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Town of Nantucket Zoning Board of Appeals
2 Fairgrounds Road
Nantucket, MA 02554

Re: Surfside Crossing

Dear Sir/Madam:

Thank you for the opportunity to address the Board at its January 16th, 2018 meeting. I appreciate the many courtesies extended by the members of the Board and came away with a great appreciation for the pressures the Board is under in addressing the complex issues and concerns related to this significant G.L. c. 40B comprehensive permit application. I wanted to submit this supplemental letter in order to correct, if necessary, the record concerning some statements that were made near the close of the public hearing last Wednesday evening.

Let me first reiterate that I am not an attorney licensed to practice in the Commonwealth of Massachusetts nor is anything I say or write intended as legal advice. I am relatively certain that the Board does not often get testimony regarding governance and the importance of interpreting existing law with an understanding of the present and future very real threats posed by the impacts of climate change. It bears repeating that sustainability, and the health and well-being of the inhabitants of Nantucket requires ecosystems be viewed as non-linear complex systems with self-organizing properties, resilience, and inherent uncertainty. Planning design, landscaping and other decisions concerning infrastructure and land use can no longer be made solely by referencing past practices and conditions and assuming the future will bring no change. This means, that among other considerations, management and planning must shift its focus from the current emphasis on satisfying the needs of humans through output objectives (like increasing development pressure in remote islands with sole-source aquifers) to an emphasis on protecting the ecosystem functions that provide those goods and services.

While in my presentation I tried to convey the message that the Nantucket Board of Zoning Appeals was subject to the laws and regulations of the Commonwealth of Constitution. Given this reality, I tried to make the point that the Board need not turn a blind eye to the very real environmental conditions at the site – not just current conditions but conditions likely to change in a surprising and perhaps devastating ways in the future. In my view this is a responsible and necessary part of the Board's decision making process. Near the end of the meeting on Wednesday night, however I listened as town counsel seemed to admonish the board to come back onto Planet Earth and stay within its jurisdiction. While I agree with nearly everything that town counsel said in his remarks, and was impressed with the knowledge he demonstrated, in an abundance of caution I

want to try and set the record straight with respect to jurisdictional issues as I understand them.

The jurisdiction of the Zoning Board of Appeals to decide whether environmental issues presented by a proposed c. 40B comprehensive permit arise to the level of “local concern” that could, at a particular site and with the environmental mitigation provisions set forth in the application, outweigh the project’s contribution toward resolving the regional need for affordable housing. See Board of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339, 382 – 393 (Mass. 1973). Jurisdiction over environmental issues extends to the Zoning Board of Appeals even where the assertion of such jurisdiction overlaps with the duties of a town’s Conservation Board. Zoning Board of Appeals v. Sugarbush Meadow, LLC, 464 Mass. 166 (Mass. 2013) (Board denial of permit based in part on town wetlands ordinance reversed where no evidence of harm to wetlands posed by project). The Massachusetts Housing Appeals Committee has repeatedly addressed environmental concerns when raised as “local concerns” by Zoning Boards of Appeal decisions to deny comprehensive permits or otherwise impose conditions.¹

The Massachusetts regulations interpreting and implementing the statutory scheme of the Comprehensive Permit Statute, M.G.L c. 40 B, §§20 – 23, are clear that environmental considerations are relevant to the process:

2. In the case of a denial, the Applicant may establish a prima facie case by proving, with respect to only those aspects of the Project which are in dispute (which shall be limited), in the case of a Pre-hearing Order, to contested issues identified in the pre-hearing order, that its proposal complies with federal or state statutes or regulations, or with generally recognized standards as to matters of health, safety, *the environment*, design, open space, or other matters of Local Concern. [emphasis added]

¹ Woodland Heights Partnership v. Bourne Zoning Bd of Appeals, Housing Appeals Comm. Dec. (June 14, 1993) (Board denial of permit in part because of concerns over nitrogen loading into groundwater overturned where Board failed to prove that nitrogen leaching into the groundwater from the project would create a health concern for public water supply.)
G.P. Affordable Homes Corp. v. Falmouth Bd. of Appeals, Housing Appeals Comm. Dec. at 12 - 36 (Nov. 12, 1991) (Board denial of 40B development overturned where development could cause additional nitrogen/phosphorous loading of nearby pond but town had history of approving other, larger non-40B developments near pond)
Sheridan Dev. Co. v Tewksbury Bd, of Appeals, Housing Appeals Comm. Dec. (Jan 16, 1991) (Board denial of permit based in part on concerns over harm to adjacent freshwater pond and “swamp” from nitrogen and phosphorous discharges from septic system reversed where Board evidence at hearing failed to adequately discuss site soil conditions)
Transformations, Inc. v. Townsend Board of Appeals, Housing Appeals Comm. Dec. (Jan. 26, 2004) (Nitrogen overloading – no proof of harm)
Weston Dev. Group v. Hopkinton Zoning Bd of Appeals, Housing Appeals Comm. Dec. (May 26, 2004) (Board denial based on town wetlands protection bylaw reversed where no evidence in record that the project would result in adverse impact to wetland resources intended to be protected by the bylaw.)
Princeton Development Group v. Bedford Zoning Bd of Appeals, Housing Appeals Comm. Dec. (Sept. 20, 2005) (Board reduction of size of project upheld as “local concern” where design was in violation of local bylaw limiting impervious surface to 25% of area in a wetlands buffer)
LeBlanc v. Amesbury Zoning Bd. of Appeals, Housing Appeals Comm. Dec. (May 12, 2008) (stormwater runoff threats to nearby surface water/wetlands posed by design utilizing underground infiltration structures discounted where developer agrees to comply with MA Wetlands Protection Act)
HD/MW Randolph Avenue, LLC v. Milton Bd of Appeals, Housing Appeals Comm. Dec. (Dec.20, 2018) (Stormwater run-off conditions; threats to nearby surface water/wetlands)

Given the above it is clear that the Nantucket Zoning Board of Appeals has the jurisdiction and obligation to include examine the tangible environmental impacts of the proposed development. It will be up to the Board to determine whether the developer's use of 1986 precipitation data, which significantly underestimates the rainfall that can be expected as effects of climate change slam the NE United States.

The recent dominant trend in precipitation throughout the Northeast has been towards increases in rainfall intensity,² with increases in intensity exceeding those in other regions of the contiguous United States. Further increases in rainfall intensity are expected,³ with increases in total precipitation expected during the winter and spring but with little change in the summer.⁴ Monthly precipitation in the Northeast is projected to be about 1 inch greater for December through April by end of century (2070–2100) under the higher scenario (RCP8.5).²

It will be incumbent on the Board to determine whether local concern over storm water runoff is satisfied by a system that is designed with outdated data and will admittedly impact a key municipal well – the only question is when. How many years out does contamination have to wait to manifest itself into drinking water before the local concerns are satisfied. Similarly, the development is proposed for a construction in a Zone 2 Wellhead Protection Zone. Using outdated precipitation data, and constructing swales, berms and underground subsurface leaching pit systems as part of a design to pass storm water runoff from the largely impervious surface of the project into the island's sole source aquifer, is enough to satisfy local concerns over the health and safety of the town's drinking water as well as the water from the many nearby private wells.

In my view the laws, regulations, and precedent in the Commonwealth of Massachusetts provides ample authority and jurisdiction for the Board of Zoning Appeals to investigate whether the Surfside Crossing design satisfies the local concerns raised by the certainty of groundwater contamination that will result. Jurisdiction is not an issue – freeing the Board up to use its experience, background, knowledge, and common sense to come up with a decision protective of the health, safety, and environment of Nantucket inhabitants.

Thank you for this opportunity to supplement the record before the Board.

Sincerely,

John R Coon, JD, PhD

² **USGCRP**, 2018: *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II* [Reidmiller, D.R., C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock, and B.C. Stewart (eds.)]. U.S. Global Change Research Program, Washington, DC, USA, 1515 pp. doi: 10.7930/NCA4.2018 , p. 671

