



MANCHESTER-BY-THE-SEA

ZONING BOARD OF APPEALS

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

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MINUTES

ZONING BOARD OF APPEALS – 40B

ZOOM Meeting June 8, 2022

Members Present: Sarah Mellish (Chair), John Binieris, Brian Sollosy, Kathryn Howe, Jim Diedrich, and Sean Zahn

Member Not Present: James Mitchell

Staff Present: Town Planner, Sue Brown, Administrative Assistant, Gail Hunter

Guests: Geoffrey Engler, SLV School St. LLC., George Pucci, KP Law, Patrice Murphy, Executive Director, METC, Elizabeth Pyle, Hill Law METC, Counsel, Stacey Minihane, B+T Peer Review Consultant, Steve Gang, Chair MBTS Conservation Commission, Luke Legere, Counsel for CHIAH

PUBLIC HEARING – 40 B CONTINUED APPLICATION

Ms. Mellish called the ZBA meeting to order at 7:02 p.m. on June 8, 2022 and introduced the Board.

Ms. Mellish opened the Continued Public Hearing on the 40B Application of Geoffrey Engler of SLV School St. LLC, to be known as The Sanctuary at Manchester-by-the-Sea, for a comprehensive Permit under M.G.L. Chapter 40B, Sections 20-23 to construct a 136-unit apartment complex for which the Massachusetts Housing Finance Agency issued a Project Eligibility Decision on September 16, 2021, at School Street, Assessor's Map No. 43, Lot No.18 filed with the Town Clerk on September 27, 2021.

Ms. Mellish stated the article in the *Gloucester Times* was inaccurate. She clarified that only the Developer, not the State, can grant a continuance and the continuance needs to be approved by the Board in a Public Hearing. Currently the Public Hearing is scheduled to close on June 22, 2022. The Board is waiting to receive the Wildlife Habitat Study and the municipal Water and Sewer Feasibility Study. Mr. Engler has indicated he will consider a 30-day extension. Ms. Mellish has polled the Board and the available dates in July for meetings are July 13 and July 27. Ms. Mellish asked Mr. Engler if those dates were agreeable to him. He acknowledged he was comfortable with the suggested dates.

Ms. Mellish moved to accept the extension of the 40B Public Hearing to July 28, 2022; Mr. Sollosy seconded the motion. The motion passed with Mr. Sollosy, Mr. Binieris, Mr. Diedrich, Ms. Howe, Mr. Zahn, and Ms. Mellish voting affirmatively. Mr. Mitchell was not available for the vote.

Ms. Mellish asked Ms. Minihane to clarify the difference between the State and Town By-Laws as related to wildlife habitats. Ms. Minihane stated the State does not regulate Vernal Pools they are considered a habitat feature of other resource areas. Where there is a Vernal Pool in a vegetative wetland it is a habitat feature of the vegetative wetland, the Vernal Pool is not itself a resource area that is protected.

The State considers the habitat feature to be the basin when it is within another resource area for instance in land subject to flooding, bordering vegetative wetlands, a river front area, etc. The State considers the Vernal Pool habitat to be the area within 100-feet of the limits of the basin but only to the extent that the 100-foot offset also lies within another State designated resource area.

Locally Manchester regulates Vernal Pools resource areas, and the local By-Law considers the resource area to be the basin itself plus 100-feet upgradient of the basin regardless of the area being within another resource area. The local By-Law states basin plus 100-feet on top of that area a 30-foot and 50-foot setback from the Vernal Pool resource area; 130-feet is a no disturb area and 150-feet is a no build zone.

Ms. Mellish clarified that State 100-feet is not a resource area. Ms. Minihane replied the A series needs to be within a full 100-feet border of the vegetative wetland and the State consideration has no bearing on local By-Laws. Ms. Howe confirmed that the Town's By-Laws are more restrictive and are not covered by State By-Laws. Ms. Minihane stated the local By-Law has to be more restrictive than the State. Ms. Minihane added the standard for a waiver is if the waiver is needed and if without the waiver the project is unbuildable the waiver is granted. She concluded in the case of 40B law the need for Affordable Housing trumps other environmental considerations.

- **Environmental Peer Review**



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Waivers 2022_5.25.2

Ms. Minihane summarized the above comprehensive letter. She noted that the letter is 40 pages in length and the letter reflects how the waiver requests have changed over time providing a comprehensive back and forth between the Applicant and the Peer Reviewer. During this evening's review Ms. Minihane stated she will focus on the areas in bold. If the Board were looking at the letter from the starting point the board would notice that the waiver requests have changed, and the most current language is reflected in this response. Ms. Minihane added B+T looked at each waiver for the three ponds as the Board requested and considered – necessity of relief, alternate methods of compliance, and the adverse impact if the waiver is granted

Wetland By-Law section 1.2.2 – relates to use of home rule authority. Some additional consideration of this waiver will be discussed with the submission of the Wildlife Habitat Study.

B+T Current Response: B+T understands that some manner of a waiver to the vernal pool setback provisions will be required by this design. The Applicant notes that they will demonstrate ‘how the plan complies with DEP regulations and does not impair vernal pool function. We recommend the Applicant provide a synopsis of engineering or construction management solutions being explored to achieve this protection, particularly as it relates to the removal of potential ledge outcrops up-gradient of the A Series PVPs. In the vicinity of the A Series PVPs, work is proposed to extend down-gradient from the crest of the slope above one of the vernal pools with significant ledge. We feel that a greater discussion as to how work will be undertaken to avoid impacts to the PVPs during construction is warranted.

Applicant Response: The Applicant believes that the level of detail being requested, specifically construction strategy solutions, are better addressed during the development of Construction Drawings and prior to the building permit application submittal. The Applicant will accept a customary condition requiring such construction management details. Nevertheless, the Applicant has contacted a prominent multi-family general contractor in an effort to communicate possible means and methods that could be used during construction to appropriately protect resource areas during construction, and further details will be forthcoming.

- Necessity of Relief – relief is requested for 2 areas to allow for construction of driveway and road
- Alternate Method of Compliance – in one area there appears to be the potential for alternate grading but in the other area there does not appear to be an alternative
- Impact if Waiver Granted – reduction of area around the Vernal Pools waiting for receipt of the Vernal Pool and Wildlife Habitat study

Wetland By-Law 2.2 – Definition of Alter Ms. Minihane added the local language includes the words incremental and cumulative – the terms are not defined. *Cumulative could apply to existing development but there is no just development and incremental may relate to lawn creep into existing development.* There was no firm statement that denying the waiver would make the project unbuildable. Mr. Engler stated he was not comfortable entering into an agreement where the definitions are not clear. Ms. Minihane stated B+T does not take exception to the waiver but believes some guidance is given to the definitions.

B+T Current Response: At this time the submitted plans do not clearly demonstrate compliance with all applicable MassDEP regulations. For example, the plans do not quantify total RFA impacts in relation to total RFA on-site in compliance with the performance standards of 310 CMR 10.58(4). Although we understand that some of this information is forthcoming through the NOI process with the MCC, we caution against noting compliance with the Act and its implementing regulations based on the information submitted to date until the project is reviewed and approved by the issuing authority.

B+T Current Response: Acknowledged. However, we recommend that the Applicant provide as much documentation to this effect, in essence, an alternatives analysis, as is feasible during the waiver request process.

Applicant Response: The Applicant will do an alternatives analysis as part of the Notice of Intent if it is deemed to be necessary. We will submit that information at that time.

B+T Current Response: Acknowledged; we recommend that the plans be updated to reflect these delineations to allow for a more thorough evaluation of implications.

Applicant Response: See previous responses. As the plans and exhibits represent, the project cannot be built without the granting of the waivers.

- Necessity of Relief – uncertainty of defined terms granting waiver defer to Wetlands Protection Act
- Alternate Method of Compliance – not applicable
- Impact if Waiver Granted – B+T not clear why denying the waiver makes the project unbuildable. See opening statement to By-Law B+T takes no exception to request

Wetland By-Law 2.9.5 Definition of Vernal Pool discussed on page 2, paragraphs 2, 3, and 4. Ms. Minihane stated there are two areas where work is being considered for the outer Vernal Pool boundaries.

- Necessity of Relief – two areas proposed
- Alternate Method of Compliance – waiting Wildlife Habitat Study
- Impact if Waiver Granted – waiting Habitat Study

Wetland By-Law 4.1.1 Jurisdiction

B+T Current Response: We request that all delineated CVPs and PVPs, with associated resource area limits, buffer zone, and no disturb and no build zones, be reflected on the revised plan as these boundaries serve as the basis for the dimensional waiver requests.

- Necessity of Relief – B+T not clear why this waiver is needed but suspect it is to avoid uncertainty
- Alternate Method of Compliance –
- Impact if Waiver Granted – makes VP not resource and reduces existing area – again waiting for Wildlife Habitat Study

Wetland By-Law Sections 4.4, 4.4.1 and 4.4.2 are waiting for the completion and submittal of the Wetlands Habitat Study.

- Necessity of Relief – work will occur within the resource area and within 30 feet for the Vernal Pool
- Alternate Method of Compliance – there are no alternat methods given the location

- Impact if Waiver Granted – presumed adverse effect will occur and work is within the riverfront area.

Wetland By-Law Section 6.1 – This section relates to application fees and the 40B process. This will take place with the filing of the Notice of Intent. Section 6.1 is an administrative process where ZBA takes ownership of the local By-Law Review. This is a procedural waiver there is no necessity of relief, method of compliance or adverse impact. The waiver request is consistent with how the 40B process proceeds with ZBA overseeing the local By-Law Review and the Conservation Commission overseeing the Wetlands Protection Act.

Wetland By-Law Section 9 with multiple sub-sections 9.1 – 9.6 and 9.12 – 9.16

Section 9 relates to standards of review from the local By-Law. Requesting a waiver from the entire section is indicating enforced standards or burden of proof would nullify the project. Again, with the Wildlife Habitat Study will demonstrate there will be no impact on Wildlife Protection Act.

9.1 to 9.6 and 9.12 to 9.16 are procedural requests, B+T has no issue with waiver request for these sections. Administrative matter.

9.7 relates to buffer zone impact will demonstrate there is no impact a more onerous standard

9.8 riverfront area standards – no issue granting

9.9 Wetland Replication nonapplicable

9.10 Wildlife Habitat Study one is undertaken grant waiver as relates to scope of study

9.11 Vernal Pool and adjacent area essential to Habitat function.

- Necessity of Relief – given these are primarily administrative waivers there is no relief proposed.
- Alternate Method of Compliance – not relevant to this section
- Impact if Waiver Granted – to the extent this is relevant, and the Applicant has engaged the Wildlife Habitat Study – there is no adverse impact.

Wetland By-Law Sections 2.17 and 2.18 which relate to the no build and no disturb zones discussed previously and the definitions of zones and waivers within the zones. The waiver is being requested because of the work within these zones primarily the driveway and stormwater features.

- Necessity of Relief – these are definitions
- Alternate Method of Compliance – these are definitions
- Impact if Waiver Granted – Project requires waiver to achieve design for project. Ms. Minihane added that this includes the area of steep tall slopes with ledge and monitoring during construction is warranted for monitoring adverse impacts.

Ms. Mellish asked who would be responsible for monitoring that? Ms. Minihane stated Town Staff or a third-party consultant. Mr. Engler added that Town monitors the project during construction and suggested hiring a consultant like B+T who is familiar with the project.

Ms. Minihane directed the Board to page 25 of the letter. Noting specifically the following comments:

- Comment 3 is no longer relevant it related to the on-site Wastewater Plant.
- Comment 4 addresses definitions of the Vernal Pool boundaries already discussed.
- Comment 5 restated the definition of Alter and the definition of cumulative and incremental. In this section a full waiver is requested.
- Comment 6 relates to hydrology pre and post construction and changes in the flow pattern. Ms. Minihane stated this is covered in the Wetlands Protection Act and this will be addressed as part of that review.

Ms. Minihane stated there are several Wetlands Resource comments all of which have been addressed, but she would be happy to review the comments.

- Comment 10 notes the critical resource areas on the site i.e, Sawmill Brook, and the Vernal Pools.

Ms. Mellish asked about the change in canopy and the impact on the cold-water fishery and the rise in temperature of the water. She was interested in understanding where that would be covered. Ms. Minihane stated that is not addressed specifically in a By-Law or the Wetlands Protection Act. Adding if the shading along the shoreline of the Brook was changing there could be an impact but in this project the Brook is far enough away that that may not happen.

- Comment 11 All Vernal Pools are shown in the revised plans. The Applicant has submitted revised plans showing all the Vernal Pools noted in the field. Separately there is an illustrative depiction of the buffer zone with exhibits that show limit of work and the associates setbacks with the Vernal Pools.
- Comment 12 Isolated Land Subject to Flooding (ILSF) calculation and the land does not qualify as an ILSF.
- Comment 13 B+T was looking for Applicant to provide information around why a flood study was not needed that information was provided.
- Comment 17 This relates to time of year restrictions in the construction schedule given the Vernal Pools and spring breeding season and migration. The Applicant stated that can be mitigated. B+T defers closure on this comment until completion of the Wildlife Habitat Study.
- Comment 24 addressed the landscape plan where B+T requested additional delineation between borders, lawn, and trees – that information has been provided.
- Comment 25 relates to considerations that will be raised in Wildlife Habitat Study. B+T defers to the receipt of the Study.
- Comment 26 Shadow Studies requested that Vernal Pools be added to the studies the Applicant has added the Vernal Pools to the Shadow Studies.
- Comment 27 By-Law section 10.1 the 30 and 50-foot setbacks it is not feasible to remove work from around the ledge and B+T deferred to Wildlife Habitat Study.
- Comment 28 By-Law section 4.4.2 waiver does not appear necessary and there is no alternative method of compliance. B+T is comfortable with the administrative reason for this waiver. No adverse impact all the Vernal Pools have been confirmed to be certifiable.

Mr. Engler interjected that SLV would still like this waiver because B+T's interpretation may be different from others. Ms. Minihane stated she understood.

- Comment 29 Wetlands Regulation Section 8.2 Clear and convincing standards regarding burden of proof. The Applicant is requesting this waiver as it pertains to work within resource areas and the no disturb zones. The proponent carries the burden of proof that there will be no significant or cumulative adverse effect. B+T understands terms in standard are undefined and see this waiver as procedural. Adverse impact information is forthcoming, if received and agreed with and construction information asked for is received and addresses protection of those areas B+T would not see and adverse impact in granting this waiver request.
- Comment 30 Request for waiver under section 9.7 standard review of Vernal Pools. Information is forthcoming in Wildlife Habitat Study defer adverse effects to completion of study.
- Comment 31 section 12.4 mitigation requirements around incorporation of native species, invasive species control, and return to natural state. Applicant has not proposed mitigation although he has noted willingness to incorporate invasive species management to avoid this issue. B+T recommends reviewing landscape design to see if any aspects qualify as mitigation.

Ms. Minihane noted this was the end of her review.

Mr. Diedrich asked if local By-Laws are more restrictive than State Laws. Ms. Minihane replied it is true that local laws are more restrictive and mentioned Home Rule Authority in MA. Noting that Authority provides many communities to implement local By-Laws. In response to Ms. Mellish question about ocean front communities and additional By-Laws Ms. Minihane noted many in land communities have adopted By-Laws to protect their communities.

Mr. Gang asked about Comment 29 and the preponderance of evidence and clear and convincing as standards. He noted that reducing the burden of proof across all matters is a different waiver and covers all jurisdictional matters and does not require a specific definition. Ms. Minihane deferred to the attorneys for a reply. Ms. Gang had a general comment around the local protection of Vernal Pools stating he urges the ZBA to request all available information in the Notice of Intent and put in place Conditions of anything that is unclear until later in the process.

Public Comment on Environment

Ms. Mellish stated public comment will be limited to environmental issues. She added she has received many letters related to hiking and walking trails and those aspects of the project will be reviewed during the Architectural review. Ms. Mellish clarified that the role of the Board is to collect all information and consider all documents input into the Public Record.

Luke Legere, CHIMH Counsel – Mr. Legere stated he agrees with the need for the Wildlife Habitat Study and a CMP. He added it is impossible to understand the nature and extent of the negative impact of this project. He reminded the Board that waivers can be denied unless and until the Applicant has fully justified deficiencies. Mr. Legere is amazed that the Applicant is essentially requesting a blanket waiver from the Town's By-Laws. He noted that B+T did not

flag requests with why the waiver was being requested and why waiver requests for Vernal Pool requirements were not being met. Mr. Legere concluded the Board needs more information and cannot move until that information is provided.

Elizabeth Pyle, Hill Law, MECT Counsel – Ms. Pyle seconded what Mr. Legere stated and suggested that the Board take a hard look at the project. She added the project is uneconomic, environmentally unfriendly with safety issues that outweigh the need for Affordable Housing. If the Board reaches that conclusion the Application needs to be denied. Ms. Pyle added she had a comprehensive letter from Patrick Gardner, an environmental scientist, who is unable to attend this evening and asked that Mr. Gardner's letter be included in the record. (Mr. Gardner's letter is contained in the PDF below labeled Vernal Pools Water Budget Analysis.)

Ms. Pyle also requested that Scott Horsley be allowed to address the Board. Mr. Horsley spoke to the Board his previous letter regarding ground water analysis is also attached below in a PDF.



Vernal Pools Water
Budget Analysis.pdf



Horsley Letter.pdf

Ms. Pyle concluded that Mr. Gardner addressed the decrease in surface water hydrology and between the decrease in groundwater and surface water as stated by both Mr. Gardner and Mr. Horsley it is questionable whether the Vernal Pools will be viable or will simply dry up. This raises serious questions as to if the project is permissible under the Wetlands Protection Act and she asked B+T to take these findings under consideration. Ms. Pyle added as Mr. Horsley states there are requirements that the water budget be sustained post construction. There is no evidence that there has been any effort to meet that standard. The stormwater standard has been heard in the DEP case law Office of Appeals and Disputes and there are resolutions on record that support the standards.

Alan MacMillian, Rockport – Mr. MacMillian has served on the Rockport Conservation Commission for 35-years and no project in Rockport has ever requested 19 waivers. He added water is critical to the Vernal Pools and consideration needs to be given to salt run off from Winter when salt will be needed to keep the steep road and sidewalk free of ice. Mr. MacMillian added that the carbon footprint of this building will be significant with the elimination of thousands of truckloads of soil and cutting down hundreds of trees. He concluded this is a project for the rich not the residents in need of Affordable Housing.

Karen Kirsch, Essex – Ms. Kirsch echoed Mr. MacMillian's comments. She stated the site is a sanctuary as it stands, and this project is committing ecocide by destroying the natural habitat. Twenty plus acres will be destroyed and forever altered. There must be other places more appropriate for this project.

Ms. Mellish added that voters of Manchester included this land in the Limited Commercial District and did not preserve the land as an environmental resource, something that Ms. Mellish supports.

Geoff Engler, SLV – Mr. Engler responded by stating that he is comfortable that the project has met all State DEP standards and there are no deficiencies. He believes that the Wildlife Habitat Study will confirm that statement. He corrected Ms. Pyle by stating that Affordable Housing outweighs local By-Laws when that community like Manchester is below 10% and that puts the leverage with the Applicant.

Scott Goddard, Goddard Consultant – Mr. Goddard agreed with Mr. Engler and added that the Vernal Pools on the site are a secondary habitat and that is represented in his study. He noted that the letter from Mr. Gardner artificially represented the weight of the project on the watershed and B+T the Board’s independent peer reviewer will confirm that. Mr. Goddard stated the project overwhelming meets the DEP Wetlands Protection Act and substantial and dramatic efforts have been put in place to protect the environment 100%.

Carlton Quinn, Civil Engineer SLV – Mr. Quinn reiterated Mr. Goddard’s comments and pointed out Sawmill Brook feeds the area, and the land never gets dry. He added the groundwater recharge provided for the area is the same as it is currently with the Vernal Pools drainage the same as is currently going to the site.

Steve Gang, Chair Manchester Conservation Commission – Mr. Gang wanted to clarify on Mr. Engler’s statement that waivers had been granted for the construction of the Memorial Elementary School, the MERSD Middle High School and to Black Earth for the construction of their composting facility. Mr. Gang stated in fact no local By-Law waivers had been granted to any of those projects they all met local standards. He added that a study from the Tufts Scholl and CHPA Research indicated that many developments were going into environmentally sensitive sites because the land is cheap and local By-Laws are eliminated in the 40B process.

Marilyn Kobus, 2 Bell Court – Ms. Kobus deferred her question due to technical difficulty.

Mr. Rosmarin, Crooked Lane clarified future 40B meeting to be held by ZBA. Ms. Mellish indicated that the Public Hearings had been extended through to July 28, 2022 with meetings scheduled for June 22, 2022, July 13, 2022 and July 27, 2022.

- **Next Meeting, Continue Public Hearing to 6/22/2022 – Architectural Peer Review**

Ms. Mellish moved to continue the Public Hearing on the application of Geoffrey Engler of SLV School St. LLC, to be known as The Sanctuary at Manchester-by-the-Sea, for a comprehensive Permit under M.G.L. Chapter 40B, Sections 20-23 to construct a 136-unit apartment complex for which the Massachusetts Housing Finance Agency issued a Project Eligibility Decision on September 16, 2021, at School Street, Assessor’s Map No. 43, Lot No.18 filed with the Town Clerk on September 27, 2021 to June 22, 2022 at 7:00 p.m. Mr. Diedrich seconded the motion. The motion passed unanimously with Mr. Binieris, Mr. Zahn, Mr. Sollosy, and Ms. Mellish voting affirmatively. Ms. Howe and Mr. Mitchell abstained.

ADMINISTRATIVE MATTERS

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

Mr. Zahn moved to approve the meeting minutes of April 13, 2022; Mr. Sollosy seconded the motion. The motion passed with Mr. Sollosy, Ms. Mellish, Mr. Binieris, and Mr. Zahn voting affirmatively. Mr. Diedrich and Ms. Howe abstained.

- **Any other administrative matters that could not reasonably be anticipated in advance of the meeting.** There were no additional matters to discuss this evening.
- **Adjourn --** *Ms. Mellish moved to adjourn the meeting; Mr. Diedrich seconded the motion. The motion passed unanimously by roll call vote.*