



MANCHESTER-BY-THE-SEA

ZONING BOARD OF APPEALS

Manchester-by-the-Sea, Massachusetts 01944-1399

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MINUTES

ZONING BOARD OF APPEALS

Hybrid Meeting January 25, 2023

Members Present: Sarah Mellish (Chair), Brian Sollosy, Kathryn Hall, James Mitchell, and Sean Zahn

Members Not Present: John Binieris and Jim Diedrich

Ms. Mellish called the meeting to order at 7:00 p.m. and stated that the meeting was a Hybrid meeting on Zoom with members of the Board and Applicants in Town Hall, Room 5, and members of the public on Zoom. Ms. Mellish introduced herself and Board members present.

New Application

Ms. Mellish opened the Public Hearing for the Application of Joel Favazza (Seaside Legal Solutions, P.C.) on behalf of Samuel and Drayton Martin for a Variance under Sections 5.6 and 7.4.6 of the Zoning By-Law, and/or other relief as may be necessary, to construct a detached garage with a ridge height that exceeds the 25' maximum height for an accessory structure at 107 Summer Street, Assessor's Map 14, Lot No. 34 in District A, filed with the Town Clerk on December 15, 2022.

Mr. Favazza presented the application stating that the relief requested is for a variance to exceed the maximum allowable building height for an accessory structure pursuant to By-Law Section 5.6:

- Maximum height for accessory structure is the lesser of 1 ½ stories or 25'.
- Proposed height of the structure is 32.25' above construction grade.
- Relief requested is for 7.25'.

The site plan design mimics the existing house, and the side entrance of the garage mirrors the opposite porch overhang. From the street level the elevation is 7.5' down from the driveway and will be filled to bring the garage level with the driveway. There is no lower level planned for the garage; the garage will be constructed on a concrete slab. The topography of the site is unique to the project.

Variance By-Law Section 7.4.6

- Proposed location of garage slopes downhill dramatically (up to 10' from the NE corner to the SW corner) from the grade of the existing driveway
- Proposed garage will utilize the existing driveway, requiring the structure to be “built up” to meet the current driveway level.

Mr. Mitchell thanked Mr. Favazza for his presentation and asked if the existing retaining wall would be built up to support the fill or if a new wall would be built. Mr. Mitchell added that substantial fill was being added and a wall would be required to support the area. Mr. Favazza indicated that the plans did not currently go to that level of detail and during the construction permitting process the contractor would likely rely on the recommendation of the Building Inspector to extend the existing wall or build up with a new wall.

Ms. Howe asked if the driveway matches the existing staircase of the house. Mr. Favazza stated that it does and there was no way to regrade the driveway and rematch the staircase. Ms. Mellish asked why the structure was 26' vs. 25'. Mr. Favazza answered that the height was sufficient to match the level of the garage doors, so the peak matched the house with the same architectural detail. Mr. Mitchell stated if the roof was shortened the garage would not be in harmony architecturally.

Ms. Mellish moved to close the Public Hearing and approve the application of Joel Favazza (Seaside Legal Solutions PC.) on behalf of Samuel and Drayton Martin for a Variance under Sections 5.6 and 7.4.6 of the Zoning By-Law, and/or other relief as may be necessary, to construct a detached garage at 107 Summer Street, Assessor's Map No. 14, Lot No. 34 in District A, filed with the Town Clerk on December 15, 2022, based on a finding that the garage 26' building height is appropriate to be consistent with the architecture of the existing residential dwelling and the ridge height of 32.25' from mean construction grade is due to a steep drop-off on the property at the location of the garage, owing to circumstances relating to the shape and topography of the land especially affecting such land but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of the By-Law would involve substantial hardship and that the desired relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of the By-Law, based on the condition that the garage is constructed in accordance with the following documents:

- *Site Plan prepared by Hancock Survey Associates; Inc. for Works by Jesse De Benedictis LLC dated 11/21/22.*
- *Designs prepared by LF Studio for Works by Jesse De Benedictis LLC dated 9/28/2022: Main Level Layout, Upper-Level Layout, Roof Layout, Front Elevation, Left Side Elevation, Rear Elevation, 28' 0" Building Cross Section AA, Right Side Elevation*

Mr. Mitchell seconded the motion; the motion was passed unanimously.

Ms. Mellish opened the continued public hearing for the Application of **Benjamin B. Tymann, Attorney** on behalf of Samuel and Tracey Byrne of 1-3 Blossom Lane for the Appeal of an Administrative Decision under Section 7.4.5 of the Zoning By-Law, regarding a Request for Zoning Enforcement filed with the Building Inspector on June 21, 2022, for construction in

progress which appears to exceed the scope of the Special Permit granted and Building Permit issued at **2 Blossom Lane**, Assessor's Map No. 17, Lot No. 12 in District E, filed with the Town Clerk on August 8, 2022.

The 5 members of the Board who will be voting on this Application tonight are: Ms. Howe, Mr. Sollosy, Mr. Mitchell, Ms. Mellish and Mr. Zahn. Although Mr. Zahn did not attend the October meeting, he has watched the video of the meeting, has read the minutes of that meeting, and feels prepared to vote on this Application.

Ms. Mellish started by reviewing the information with respect to the garage main residence, spa, pool, pool shed, coverage by structures and total coverage by structures and impervious surface. Adding she would take comments from the public only on those matters. The Board will then discuss issues with respect to topography. Ms. Mellish asked everyone to be brief, and not to duplicate what others have said. Ms. Mellish added she will limit the amount of time each person may speak.

Attorney Barry, on behalf of the property owners of 2 Blossom Lane, submitted a letter to the ZBA dated 11.10.2022, in which they agreed to make certain changes to reduce the coverage by structures to 29.52% which is below the 29.8% coverage by structures reflected in the plans incorporated into the Special Permit decision. They have agreed to remove the spa and reduce the size of the pool shed to 197 square feet and reduce the size of the terrace. This results in coverage by structures and impervious surface of 32.6% which is less than the 35% condition included in the Special Permit, excluding the walls.

Ms. Mellish asked if there was someone who would like to speak to the changes. Mr. Gray of Carpenter & MacNeille stated he would speak. Mr. Gray stated that Carpenter & MacNeille had been working with Mr. Orlando and had made changes to the pool house structure, so it is now under 200 sq. ft. in addition the size of the terrace and other improvements like the spa, which he acknowledge was an error, have been removed. Mr. Harrington added that plans for the pool shed had been submitted to the Board prior to the December 2022 hearing. Mr. Harrington projected the revised pool shed plans onto Zoom.

The Board discussed the pool shed, noting it was larger than originally planned and no modification to the approved plans in the original Special Permit had been requested. Mr. Gray stated that Carpenter and MacNeille had been working with the Building Inspector and that the original pool house plans were an oversight on their part. When the oversight was brought to their attention, they quickly corrected the error. Ms. Mellish noted that if changes had been brought back to the Board that would have made things smoother. She added that the Building Inspector should have notified the Board about the changes. She acknowledged that was on "us", the Town. The Board briefly discussed the difference between the approved 180 sq. ft. and the rebuilt 197 sq. ft. pool shed. The reason for the design addition of 17 sq. ft. was an architectural improvement, the change added only 6 inches to the interior space and allowed for door access to what was stored in the shed.

Mr. Tymann, representing the petitioners, stated it was hard to believe that the pool house built at 430 sq. ft. was a mistake. He agreed that the changes should have been brought before the Board

and urged the Board to require any variations to the original Special Permit to require an amendment and added that he believed both the pool house and the pool required applications for a variance.

Ms. Mellish asked if Mr. Orlando would like to speak. Mr. Orlando stated he would. He noted that he had informed the builders that they needed to return to the ZBA for approval of the changes to the Special Permit once he became aware of how much larger the structure was than what was approved. Once the builders were informed of the steps required, they changed the pool house to be substantially smaller and more compliant with the By-Law. At the point the structure did not require a building permit because it was under 200 sq. ft.

Ms. Mellish asked the Board if they had questions about the other structures, adding that she believed the other structures as constructed were consistent with the Special Permit and Building Permits. The Board had no questions regarding other structures.

Ms. Mellish asked if there were any comments from the Public on this aspect of the Appeal?

Mr. Byrne spoke indicating that they should not be held to the parameters of the Building Permit. Ms. Mellish stated that the appeal period is under State regulations, adding that a Special Permit is filed with the Town Clerk and there is an appeal period of 20 days.

Ms. Barry responded that when a Building Permit is issued it is posted on the property and plans are available on the Town website.

Mr. Tymann stated that he believed the Board was correct that the comparison should be between the Special Permit and As Built Plans and there are no As Built Plans. He urged the Board to consult with Town Counsel about the discrepancies with the Special Permit. Ms. Mellish stated that the design of the building was not discussed, the Board was concerned with location, setback, and height. The Board negotiated with the applicant on the location of the garage which was moved back to the site of the original garage. She concluded that the swimming pool is 18' x 40' and was approved at 18' x 36' she does not see that as materially different.

Ms. Howe and Mr. Sollosy agreed that there was an issue with how the project proceeded and it is difficult to accept that it was all an innocent mistake. Their point was the Special Permit was not followed and the Public did not have an opportunity to comment. Mr. Sollosy brought up the stone wall at the back of the property with lighting. The Carpenter & MacNeille representative stated it is their practice to work with the Building Inspector and any changes were with his full knowledge and understanding.

Mr. Tymann stated that there should be a revised application submitted. Ms. Mellish clarified that the By-Laws do not cover stone walls. That was not part of the Board's review.

Ms. Barry stated these things were not intentional and these types of changes do not imply modifications and were completed in concert with the Building Inspector and walls are not the purview of the Board.

Ms. Mellish moved the discussion to topography.

Ms. Mellish asked Mr. Orlando, the Building Inspector, if he would like to explain the order issued on 12/13/22 with respect to topographical changes and the response you received from the property owner.

Mr. Orlando replied on 12/13/2022 he issued a letter to the 2 Blossom Lane property owners stating: “it seems that while most of the activities are covered by the listed exempt activities in Section 6.16 of the Zoning By-Law the volume of fill brought in, particularly in the right side of the property does seem to reach the limits that would require a special permit from the Planning Board.

Attached is a copy of the plan with those areas of concern highlighted. It is a requirement of this office that all fill activity in those highlighted areas be ceased immediately until such time that the activity in those areas is properly permitted or it can be proven that the areas have been brought into compliance with Section 6.16 of the Zoning By-Law.

Mr. Orlando stated that he used a 2’ of fill calculation for green activity in those areas, rather than 3’ as the Building Permit was issued between 2 and 3 years ago. On 12/19/2022, the contractor for the property owner sent a remediation plan to the Building Inspector. On 12/21/2022, the Building Inspector responded “Your revisions to the grading look appropriate to me. This work should bring you into compliance with the bylaw.”

Ms. Mellish asked if Mr. Tymann would like to speak about his concerns with respect to topographical changes. Mr. Tymann stated he had a question for Mr. Orlando and asked if Mr. Orlando’s estimates took into consideration the “green activity exclusion” where it is stated that the applicant is entitled to 3 feet or 12 inches over 3 years for a green activity exemption. Mr. Orlando replied that he took a conservative approach to the green activity exemption because three years had not passed and allowed for 2 feet of change. Mr. Orlando added that the statement in Mr. Merrikin’s definition of “green activity exclusion” failed to take into consideration the last sentence of the definition which clearly states, “soil of any other material.”

Mr. Merrikin, Legacy Engineering stated there are two triggers that demonstrate more than 10 % disturbance in the set back. He estimated that the disturbance in the set back was 90%. He added that patios and walls are not structures and that the patios at 18.4% and the wall at 27% of the disturbed area for a total of 45%. He added that excavation and back fill likely also exceeded the minimum requirement and estimated the cubic yards at 150-300 cubic yards for the wall and 105 cubic yards for the patio which would require a Special Permit.

Mr. Harrington replied showing the area cited by Mr. Orlando in his cease order. Working with Mr. Orlando the correction was made noting that patios are another material as defined in the green exemption. The area highlighted by Mr. Orlando was graded to below 2 feet, bringing it into compliance. The cubic yards and disturbance areas have a volume calculation of 19.1 cubic yards and 4.3%. Mr. Gray stated excavation is the removal and putting back of material which is part of every construction process. Soil was not being removed from the site.

Ms. Mellish asked if there were any comments from the Public on topography changes? *There were none.*

Mr. Gray asked if Mr. Mac Neille, 13 Eaglehead Road, President of Carpenter & MacNeille could speak to the Board. Mr. MacNeille stated he would like to clarify and provide some background. He added he has resided in Manchester since 1991 and served on the ZBA from 1996 to 2000 resigning after one term given the demands of the position. He served on the HDC for 6 years after that. The assertion that his company would play fast and loose with any project is 100% inaccurate. Carpenter & MacNeille have worked on hundreds of projects in town and worked with ZBA, PB, Con Com, BOH and HDC. He wants to push back on that assertion.

He is not comfortable and frustrated with the project being discussed. This is not how our company does business if it was, we would not have been in business in Manchester for 25 years. We did make mistakes and you have my personal apology it was never our intent to deceive or take advantage these were good-faith mistakes.

The Board accepted the apology and expressed frustration with this project and other projects that have not followed the Board's approved permits. Ms. Mellish added that people make mistakes, and the Town needs more oversight. Mr. Tymann reminded the Board that it was their responsibility to ensure residents are building according to the provisions of the Special Permit.

The Board discussed the topographical changes and agreed the majority were due to construction structural changes, the new septic system, the leaching field with associated retaining walls and green activities, all of which are exempt activities under Section 6.16 of the Zoning By-Law. The Board also discussed whether the walls were intended to be included as a topographical change in the By-Law and agreed with the property owner that it is an excavation, not a topographical change. Ms. Mellish added that that if excavation for a wall is a topographical change requiring a Special Permit from the Planning Board. Almost everyone in Town would need a Special Permit and that has not historically happened.

Ms. Mellish moved to close the Public Hearing for the Application of **Benjamin B. Tymann, Attorney** on behalf of Samuel and Tracey Byrne of 1-3 Blossom Lane and take the following action with respect to the Appeal of an Administrative Decision under Section 7.4.5 of the Zoning By-Law, regarding a Request for Zoning Enforcement filed with the Building Inspector on June 21, 2022, for construction in progress which appears to exceed the scope of the Special Permit granted in 2019 and Building Permit issued in August, 2020 at **2 Blossom Lane**, Assessor's Map No. 17, Lot No. 12 in District E, filed with the Town Clerk on August 8, 2022:

Ms. Mellish moved to DENY the Appeal and UPHOLD the Enforcement Officer's Administration Decision, including the changes agreed to by the property owners for the following portions of the construction project based on a finding that the as-built condition is substantially consistent with the relief granted in the 2019 Special Permit and the Building Permit issued in August, 2022:

- Garage with respect to side setback, rear setback and roof height based on a finding the dimensions are consistent with the 2019 Special Permit granted and the design is consistent with the approved August, 2020, Building Permit, neither of which were appealed.
- House with respect to front setback, rear setback and roof height based on a finding the dimensions are consistent with the 2019 Special Permit and the East second floor deck and design which are consistent with the approved, August, 2020, Building Permit, neither of which was appealed.
- Coverage by structures of 29.52%, based on a finding that the coverage is less than the 29.8% that was granted in the 2019 Special Permit.
- Total coverage by structures and impervious surfaces of 32.6%, based on a finding that coverage is less than the 35% granted in the 2019 Special Permit.
- The stone wall and iron fence surrounding the property based on a finding they were depicted on the plans included in the 2019 Special Permit.
- Swimming Pool based on a finding the 18' x 40' size is not materially different from the 18' x 36' swimming pool granted in the 2019 Special Permit and an 18' x 40' pool was reflected in the plans included with the August, 2020 Building Permit and is not relief required under a Special Permit.
- The spa is based on a finding that the property owner has agreed to remove the spa as it was located within the setback and such relief was not requested in the 2019 Special permit.
- The pool shed based on the new design reducing the size to not exceed 197 square feet, based on a finding it is not substantially different from the 180 square feet granted in the 2019 Special Permit provided the structure does not encroach into the setback, has a roof height of no more than 12' 6" above the new patio grade and the chimney does not extend more than 2' 6" above the roof, and provided an application for a Building Permit is filed and approved by the Building Inspector, if required, and is constructed strictly in accordance with PS2.00, prepared by Carpenter & MacNeille, dated 12.12.22. Since the pool shed relief was granted under the 2019 Special Permit, which was not appealed. It is now moot whether it should have been a Variance or a Special Permit.
- Topographical changes made to the property which may have exceeded those allowed under "Excluded Activities" based on a finding the Enforcement Officer issued an Administrative Order to the property owner on December 13, 2022 to which the property owner's contractor responded with a proposed changes and a remediation plan on December 19, 2022 and the Enforcement Officer responded on December 21, 2022 that with those change they will meet the requirements of Section 6.16 of the Zoning By-Law and do not require a Special Permit from the Planning Board. That Administrative Decision was not appealed.

VOTE: Ms. Howe, Ms. Mellish, Mr. Mitchell, and Mr. Sollosy voted to approve the motion and DENY the appeal. Mr. Zahn voted not to approve the motion and Approve the Appeal. The Appeal was DENIED. The motion was seconded by Mr. Mitchell.

Ms. Mellish will write the Decision; Ms. Howe will review the Decision.

ADMINISTRATIVE MATTERS

- **Review and approval of meeting minutes.**

Ms. Mellish moved to approve the amended meeting minutes of November 16, 2022, Mr. Sollosy seconded the motion the motion passed with Ms. Mellish, Mr. Sollosy, Mr. Zahn, Mr. Mitchell, and Ms. Howe voting affirmatively.

Ms. Mellish moved to approve the meeting minutes of December 21, 2022; Mr. Sollosy seconded the motion. The motion passed with Mr. Sollosy. Ms. Mellish and Mr. Zahn voting affirmatively.

- **Status of Decisions** There are no outstanding decisions.
- **Any other administrative matters that could not reasonably have been anticipated in advance of the required 48-hour posting.**

Mr. Mitchell moved to adjourn the meeting; Ms. Howe seconded the motion. The motion passed unanimously by roll call vote.