



ZONING BOARD OF APPEALS

2 Fairgrounds Road
Nantucket, Massachusetts 02554
www.nantucket-ma.gov

Commissioners: Susan McCarthy (Chair), Elisa Allen (Clerk), Michael J. O'Mara, John Brescher, Joe Marcklinger
Alternates: Lisa Botticelli, Mark Poor, Jim Mondani

~~ MINUTES ~~

Tuesday, October 22, 2024

This meeting was held via remote participation using ZOOM.

I. CALL TO ORDER

Called to order at 11:12 am and Announcements made by Ms. McCarthy

Attending Members: McCarthy, Marcklinger, Allen, Brescher, Mondani

Staff in attendance: William Saad, Zoning Administrator & Land Use Specialist

Absent: - O'Mara & Poor

Late Arrivals: - Botticelli (11:20)

Early Departures: - Botticelli (11:34)

II. APPROVAL OF AGENDA

Motion: Motion to Approve the agenda, as drafted. (made by: Brescher) (seconded by: Marcklinger)

Vote: Carried 4-1 // McCarthy, Marcklinger, Allen, Brescher (Aye) Mondani (Nay)

25-24 SURFSIDE CROSSING 40B

Voting:	McCarthy, Brescher, Allen, O'Mara
Alternates:	NONE
Documentation:	File with associated plans, photos, correspondence and required documentation
Representing:	NONE
Discussion:	Susan McCarthy - Stated that the purpose of the meeting was to improve the responses required to address the Select Board's inquiry concerning the necessity for independent counsel. Jim Mondani - Stated that the Board's previously adopted motion to request independent counsel did not require further clarification for the Select Board. - Motioned to adjourn the meeting; however, as it did not receive a second, the meeting continued. Susan McCarthy - Requested that each member provide their insights regarding the Town Manager's request to elaborate on any additional justifications they may have. John Brescher - Indicated a necessity for independent legal counsel. - Recommended Ed Marchant as a potential contact to assist the Board. - Inquired whether the current level of Select Board involvement exceeds that observed in previous 40B comprehensive permit applications, expressing uncertainty about such extensive participation in past applications. Elisa Allen - Concurred with Brescher's statements. - Believed that obtaining a second opinion would be advantageous. - Noted that any member who feels uncomfortable with the Board's representation has a valid reason to

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	request separate counsel. - Emphasized that the process is complex, and legal counsel could aid the Board in understanding it more effectively. Lisa Botticelli - Concurred with the statements made by Brescher and Allen. - Acknowledged the complexity of the situation due to varying rulings and the need to understand timing, extensions, and the overall process. - Stated that legal counsel will assist the Board in navigating the remand process, ensuring that the Select Board and other interests do not influence their advice. The Board - Emphasized that this request is not intended as a criticism of Attorney Pucci. However, the Board feels that KP Law's representation does not fully align with the best interests of the ZBA at this time. Elisa Allen - Questioned the timeline and deadlines. Susan McCarthy - Highlighted the significance of interpreting both the Superior Court Order and the HAC Order, stressing the necessity for legal counsel to clarify the relevant timeframes. The Board - Reviewed Jim Mondani's email directed to the Chair and town administration, agreeing that the points presented regarding the necessity for Special Counsel were sufficient. - Discussed who would represent the request at the Select Board meeting.
Motion:	Moved to authorize McCarthy and Mondani to work in tandem to present the request for independent counsel to the Select Board. (made by: Brescher) (Seconded by: Allen)
Vote:	Carried 4-0// McCarthy, Brescher, Mondani, Allen (Aye)

III. ADJOURNMENT

Motion:	Motion to adjourn.
Vote:	Carried 4-0// McCarthy, Brescher, Mondani, Allen (Aye)

Submitted by: Rodlisha Dixon

From: [Jim Mondani](#)
To: [Libby Gibson](#); [William Saad](#)
Cc: [Leslie Snell](#); [Brooke Mohr](#); [Susan McCarthy \(sem@sgriffinlaw.com\)](mailto:sem@sgriffinlaw.com)
Subject: Re: Request for Special Counsel
Date: Thursday, October 17, 2024 12:19:41 PM
Attachments: [image001.png](#)

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Pursuant to the Chair's request, below are my responses to your questions about the ZBA's request for special counsel. I'm providing information now because I was unaware until recently that this request added to the October 2nd Selectboard agenda. Unfortunately, I was out of the loop, I would have provided this information advance of the meeting. It is also unfortunate that there was no ZBA representation at the meeting to address the request. Coincidentally, at this same meeting, we were made aware of activities that further bolster our request for new representation so the delay is warranted. Nevertheless, I trust that my delayed response and/or lack of ZBA representation at the October 2nd meeting will not be construed as a withdrawal of this request. We appreciate your continued support and attention to this matter.

Why is there a need for special counsel/specific reasons for this need?

As you know, the ZBA voted at its 9/5 meeting to request the Town's approval of the Board's engagement of substitute special counsel to advise us on matters related to the Surfside Crossing 40B development. The reason for this vote is simple: the Board requires the services of special counsel that can provide uncompromised, unconflicted legal representation of the Board in connection with our ongoing 40B responsibilities. We are in need of special counsel because the existing Town council has demonstrated an inability to provide unconflicted legal advice to the ZBA regarding this matter. Time and again, Town counsel as failed in its duty to provide dedicated legal representation of the Board as a result of its advisory role with other Town entities related to the same matter. Unfortunately, the Board believes that this dual representation has resulted in a compromised legal representation. It has reached a point that the majority of ZBA members that the only option is to seek the advice of special counsel. Our main issue is that Town counsel has provided ongoing concurrent legal representation of other Town stakeholders related to same project. These other Town stakeholders have a different set of objectives regarding the project which place Town counsel in a compromised position in meeting the expectations of this Board. This multiparty representation has materially limited KP Law's duty to provide dedicated legal representation required by the Board and has seriously impacted the Board's ability to address these ongoing legal issues. In this scenario, it is unacceptable for Town counsel to represent other interests. As the sole statutory Town authority over the 40B permitting process, it is imperative that the ZBA be provided with dedicated, reliable legal representation that is aligned with the ZBA's objectives and create an inherent conflict. We are u. Based on KP Law's ongoing representation of other entities relating to this project, we are of the opinion

that our attorney/client relationship is no longer sustainable due to this inherent conflict. We require an independent counsel that will uphold its professional duty to provide sound legal representation on this matter. The 40B permit process is well-defined and the ZBA's sole authority cannot be usurped by other Town stakeholders that are obtaining legal advice from the same counsel.

The recent unveiling of documents at the October 2nd Selectboard meeting relating to ongoing backchannel dialogue and negotiations with the developer further illustrates KP unwillingness to provide dedicated legal counsel to Board. We believe this ongoing involvement by KP Law will continue to cloud its legal advice to the Board. Regardless of Town counsel's level of involvement with this ongoing subterfuge, there is no scenario that would enable KP Law to provide legal services to the Board. Based on the foregoing, the ZBA requests the services of special counsel to replace the role of existing legal counsel. Unless we are provided with substituted legal counsel, we risk being in the vulnerable position of having no legal representation throughout the remainder of permitting process and thereafter. This is not acceptable.

In order to substantiate our position, we provide you with the following examples of this discord with existing counsel:

- KP Law ("TC") was involved with usurping the ZBA's statutory authority by counseling the Affordable Housing Trust/Selectboard on its decision to terminate the appeal. The firm failed in its obligation to provide notify the ZBA of the ongoing negotiations with the developer to terminate the Board's appeal. Under KP Law's supervision, both Town boards were allowed to conduct unlawful executive sessions outside of the ZBA's purview and failed to provide a timely release of meeting minutes. Additionally, TC advised against the ZBA conducting its own executive session in an effort to further deprive the ZBA with a chance to address the proposed termination.
- TC invoked the attorney/client privilege by failing disclose information to the ZBA related to its involvement with the other Town board's ill-advised decision to terminate the ZBA appeal. This greatly impaired the ZBA's ability to obtain pertinent information relating these unlawful activities.
- TC failed to provide, at the ZBA's clear directive, a customary written settlement agreement with the developer prior to the termination of the appeal.
- Contrary to the ZBA's explicit conditional directive, TC filed the Stipulation of Termination(with prejudice) immediately following its insufficient email request to the Selectboard on the ZBA behalf
- TC failed to recuse themselves from discussions during the ZBA's April 2023 relating to acquiring the services of special counsel; in fact, they advised against it (presumably for their own benefit). Additionally, TC became combative with individual ZBA members who merely questioned their actions.
- At the 2023 Town Meeting, TC advised against adopting the proposed

amendment to add funds for hiring ZBA special counsel. It is important to note that a point of order was granted related to the perceived conflict of TC advocating against the amendment.

- TC failed in its duty to represent the ZBA in court following ill-advised appeal termination despite the fact that the ZBA remained a party defendant in the related countersuits by Turning Point and NLA. As the attorney of record for the ZBA, TC failed to represent the ZBA's interests at subsequent court hearings. At one point in the process, the judge questioned the other parties about the lack of representation on behalf of the ZBA.
- TC failed to advocate on the ZBA's behalf in obtaining a delay of the last year's ill-advised comprehensive permit approval advocated by the developer due to the appeal being undecided. As expected, this would considerable wasted time and effort for all involved. Furthermore, TC appeared to continuously capitulate to developer's demands and unreasonable document dumps which only served to confuse and obfuscate the Board in its review.
- TC law failed to adequately address developer counsel's unwarranted attacks throughout the wasted approval process.
- TC advised the Board on the 40B Regulatory Agreement which has triggered a ethics complaint against ZBA members. Again, TC failed to obtain a delay in the review until after the appeal which limited the ZBA's understanding of the Project.
- Based on a recent FOIA discovery, TC was involved with on-going negotiations of agreements with the developer outside of the 40B process and the purview of the ZBA. Furthermore, the negotiated terms of the agreement explicitly limited the ZBA's authority over the project in direct violation of the law.

What is the specific scope of work that a special counsel would undertake?

The special counsel will assume the role of existing counsel throughout the remainder of the permitting process. Therefore, the scope of work will be similar to that of existing counsel providing on-going legal representation of the ZBA throughout the 40B permitting process and matters related thereto.

Is there an estimated cost for special counsel, including hourly rate, number of hours?

Because special counsel will be substituting for the existing representation, I would expect that costs will track to the estimates already budgeted for the matter, except for some additional fees associate with special counsel getting up to speed. With regard to rates, I expect all firms practicing in this area of expertise have similar fee structures as existing counsel so there is ultimately additional impact to the budget.