



STRATEGIC LAND VENTURES

Date: February 18, 2021
To: Manchester by the Sea Board of Selectmen
From: SLV School Street, LLC
Re: Supporting Detail for Anticipated Waivers from Local Manchester Wetland Bylaws and Regulations

In response to the request issued by the Board of Selectmen during the February 11th 2021 public hearing, we have provided some additional context and explanation to the waivers we believe will be required from local Manchester-by-the-Sea conservation bylaws and regulations in order to build the development as has been represented to date.

Our experience in the 40B arena would suggest that it is highly unusual to be discussing specific waivers on a project that has not been formally submitted to a permit granting authority. Moreover, the proposed development is still in preliminary/schematic design stages, and as such, it is possible that an additional waiver(s) may be necessary. Likewise, as the design advances, it is also possible that the developer, the ZBA and its consultants determine that some of these waivers are not necessary to build the development as proposed. We would expect this discussion to occur in greater detail before the ZBA. Nevertheless, we are attempting to provide this information in an effort to be responsive to the Board of Selectmen request.

<i>By-Law or Regulations Section</i>	<i>Requirement</i>	<i>Explanation</i>
Wetlands Bylaw Section 1.1: Resource area values	<i>protection of wildlife habitat and rare species habitat</i>	There is no rare species mapped under the State's MESA priority habit mapping. We are not subject to do this additional review under Chapter 40B as it's not required under State regulations.
Wetlands Bylaw Section 1.2.2: Use of Home Rule Authority	<i>protect vernal pools as an additional resource area recognized by the Town as significant, but not included in the Act;</i>	DEP does not regulate vernal pools, only vernal pool habitat. Vernal Pool habitat does not extend into uplands under DEP regulations which is in contrast to the local bylaw. The Applicant cannot adhere to this local bylaw. This would effectively make a 130' no disturb area around any vernal pool, which would require a major redesign and a



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		substantial loss of units.
Wetlands Bylaw Section 1.2.3: Use of Home Rule Authority	<i>protect all resource areas for their additional values beyond those recognized in the Act;</i>	<p>This waiver relates to a procedural process. To the extent it requires additional burden beyond what is required in the Wetlands Protection Act, we would be asking for a waiver.</p> <p>There are specific values identified in the local bylaw more restrictive than the Act, we will be requesting a waiver from those provisions.</p>
Wetlands Bylaw Section 1.2.4: Use of Home Rule Authority	<i>impose, through local regulations and permits, additional standards and procedures stricter than those of the Act and its implementing regulations, 310 C.M.R. 10.00, et.seq. ("Regulations")</i>	<p>This waiver relates to a procedural process. To the extent it imposes additional burdens beyond what is required in the Wetlands Protection Act, we would be asking for a waiver.</p> <p>As customary in the 40B process, we will be requesting waivers as part of the Comprehensive Permit application which are necessary to build the project as represented. We may be able to adhere to SOME local regulations that are stricter than the ACT, but not in other areas. So we believe we need this waiver, but would defer until we enter the discussion with the Zoning Board of Appeals.</p>
Wetlands Bylaw Section 2.2.13: Definitions	<i>Any incremental activities, changes or work which have, or may have, a cumulative adverse impact on the Resource Areas protected by this By-Law.</i>	<p>This local requirement goes beyond what is required in the Wetlands Protection Act.</p> <p>The terms "cumulative" and "incremental" are not defined. Thus, it is open to subjective interpretation and could require a major redesign and a substantial loss of units depending on the local Commission's interpretation.</p>
Wetlands Bylaw Section 2.9.5: Definitions	<i>The boundary of the Resource Area for vernal pools shall be the 100 feet perpendicular to the mean annual high-water line defining the depression.</i>	<p>This bylaw would extend the resource area boundary 100 feet into the uplands, which greatly exceeds the Wetlands Protection Act definition which has the boundary ending at the edge of the resource area. Adherence to this bylaw would effectively create a 130-foot no disturbance zone around any vernal pools which would require a major redesign and a substantial loss of units.</p>
Wetlands Bylaw Section 4.1.1: Jurisdiction	<i>any freshwater or coastal wetland; salt marsh; wet meadow; bog; swamp; vernal pool; spring; bank; reservoir; lake; pond; river or stream; beach; dune; estuary; coastal bank; lands under any water body;</i>	<p>The Applicant is requesting a waiver from this section as the Department of Environmental Protection shall have jurisdiction over vernal pool habitat areas.</p>



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	<i>land subject to flooding or inundation by groundwater or surface water; land subject to tidal action; coastal storm flowage or flooding; and</i>	The Wetlands Protection Act also does not protect Isolated wetlands.
Wetlands Bylaw Section 4.3: Jurisdiction and Presumption	<i>A Resource Area, where isolated and of a size of 5,000 square feet or greater, shall be protected whether or not it borders surface waters.</i>	The Applicant is waiting for the ORAD to be completed. If the ORAD confirms that there are no isolated wetlands, then this waiver will not be required. But the ORAD has not yet been completed.
Wetlands Bylaw Section 4.4: Jurisdiction and Presumption	<i>Unless the applicant demonstrates by clear and convincing evidence that a significant adverse effect will not occur, it shall be presumed that significant adverse effects will result from any alteration within:</i> 4.4.1 - <i>a Resource Area, other than land subject to flooding or inundation by groundwater, or surface water or coastal storm flowage or flooding;</i> 4.4.2 - <i>30 feet of the edge of any salt marsh, freshwater wetland or vernal pool; or</i> 4.4.3 - <i>30 feet of the top of any coastal or inland bank.</i>	4.4.1 – The Applicant requires this waiver to allow for a sewer pipe to cross the resource area to provide access to the rear leaching field. The Applicant will NOT need this waiver if the Town allows the Applicant to connect to municipal sewer. 4.4.2 – The Applicant requires this waiver to allow for work to occur within 30 feet for sewer pipe crossing mentioned above. The Applicant will NOT need this waiver if the Town allows the Applicant to connect to municipal sewer. 4.4.3 – This is only applicable if there is a section of intermittent stream flowing through the wetland to be altered, in which case the Bank would need to be delineated
Wetlands Bylaw Section 6.1: Applications and Fees	<i>Except as provided in Section 5 hereof, a written NOI application shall be filed with the ConCom to prior to performing any activity affecting a Resource Area. The NOI shall include such information and plans as are deemed necessary by the ConCom to describe proposed activities and their effects on the Resource Area or Resource Area Buffer Zone. No activities shall commence without receiving and complying with a permit issued pursuant to this By-Law.</i>	This waiver relates to a procedural process. To the extent it imposes an additional burden beyond what is required in the Wetlands Protection Act, we would be asking for a waiver.
Wetlands Bylaw Section 9: Permits and Conditions	This entire section grants the Commission authority to discretionarily deny the project.	This waiver relates to a procedural process. This section imposes an additional burden and higher a standard beyond what is required in the Wetlands Protection Act, thus we will be asking for a waiver. For example, an Alternative Analysis is required (among many other things) under the local bylaw and not required under the WPA.
Wetlands Regulations Section 2.17: Definitions	<i>“No Build Zone” means the fifty (50) feet horizontally landward of those Resource Areas included in</i>	The Applicant is waiting for the ORAD to be completed. Once the ORAD is finalized, the



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	<p><i>Sections 2.17.1 and 2.17.2 in which there shall be no construction or installation of any Structures. The No Build Zone includes the area fifty (50) feet horizontally landward of:</i></p> <p><i>2.17.1 - the edge of any salt marsh, freshwater wetland or vernal pool; or</i></p> <p><i>2.17.2 - the top of coastal bank, or the top of the bank of any stream or river</i></p>	<p>Applicant would be better able to determine if this waiver is necessary. This waiver may or may not be necessary.</p>
<p>Wetlands Regulations Section 2.18: Definitions</p>	<p><i>“No Disturb Zone” means the thirty (30) feet horizontally landward of those Resource Areas included in Sections 2.18.1 and 2.18.2 in which there shall be no Alteration. The No Disturb Zone includes the area thirty (30) feet horizontally landward of:</i></p> <p><i>2.18.1 - the edge of any salt marsh, freshwater wetland or vernal pool; or</i></p> <p><i>2.18.2 - the top of coastal bank, or the top of the bank of any stream or river</i></p>	<p>The Applicant requires this waiver to allow for a sewer pipe to cross the resource area to provide access to the rear leaching field. The Applicant will NOT need this waiver if the Town allows the Applicant to connect to municipal sewer.</p>
<p>Wetlands Regulations Section 2.28: Definitions</p>	<p><i>“Significant Immediate or Cumulative Adverse Effect” means an impact that would under reasonable assumptions result in a measurable decrease in the function of a Resource Area protected by the By-Law at the site or proximal to the site, taking into consideration past losses, current conditions and the projected impacts of reasonably foreseeable future work resulting in similar, comparable, or other discernible impact and disturbance, as determined by the Commission. When an activity that may not be significant in and of itself, or incremental activities that may not be significant in isolation, but cumulatively have an adverse impact, that activity may have a Significant Immediate or Cumulative Adverse Effect. Determination of Significant Immediate or Cumulative Adverse Effect shall be made on case by case basis, considering all relevant evidence presented and which shall include but not be limited to attritional loss and history of activities within Resource Areas.</i></p>	<p>This local requirement goes beyond what is required in the Wetlands Protection Act.</p> <p>The terms “significant immediate” and “cumulative adverse” are not defined. Thus, it is open to subjective interpretation and could require a major redesign and a substantial loss of units depending on the Local Commission’s interpretation.</p>
<p>Wetlands Regulations Section 2.32: Definitions</p>	<p><i>“Vernal Pool” means that as defined in Section 2.9 of the By-Law.</i></p>	<p>This bylaw would extend the resource area boundary into the uplands, which greatly exceeds the requirements under the Wetlands Protection Act definition which has the boundary ending at the edge of the resource area. Adherence to this bylaw would require a major redesign and a substantial loss of units</p>



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		The Applicant will adhere to all State requirements as it relates to Vernal Pool habitat and boundaries.
Wetlands Regulations Section 8: Burden of Proof	<p>8.1 General Standard. <i>Except as set forth in Section 8.2 of these Regulations, an Applicant shall have the burden of proving by a Preponderance of the Credible Evidence that any work or activity proposed in an Application will not have a Significant Immediate or Cumulative Adverse Effect upon the wetland values protected by the By-Law.</i></p> <p>8.2 Specific Standard. <i>An Applicant shall have the burden of proving by a Clear and Convincing Evidence that any work or activity proposed in a Resource Area (other than land subject to flooding or inundation by groundwater, or surface water or coastal storm flowage or flooding) or a No Disturb Zone, will not have a Significant Immediate or Cumulative Adverse Effect upon the wetlands values protected by the By-Law.</i></p>	<p>This burden of proof is more rigorous and stringent than the burdens and requirements under the Wetlands Protection Act.</p> <p>For example, “Wetland Values” are different than the WPA, “protection of wildlife habitat and rare species habitat” are also different, among many others.</p> <p>Adherence to these regulations would require a major redesign and a substantial loss of units.</p>
Wetlands Regulations Section 9: Performance Standards	<p>9.2 Additional Performance Standards. <i>In addition to the performance standards contained in the MA Regulations, and all presumptions of significance contained therein, the performance Standards set forth for the Resource Areas referenced in Sections 9.3 through 9.7 shall be Additionally applied, and shall also carry a presumption that any proposed Alteration shall have a Significant Immediate or Cumulative Adverse Effect.</i></p> <p>9.7 Vernal Pool. <i>Prior to the issuance of a permit for work or activity which Alters a Vernal Pool, the Applicant shall demonstrate by Clear and Convincing Evidence as set forth in an Alternatives Analysis that there is no Practicable Alternative to the work or activity proposed. Any Alteration which impacts the topography, soil structure, plant community composition, Vegetation canopy or understory, hydrologic regime, drainage patterns, migratory paths of Vernal Pool species and/or water quality of a Vernal Pool shall be presumed to have a Significant Immediate and Cumulative Adverse Effect to the Vernal Pool and the wetlands values protected By the By-Law.</i></p>	The Applicant is requesting a waiver from this section as the Department of Environmental Protection shall have jurisdiction over vernal pool habitat areas.
Wetlands Regulations Section 10: Establishment of the No	10.1 Resource Area Buffer Zones. <i>Resource Area Buffer Zones are essential for protection of Resource Areas in that they reduce adverse impacts to the</i>	The Applicant is waiting for the ORAD to be completed. Once the ORAD is finalized, the Applicant would be better able to determine



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<p>Build Zone and the No Disturb Zone within the Resource Area Buffer Zone.</p>	<p><i>wetland functions and values from nearby activities and a naturally vegetated Resource Area Buffer Zone functions to protect the wetland values included in the By-Law. In order to protect the Buffer Zone and its adjacent Resource Area(s), a 30 (thirty) foot No Disturb Zone and a 50 (fifty) foot No Build Zone have been established to limit the types of activities that are permitted in the first 50 feet of the Buffer Zone to the edge of any saltmarsh, freshwater wetland, vernal pool, the top of a coastal bank or the top of any bank of any stream or river.</i></p>	<p>if this waiver is necessary.</p> <p>This bylaw most likely would extend the resource area boundary into the uplands, which greatly exceeds the requirements under the Wetlands Protection Act definition. Adherence to this bylaw would likely require a major redesign and a substantial loss of units</p>
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MEMORANDUM

TO: Board of Selectmen **CC:** Greg Federspiel

FROM: Conservation Commission

DATE: February 25, 2021

SUBJECT: 19 Waivers Requested by SLV

At your request, we've analyzed the 19 waivers sought from Manchester's Wetlands Bylaw, and the developer's follow-up about those waivers. This memo summarizes our results. We will not dwell on the numerous errors and circular statements in the developer's follow-up explanations.

We've pinpointed the specific sections of the State WPA that will remain in effect if these local rules are waived, compiled these in a lengthy database and will be happy to take you through that detail. This work combines the efforts of Vice Chair Sari Oseasohn, Conservation Administrator Chris Bertoni and me. We have polled the other members of the Conservation Commission and will discuss this matter at our next meeting March 2.

Our bottom line is that the developer clearly recognizes that its project threatens wetland resources and the values of clean water, storm control, wildlife and plant habitat, and others.¹ Through these waivers, the developer is trying to raise the odds it can succeed despite these threats – in essence, to be judged by less stringent standards. This will inevitably mean higher risks of damage to our clean water in an area that plays a key role in the Town's water supply, as well as a higher risk of damage to native animal and plant populations, lower resilience in the face of storms and other climate changes, and less enjoyment of open space and natural resources.

To summarize our analysis, we've attempted to answer these questions:

- 1. What are the most important rules included in these waivers?**
- 2. What effect would granting the waivers have on protecting our wetland resources?**
- 3. What are the implications of requesting these waivers for BOS?**

1. What are the most important rules included in these waivers?

Overall, these waivers virtually eliminate the additional protections our Town has seen fit to provide for our wetland resources, along with the procedures to implement those additional protections. Specifically, the waivers remove:

- Protection for all Vernal Pools (whether or not State-certified), with wide boundaries for these resources and their buffer zones. (WPA protects in most cases only certified Vernal Pools and applies shorter/weaker boundaries.²)
- Stronger protection for the first 30' and 50' of the 100' buffer zone around most wetland resources – the “No Disturb Zone” and “No Build Zone.” (WPA creates in most cases a single 100' buffer zone.)
- Protection explicitly against “cumulative” as well as “immediate” impacts on protected resources. (WPA does not use either of those adjectives.)
- Protection of Isolated Vegetated Wetlands. (WPA protects Land Subject to Flooding to a lesser extent.³)

In addition, granting the waivers would change Con Comm procedures and would:

- Reduce the standard of proof developer must meet in rebutting presumed adverse impact to wetland resources.
- Eliminate the need to provide alternatives for impact on BVW, with analysis demonstrating no practicable alternatives exist to the proposal and change the standards for judging those arguments.⁴
- Reduce Con Comm’s authority to order a Wildlife Habitat Study.⁵

2. What effect would granting the waivers have on protecting our wetland resources?

The primary effect of granting these waivers would be to allow structures and construction work much closer to wetland resources, particularly vernal pools, and on top of existing wildlife habitat, potentially including endangered species which have been found on similar properties adjoining this site. Building structures, handling storm runoff and processing sewer effluents in closer proximity to these wetland resources significantly increases the risk of permanent harm to our wildlife habitat, groundwater and drinking water supply.

3. What are the implications of requesting these waivers for BOS?

In addition to the above analysis (and the detailed backup), we have speculated about the implications of developer’s request for 19 waivers (especially since it is apparently very unusual to make this kind of request while in discussion with the BOS and before a hearing with the ZBA.) We believe that the likelihood of numerous Vernal Pools on the site (pointed out by our expert peer reviewer) will greatly complicate the developer’s plans for sewage treatment and for the overall scale of planned construction.

It seems likely that developer is anticipating difficulty siting a sufficient sewage treatment facility and leaching field(s) on this property, and is trying to eliminate the more stringent wetland protections that contribute to that difficulty. (There are other likely difficulties, of course, such as the prevalence of ledge and poor drainage in the local soils.) We note that developer spent a very long time -- about one year after signing the Purchase and Sale Agreement -- flagging the wetlands and digging test pits on the property. With those results in hand, instead of following the customary procedure of filing directly with DHCD or MassHousing, the developer initiated a LIP. At the first negotiating session, the developer asked for a tie-in to the town sewer system. Yesterday, he tried to withdraw his ANRAD from consideration under the local Wetlands Bylaw. All of this evidence supports the possibility that the developer anticipates serious difficulties with sewage treatment on this site.

If this interpretation is correct, then the developer may see a significant risk that the project will not be buildable without a tie-in to town sewers. Consequently, BOS might have more leverage than initially expected in negotiating with the developer to see if a suitable Letter of Endorsement can be agreed upon and submitted.

¹ WPA language for protected interest for BVW: "Public Water Supply; Private Water Supply; Groundwater Supply; Flood Control; Storm Damage Prevention; Prevention of Pollution; Fisheries; and Protection of Wildlife Habitat."

² The Act protects 100' from the 'pool' as Vernal Pool Habitat. Our local Bylaw considers this area as a resource and adds an additional 100' of buffer zone to the resource. The 30' No Disturb Zone and 50' No Build Zone are within this 100' buffer.

³ To qualify under the Act, an isolated depression must contain a quarter of an acre-foot of water with an average depth of six or more inches at least once a year. An acre-foot is 43,460 cubic feet. Bylaw protects as a Resource an isolated area of 5,000 square feet or greater, whether or not it borders surface waters. (That's considerably smaller than a quarter of an acre, which is the minimum under the Act unless the water is deeper than 12").

⁴ The Act requires an Alternatives Analysis for impact on Riverfront.

⁵ Local Bylaw 9.10 provides Con Comm with this authority: "The ConCom may require a wildlife habitat study of a project area, to be paid for by the applicant, whenever it deems appropriate, regardless the type of Resource Area or the amount or type of alteration proposed. The decision shall be based upon the ConCom's estimation of the importance of the habitat area considering (but not limited to) such factors as proximity to other areas suitable for wildlife, importance of wildlife corridors in the area, or actual or possible presence of rare plant or animal species in the area. The work shall be performed by an individual who at least meets the qualifications set out in the wildlife habitat section of the Regulations."

