



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 March 15, 2023

Members Present: Sarah Mellish (Chair), Kathryn Hall, James Mitchell, John Binieris, Brian Sollosy, Sean Zahn, and Jim Diedrich.

Members Not Present: All members were present.

Ms. Mellish called the meeting to order at 7:01 p.m. and stated that the meeting was a Hybrid meeting on Zoom with members of the Board, Applicants, and Public in Town Hall, Room 5. Ms. Mellish introduced herself and Board members present.

New Applications

Ms. Mellish opened the public hearing for the Application of **Mike Kirk** for a Special Permit under Sections 4.1.10(f), 6.1.2 and 7.5.2 of the Zoning By-Law, and/or other relief as may be necessary, to construct a 15' x 35' gunite swimming pool and 25' x 10' paver patio at **37 Vine Street**, Assessor's Map 47, Lot No. 2 in the General District, filed with the Town Clerk on January 19, 2023.

Mr. Kirk introduced his project to the Board. Indicating his home is a single-family house surrounded by lawn. He is working with the Conservation Commission and the proposed pool site is within the 100-foot buffer. Mr. Kirk discussed the setbacks indicating the pool is among all setbacks. He has spoken with all of his immediate neighbors and no objections have been raised.

Mr. Binieris asked about lighting, Mr. Kirk replied all lighting will be solar. Mr. Mitchell asked about blasting, Mr. Kirk replied that it is unknown if there will be a need for blasting or if ledge will be hammered out. Mr. Kirk understands a permit will be required from the Fire Department if the project requires blasting.

Joan Endicott, 51A Norwood Ave., expressed concern about the location of the proposed pool to the Town's water supply, Sawmill Brook, wetlands, and the water table; and the impact construction will have on all the areas. Mr. Kirk stated he appreciated Ms. Endicott's concerns,

and he is working with the Conservation Commission, planning to ensure a net zero change around her areas of concern.

*Ms. Mellish moved to close the Public Hearing and approve the application of **Mike Kirk** for a Special Permit under Sections 4.1.10(f) 6.1.2 and 7.5.2 of the Zoning By-Law, and/or other relief as may be necessary, to construct a 15' x 35' gunite (or fiberglass) swimming pool and a permeable paver patio with an automatic cover and a 4' high fence with locking gates between the house and the pool connecting with the existing 6' fence surrounding the property and low voltage LED lights at **37 Vine Street**, Assessor's Map No. 47, Lot No. 2 in the General District, filed with the Town Clerk on January 19, 2023, based on a finding the proposed pool is in harmony with the purpose and intent of the By-Law, the proposed pool will not be more detrimental or injurious to the neighborhood in which it is located and all requirements and conditions under Section 7.5.2 of the Zoning By-Law for the grant of a Special Permit have been met, based on the following conditions:*

- *The pool is located as depicted on the Plan of Land prepared by Stephen E Stapinski, R.L.S., dated 8/19/22 and page 3 of the Proposed Pool submission package.*
- *The proposed 4' fence between the house and the pool connecting to the existing 6' fence surrounding the property is located as depicted on page 4 of the Proposed Pool submission package and is constructed in accordance with the specifications of the Manchester Zoning By-Law and the Massachusetts Building Code.*
- *The permeable patio is located as depicted on page 6 of the submission package.*
- *All lighting shall be low voltage LED contained within the pool walls and low voltage LED lights.*

Mr. Sollosy seconded the motion. The motion passed unanimously.

Mr. Binieris will write the Decision and Ms. Howe will review.

Ms. Mellish opened the public hearing for the Application of **Benjamin Herter (DSK Architects + Planners) on behalf of Pearce and Phoebe Coues** for a Special Permit under Sections 5.4, 6.1.2 and 7.5.2 of the Zoning By-Law, and/or other relief as may be necessary, to construct a first floor addition directly underneath an existing non-conforming second floor bay on a non-conforming structure which encroaches into the side setback at **64 School Street**, Assessor's Map No. 42, Lot No. 11 in District B, filed with the Town Clerk on February 21, 2023.

Ms. Mellish stated that the Board had received letters of support from: Tom Dodge, 70 School St; Al and Sue Centner, 72 School St; Brian and Beth Davis, 4 Sumac Lane; Cheryl & Michael Todisco, 68 School St.

Mr. Herter shared his screen and described the project and the plans to the Board. He highlighted a GIS map depicting that 64 School St. is set back from School St. and tucked into Powder House Hill Reservation. He noted that the site plan is from County Land Survey and indicated the proposed area of construction adding that the main house is in the side setback.

Mr. Herter stated that the reason for the project is to correct the second-floor bay supported by lally columns with corrosion at the base of the columns. There is a need to fix the problem and put in a more permanent solution extending one foot into the side set back underneath the second-floor bay with the first-floor bay completely encapsulated within the existing footprint. The proposed addition is a garden conservatory integrated into the existing living room.

Mr. Mitchell asked about excavation for the project and the likelihood that it may impact the neighbor's property. Mr. Herter replied that he had consulted with contractors, and they recommended the excavation be hand dug. The Board has no additional questions.

Ms. Mellish asked if any member of the public wished to be heard on this Application? There were no comments from the public at this time.

*Ms. Mellish moved to close the Public Hearing and approve the application of **Benjamin Herter (DSK Architects + Planners) on behalf of Pearce and Phoebe Coues** for a Special Permit under Sections 5.4, 6.1.2 and 7.5.2 of the Zoning By-Law, and/or other relief as may be necessary, to construct a first floor addition directly underneath an existing non-conforming bay on a non-conforming structure which encroaches into the side setback at **64 School St**, Assessor's Map No. 42, Lot No. 11 in District B, filed with the Town Clerk on February 21, 2023, based on a finding that the proposed use is in harmony with the purpose and intent of the By-Law and the proposed 42 square foot addition will not be more detrimental or injurious to the neighborhood in which it is located than the existing nonconforming structure and the requirements and conditions under Section 7.5.2 of the Zoning By-Law for the grant of a Special Permit have been met, based on the condition that the addition is constructed in accordance with the following plans:*

- *Site Plan, Record of Boundary Retracement, prepared by County Land Surveys, Inc., dated 2/14/2023 and update of plan dated 1/16/97.*
- *Coues Residence Living Room Addition Plans prepared by DSK Architects + Planners dated 2/21/23:*
 - *First Floor Plan – Existing*
 - *First Floor Plan*
 - *North & East Elevations – Existing*
 - *North & East Elevations - Proposed*

Ms. Howe seconded the motion. The motion passed unanimously.

Ms. Mellish will write the Decision and Mr. Diedrich will review.

Ms. Mellish opened the public hearing for the Application of **Peter Cannistraci** for a Special Permit under Sections 4.1.10(f), 6.1.2 and 7.5.2 of the Zoning By-Law, and/or other relief as may be necessary, to construct a 24' x 47' gunite swimming pool and 25' x 10' paver patio at **3 Kings Way**, Assessor's Map 7, Lot No. 31 in the District C, filed with the Town Clerk on February 21, 2023.

Mark O'Hearn, Pools by Andrew and Melanie Cannistraci were present for the hearing. Mr. O'Hearn walked through the proposed pool indicating there were two lights in the pool, both low

voltage and LED. The pool has a system that reduces use of chlorine by 70% and there is a five-foot fence around the property and the pool site has been pre-blasted.

Ms. Mellish asked if the fence around the property was properly alarmed with all exit doors that access the pool area. Ms. Cannistraci stated all the doors were properly alarmed with the security system set up by code. She added she has younger children. There is no automatic pool cover. Ms. Mellish confirmed that the lighting in the planned landscaping was also low voltage LED lighting. Ms. Cannistraci stated it was.

Ms. Mellish asked if there was any public comment. There was no public comment.

*Ms. Mellish moved to close the Public Hearing and approve the application of **Peter Cannistraci** for a Special Permit under Sections 4.1.10(f) 6.1.2 and 7.5.2 of the Zoning By-Law, and/or other relief as may be necessary, to construct a 24' x 47' gunite swimming pool and attached 44 sq. foot round spa, a 4' high fence with locking gates surrounding the rear of the property behind the house at **3 Kings Way**, Assessor's Map No. 7, Lot No. 31 in the District C, filed with the Town Clerk on February 21, 2023, based on a finding the proposed pool is in harmony with the purpose and intent of the By-Law, the proposed pool will not be more detrimental or injurious to the neighborhood in which it is located and all requirements and conditions under Section 7.5.2 of the Zoning By-Law for the grant of a Special Permit have been met, based on the following conditions:*

- The pool, spa and 4' high fence with locking gates are constructed as depicted on the Pools by Andrews plan attached to this decision and the fence is constructed in accordance with the specification of the Manchester Zoning By-Law and the Massachusetts Building Code.*
- All lighting shall be low voltage LED contained within the pool and spa walls and low voltage LED path, step, and wall lights.*
- All exterior doors of the residence which are within the confines of the fenced area shall be properly alarmed.*

Mr. Mitchell seconded the motion. The motion passed unanimously.

Mr. Mitchell will write the Decision and Mr. Sollosy will review.

Ms. Mellish opened the 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 Building Inspector, Paul Orlando's non-response and constructive denial of a Request for Zoning Enforcement sent to the Building Inspector on December 22, 2022, pertaining to **2 Blossom Lane**, Assessor's Map No. 17, Lot No. 12 in District E, filed with the Town Clerk on February 2, 2023. Brian Sollosy recused himself, so the voting members will be John Binieris, Kathryn Howe, James Mitchell, Sean Zahn, and Sarah Mellish.

Ms. Mellish asked if any Board members would like to recuse themselves. Mr. Sollosy stated he would given he had conversations with the contractor and neighbor regarding parking in his capacity as a Select Board member. Mr. Zahn replaced Mr. Sollosy for the hearing.

Ms. Mellish asked Mr. Tymann if he would like to explain why you believe this is a valid appeal and how the appeal meets the 30-day time period available for appeals?

Mr. Tymann replied that based on his request for zoning enforcement on December 22, 2022 he had identified seven issues within the scope of the case. He added under sections 7,8, and 15 of Chapter 40A there is a 14-day period for the Building Inspector to issue a response. There is case law that makes that 14-day period not mandatory but case law that describes it as directory or a suggestion.

Mr. Tymann added some case law submits RZE is put on notice that the Building Inspector is not going to act on the request at all or the way the requestor has asked. Once that happens a 30-day period begins under which requestor can appeal to the ZBA.

Mr. Tymann's original request was made on December 22, 2022 with no response received within 14-days on January 23, 2023 he sent a follow up email to Mr. Orlando on a couple of issues one was a questions regarding a response to the RZE of December 22, 2022 and the final hearing on January 25, 2023.

During that hearing Mr. Orlando made it clear that he was allowing the contractor's interpretation of the topographical change compliance plan to move forward. Which put Mr. Tymann on notice that the parts of the RZE he was asking not to occur were going to occur. That was when the 30-day clock began, and Mr. Tymann filed the second appeal on February 2, 2023.

On January 26, 2023 Mr. Orlando sent an email reminding the contractor of some of the construction management provision of the Special Permit. That further communication put Mr. Tymann on notice that Mr. Orlando was not going to accede to his request and that the entire project was going forward.

Mr. Tymann stated in his letter to the Board in the follow-up appeal that the project needed to be brought into compliance with the Special Permit following MA Law although they overlap.

Ms. Howe stated that the Board followed the timeline and read his letter of December 22, 2022 and there was no new enforcement request. The letter was related to ongoing requests, and it appears to me that you did not like the Board's decision. You could have appealed the decision; in my mind this is not a new enforcement.

Mr. Tymann informed Ms. Howe he appreciated her response.

Ms. Barry stated that Mr. Tymann's issue is regarding jurisdiction and agrees with Ms. Howe's view of the December 22, 2022 letter that there was no request for zoning enforcement peppered with language of pending appeals and ongoing and existing appeals. Section 40A Section 7 request for zoning enforcement should be in writing. The December 22, 2022 letter cited 7 issues related to the ongoing appeal that was denied.

The broad request to issue a cease and desist on all on going work does not meet required elements under 40A Section 7 statute laid out in specificity and on January 23, 2023 you

indicated you had not received a response to any of my questions below. Case law supports that no request for zoning enforcement has been addressed. Ms. Barry concluded that there was no request for zoning enforcement.

Ms. Mellish stated that there are two things to consider:

1. is this a valid request
2. not a valid appeal, if valid still deny on the basis that we adjudicated the topography issue at January 25, 2023 Public Hearing based on the fact that Paul had issued subsequent order on topography after the owners came forward with remediation plan and the Building Inspector accepted the plan that would bring them into compliance with Section 6.16 and that was not appealed within 30-days.

Ms. Howe agrees with step 1 but does not see the need to go to step 2. Ms. Mellish stated that following a discussion with the Town Counsel it was recommended that the Board bring it forward to complete the record.

Mr. Mitchell agrees with Ms. Howe and Ms. Barry that the Board take no action matters have been adjudicated.

Ms. Mellish asked if there were any comments from the Public? There was no public comment.

*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 DISMISS the Appeal of an Administrative Decision under Section 7.4.5 of the Zoning By-Law, regarding Building Inspector, Paul Orlando's non-response and constructive denial of a Request for Zoning Enforcement pertaining to **2 Blossom Lane**, Assessor's Map No. 17, Lot No. 12 in District E, filed with the Town Clerk on February 21, 2023 for the following reasons:*

- *In accordance with the case Carolyn M. Vokes, et.al. v. Avery W. Lovell, Inc., the fourteen-day limitation in the statute requiring building inspectors to notify, in writing, a party requesting enforcement of a zoning bylaw of any action or refusal to act is directory and not mandatory. Therefore, there is no constructive denial; and furthermore, no response was required as it was not a request for enforcement with the required specificity.*
- *The email dated 12/22/2022 from Mr. Tymann to Mr. Orlando asked a number of questions but did not request an enforcement order and Mr. Orlando had issued his approval of the topography remediation plan on 12/21/22 and that Administrative Decision was not appealed within the 30-day statutory period.*

For the two reasons above, we do not feel this appeal is properly before us. But if it was determined that this appeal is properly before us, we DENY the Appeal of an Administration Decision on the basis that we fully adjudicated the topography matter in conjunction with the original Appeal filed with the Town Clerk on August 8, 2022, for which we closed the Public Hearing on January 25, 2023, and the Enforcement Officer's Administrative Decision dated December 21, 2022, was not appealed within the 30-day statutory period.

Ms. Howe seconded the motion; the motion passed with Mr. Zahn, Mr. Binieris, Ms. Howe, Mr. Mitchell, and Ms. Mellish voting to dismiss the appeal, Mr. Sollosy recused himself.

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

ADMINISTRATIVE MATTERS

- **Review and approval of meeting minutes.** There were no minutes to approve this evening.
- **Status of Decisions** There is one outstanding decision for 107 Summer Street.
- **Any other administrative matters that could not reasonably have been anticipated in advance of the required 48-hour posting.**

The Zoning By-Law has been changed to allow for the Special Permits time period to be approved for three years. Variances are still approve for one year.

A site visit was scheduled for the April 19th meeting and will be held on Tuesday, April 18 at 5:30 p.m. at 17 Eagle Head Road.

Ms. Mellish stated there had been a pre-trial conference on 40B January 19, 2023. METC and a group of residents have asked to be approved as interveners. The developer has objected, and the question has not yet been resolved.

A site visit will be held with the first Public Hearing (opening of the trial) will be held in Town Hall. Following that the trial will be held in a mutually agreed upon site.

Summonses for 1 Dexter Lane were quashed.

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