. Plans, Schematic Landscape Plan, sheet 11/11.

I find that the original and revised plans are roughly equivalent in terms of open space and active and passive recreational opportunities for residents.⁵ Therefore the changes are not substantial.

Landscaping – As with open space, the reconfiguration of the site requires changes in landscaping. Both the original and revised plans show landscaping in detail. *See* Original Bracken Engineering, Inc. Plans, Schematic Landscape Plan, sheet 11/11; SCN Development Landscape Plans, sheet L100. In challenging the new plans, the Board argues that “Landscape plans provided for the new development are incomplete and inadequate.” May 4 Board Letter, p. 4. This is in fact not the case since the revised plans show considerable detail with regard to landscaping, including a list of species to be planted. SCN Development Landscape Plans, sheets L100, L101, L102, L104. But the relevant question is whether the changes are of a nature that makes them so substantial as to require remand to the Board for further consideration. I find that although the details have, of course, changed,⁶ the two landscaping plans for the site are equivalent, and the change is not substantial.

Impervious Surface – With regard to impervious areas, the Board raises concerns about roadways and sidewalks rather than about total building floor areas, porches, decks, and patios.⁷ *See* May 13 Board Letter, p. 3; June 3 Board letter, p. 3. Further, it comments only on an increase in the area of paved roads, parking, and sidewalks, and does not mention the elimination of driveways for the single-family homes. *See ibid.* The original plans called for 143,849 square feet of paved roads, parking, and sidewalks and 20,920 square feet of residential driveways, for a total of 164,769 square feet of impervious surface. March 28 Workshop/APD Plan Comparison

⁵ I note that the number of bedrooms in the new proposal has decreased from 389 to 283. March 28 Workshop/APD Plan Comparison and Plans, p. 3. This will result in fewer residents sharing the facilities.

⁶ Surfside Crossing notes that “[t]he landscaping plans... evolved through the ZBA application process to adapt to the various iterations... as well as to address some concerns articulated during the review. [They] evolved from a slightly more formal look to a distinctly organic, beachy look....” Memo on...Landscaping History, p.1.

⁷ Floor areas have decreased, but porches, decks, and patios have increased; total impervious area has decreased very slightly from 284,452 to 282,241 square feet. March 28 Workshop/APD Plan Comparison and Plans, p. 2.

and Plans, p. 2. The revised plans call for 162,028 square feet of paved roads, parking, and sidewalks with no area at all dedicated to driveways. *Ibid.* Thus, there is a reduction in this sort of impervious surface of 2,741 square feet or less than 2%. I find that this reduction in impervious surface is not a substantial change.

Parking Spaces – The Board points out that parking spaces have also been reconfigured and increased in number. May 13 Board Letter, p. 3. The original plans showed 266 spaces, and the revised plans 299 spaces. March 28 Workshop/APD Plan Comparison and Plans, p. 3. During the review process under the Massachusetts Environmental Protection Act (MEPA) it was suggested that fewer spaces might be necessary, and that the developer “land-bank” some of the spaces first shown on the revised plans. Based on this, Surfside Crossing has now eliminated 8 spaces entirely, reducing the total to 291, and land-banked another 10 spaces, that is, planning not to construct them initially, but having space available for future construction if necessary. June 16 Surfside Crossing Letter, p. 3; Bracken Engineering, Inc. Layout Plan (“Exhibit 3”). The current number of spaces, 291, is a 9% increase over the original plans.

It is unclear exactly what local concern the Board is asserting with regard the parking spaces. It is not uncommon for boards to argue for additional spaces to ensure that there is enough parking for residents and visitors, but that does not seem to be the case here.⁸ The Board does point out that in the new configuration, spaces are “close to the property line, with a diminished buffer,” and that the developer has requested the waiver of any screening requirement. May 13 Board Letter, p. 3-4. But there is no change with regard to screening since the developer requested a waiver in both its original application and for its modified proposal. Requested Waivers – HAC Modification Submittal, p. 2 (§ 139-19). The Board may well, however, have a legitimate local concern about screening abutting homes from parking areas. But that is a minor design issue can be addressed during the hearing on the merits before the Committee. (The Committee has routinely imposed conditions requiring screening when it is warranted. *See, e.g., Falmouth Hospitality, LLC v. Falmouth*, No. 2017-11, slip op. at 35 (Mass. Housing Appeals Comm. May 15, 2020) (accepting the Board's modification of a condition to

⁸ The original plans specified only 0.68 parking spaces per bedroom; the modified plans provide for slightly over 1 space per bedroom. March 28 Workshop/APD Plan Comparison and Plans, p. 3.

provide for screening through a combination of lattice, fencing, plantings or screening walls).

I find that changes in parking areas are not a substantial change.

Configuration of Roadways and Traffic Circulation – The Board also suggests that the roadways have changed sufficiently to raise concerns for pedestrian safety, and that “[t]raffic circulation... must be reviewed by a qualified professional for efficacy and safety.” May 13 Board Letter, p. 3. It similarly suggests that the plans “must be reviewed by the fire chief” with regard to firefighting access. May13 Board Letter, p. 3, n.3. Comparison of the plans, however, indicates that the roadways are substantially similar. *See* Original Bracken Engineering, Inc. Plans; Revised Bracken Engineering, Inc. Plans. The Board will have ample opportunity to present testimony from the fire chief and other experts during the hearing on the merits. I find no substantial change.

Changes in Aggregate – After reviewing each of the specific changes that the Board has pointed to, and not found any that are substantial, I have also considered whether all of the changes discussed above, in aggregate, are sufficient to constitute a substantial change. In this regard, I note that I have considered that the total number of bedrooms in the development has been reduced from 389 to 283, which reduces the intensity of the uses of the site in general, and in particular reduces the sewer flows (which have been a concern of the Board’s) from 42,790 gallons per day to 31,330 gallons per day. In aggregate, I find that the changes in the proposal are not substantial.

Good Cause Finding – Finally, the Board argues that there has been insufficient showing, as required by the comprehensive permit regulations, that the developer has good cause for not originally presenting the changes to the Board....” May 13 Board Letter, p. 5; *see also* 760 CMR 56.07(4)(a). This part of the regulation is rarely significant in that the reference to “good cause for not originally presenting” changes implies that what is to be discouraged is the withholding of information or other subterfuge on the part of the developer. Here, as in most cases, there is no indication of that, but rather simply that the developer’s plans appear to have evolved through the local hearing process and the MEPA process. As the Committee noted decades ago, “The applicant has good cause for not originally presenting... changes to the Board, in that the changes were made to meet criticisms expressed in the Board's decision. ... It must be

understood that the proposal is a dynamic, constantly evolving process; that it is to be expected that changes will be made in it throughout the entire development process, including the hearing, to improve it, to meet objections, or to meet changing conditions....” *Crossroads Housing Partnership v. Barnstable*, No. 1986-12, slip op. at 16-17 (Mass. Housing Appeals Comm. Mar. 25, 1987) (change from garden apartments to townhouses not substantial); *see also CMA, Inc. v. Westborough*, No. 1989-25, slip op. at 20 (Mass. Housing Appeals Comm. Jun. 25, 1992). The plans here have evolved both during the local hearing process and more recently during the MEPA review process. I find that Surfside Crossing, LLC had good cause for not originally presenting the modified plan to the Board.

IV. CONCLUSION

I find that the changes in the Surfside Crossing housing development proposal, as reflected in the plans filed with the Notification Letter on April 7, 2020, are not substantial. The Board’s request for remand is denied. This matter shall proceed to hearing on the merits before the Committee.

Housing Appeals Committee

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

Werner Lohe
Presiding Officer

Date: July 31, 2020