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ATTORNEYS AND COUNSELORS AT LAW

April 20, 2022

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Keith Rondeau, Chairman
Seekonk Zoning Board of Appeals
100 Peck Street
Rehoboth, MA 02771

**Re: Greenbrier 2 Comprehensive Permit Application
Letter in Support of Request for Waivers from
The Seekonk Wetlands Bylaw**

SUPPORT STAFF:

Jennifer Andrews
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Dear Chairman Rondeau and Members of the Zoning Board of Appeals ("ZBA"):

Please find attached a report prepared by Brandon Faneuf of Ecosystem Solutions, Inc., which is hereby submitted in support of the Applicant's request for waivers from the Seekonk Wetlands Bylaw (hereinafter the "Environmental Report"). Mr. Faneuf will be in attendance at the May 3, 2022 meeting to make a presentation to the ZBA and to respond to questions, if any.

In advance of the May 3, 2022 hearing, we wish to take the opportunity to discuss the legal reasons supporting the Applicant's request for waivers from the Seekonk Wetlands Bylaws and Regulations. First and foremost, as stated at prior hearings, the Applicant is committed to complying with all of the State wetland requirements imposed by the Massachusetts Wetlands Protection Act ("WPA") enacted under M.G.L. c. 131 § 40, as regulated by the Department of Environmental Protection ("DEP") pursuant to 310 CMR 10.00 *et seq.* That is to say that to the extent that the Final Plans require the submission of a Notice of Intent or other State required environmental application(s), the Applicant stipulates to make the appropriate submission to the Seekonk Conservation Commission ("ConCom") and obtain all requisite approvals from them, as well as the DEP. The Applicant is amenable to the ZBA imposing a condition of approval requiring it to seek and obtain said State wetlands approvals, if necessary (condition outlined below).

As the ZBA is likely aware, the standard for review used to determine whether to uphold, reverse or modify a board's denial of a comprehensive permit or to deny a request for a waiver associated therewith is whether "the decision of the board of appeals was reasonable and consistent with local needs." *See Zoning Board of Appeals of Holliston v. HAC*, 80 Mass.App.Ct. 406, 414 (2011) (quoting M.G.L. c. 40B § 23), a copy of said case is attached hereto. There is a rebuttable presumption that there is a substantial housing need, which outweighs local concerns when the municipality has not met its Ten (10%) percent affordable housing threshold (which is the case in Seekonk). *See id.* Where a municipality attempts to rebut this presumption, the board bears a "heavy burden" of proving first, that there is a valid health, safety, environmental, design, open space, or other local concern, which supports a denial; and

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second, that such local concern outweighs the need for affordable housing. *See id.* at 417.

Importantly, “[i]t has long been held [by the Supreme Judicial Court] that it is unreasonable for a board to withhold approval of an application for a comprehensive permit when it could condition approval on the tendering of a suitable plan that would comply with State standards.” *See id.* at 416 (quoting *Board of Appeals of Hanover v. HAC*, 363 Mass. 339, 381 (1973) (emphasis added)). Here, like the developer in the *Holliston* case, the Applicant is willing to stipulate to a condition of approval requiring that “all design features [...] comply with the State [WPA], including the DEP Stormwater Management Guidelines [and] be subject to review by the Seekonk Conservation Commission and MassDEP [...] prior to commencing any work in the areas protected by the WPA.” *See id.* at 416, 419. For this reason alone, we contend that the Zoning Board should grant the requested waivers and so condition the approval of the requested Comprehensive Permit. *See id.*

In addition, as opined by Mr. Faneuf, the extensive and historic disturbance throughout the Project’s area limits the value and jurisdiction of the on-site wetlands under the WPA. Further, the Project’s design both avoids Wetland Resource Areas in their entirety and provides stormwater discharge treatment in accordance with the Massachusetts Stormwater Standards. Therefore, onsite wetlands will still be protected by way of the issuance of an Order of Conditions by the ConCom, and indeed, wetland functions and values will be benefited by the current stormwater design. Mr. Faneuf concludes that if the ZBA waives the local Wetlands Protection Bylaw & Regulations that the ConCom will still retain controlling authority under the WPA and 310 CMR 10.00 and have the ability to impose conditions on work that will adequately protect Wetland Resource Areas onsite. Alternatively, DEP would also have authority, upon appeal, to issue a Superseding Order that conditions or denies the proposal.

Therefore, we would request that the ZBA issue the waivers requested from Seekonk’s Wetlands Bylaw and Regulations subject to the condition of approval outlined above. It should also be noted that the reasons set forth in this correspondence equally apply to other facets of the project, including but not limited to, the ZBA granting the Comprehensive Permit on the condition that all design features related to the sewer system servicing the project and roadway improvements comply with all requirements of the DEP and MassDOT, respectively.

We look forward to presenting this matter to the Zoning Board on May 3rd. Thank you for your continued consideration and diligent review of the Greenbrier 2 Comprehensive Permit Application.

Very truly yours,

Eric S. Brainsky

Enclosure

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Cc: Client
Lynne Sweete
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Project no. W22-1642

Keith Rondeau, Chairperson
Zoning Board of Appeals
100 Peck Street
Seekonk, MA 02771

**RE: GREENBRIER 2 COMPREHENSIVE PERMIT APPLICATION
Wetland Analysis**

Chair Rondeau,

Ecosystem Solutions, Inc (ESI) has been retained by RI Seekonk Holdings, LLC in the above-referenced matter. Our firm specializes in environmental permitting and analysis, with an emphasis on wetlands assessment and permitting. ESI has been working in, submitting applications to, and representing clients in front of the Seekonk Conservation Commission since about 2003. We have performed hundreds of jobs in Town since that time.

As part of our analysis, ESI has reviewed the following documents:

- Greenbrier Residential & Apartment Community- Phase II Stormwater Report by BETA Group, Inc. and dated January 2022;
- Greenbrier II Mass Housing Comprehensive Permit Documents plan set by Caputo & Wick, Ltd. (C&W), AJA Architects, and BETA Group, with various dates;
- Engineering Peer Review-Response to Initial Comments by C&W, dated 12/21/21 w/ a revision date of 1/21/22.

ESI has also performed the following work at the site:

- Refreshed all wetland flags erected by Scott Hobson of C&W. No changes were deemed necessary;
- In-process of performing an analysis of potential vernal pool areas on-site.

Wetland Jurisdiction under the MGL c. 131, §40, the Massachusetts Wetlands Protection Act (WPA)

BVW

Based on our on-site review of wetland resource areas (Resource Areas) under the WPA and the WPA Regulations at 310 CMR 10.00, ESI has determined that the wetlands on-site either qualify as Isolated Vegetated Wetlands (IVW) or Isolated Land Subject to Flooding (ILSF). There is a drainage ditch along the southern property boundary that *may* qualify as a Bordering Vegetated Wetland (BVW), but it is my opinion that it would more likely qualify as a non-jurisdictional, man-made ditch under the WPA and 310 CMR 10.00.

BVW's are called such because they 'border' on a waterbody such as a river, stream, lake or pond. BVW's also retain a 100-foot Buffer Zone around them. The performance standards for work in a BVW are outlined in 310 CMR 10.55(4).

There are no specific performance standards for work in a Buffer Zone under the WPA and 310 CMR 10.00. However, 310 CMR 10.53(1) gives the 'Issuing Authority' (aka Conservation Commissions) authority to "impose conditions to protect the interests of the Act for the adjacent Resource Area" when Buffer Zone is applicable. Those conditions may include "limitations on the scope and location of work in the Buffer Zone necessary to avoid alteration of Resource Areas. The Issuing Authority may require erosion and sedimentation controls, a clear limit of work, and the preservation of natural vegetation adjacent to the Resource Area and/or other measures commensurate with the scope and location of the work within the Buffer Zone...." The above said, it is ESI's opinion that the only potential BVW on-site is the man-made drainage ditch that runs alongside the parking area for the old Showcase Cinemas. The Buffer Zone would therefore exist almost entirely within a paved parking lot.

Commercial/industrial sites and residential sites with greater than 4 units require stormwater review under 310 CMR 10.05(6)(k-q), aka the Stormwater Standards.

IVW and ILSF

Both IVW's and ILSF's do not border on a waterbody. The only difference between IVW's and ILSF's is the volume of water that they hold. An ILSF must hold at least 10,890 cubic feet of water to a depth of at least 6 inches at least once per year (aka a 'quarter acre-foot'). An IVW does not hold that volume of water. ILSF's are protected areas under the WPA. IVW's are not. The performance standards for ILSF's can be found at 310 CMR 10.57(4)(b).

Other Environmental Resources

A search of other critical resources within the project area was conducted using GIS software and data available through various governmental agencies (FEMA, NHESP, DEP, and others). The results of our search are listed below:

Mapped Resource On or Within Proximity to Site	Yes	No
Area of Critical Environmental Concern		✓
NHESP Certified Vernal Pool	✓ ¹	
NHESP Potential Vernal Pool	✓ ²	
NHESP Estimated Habitat of Rare Wildlife		✓
NHESP Priority Habitat of Rare species		✓
DFW Cold Water Fisheries Resources		✓
Outstanding Resource Waters		✓
FEMA Flood Zones		✓
Surface Water Protection Area		✓
Interim Wellhead Protection Area		✓

Zone I Wellhead Protection Area		✓
Zone II Wellhead Protection Area		✓

Vernal Pools^{1,2}

Vernal Pools are *not* Resource Areas under the WPA and 310 CMR 10.00. They are special subsets of wildlife habitat, as outlined in 310 CMR 10.60. Most importantly, Vernal Pools must occur within another Resource Area in order to receive protections. In short, Vernal Pools are fish-free areas that flood and hold water for at least two continuous months in the spring and/or summer, in most years. That said, in order for a Vernal Pool to be protected under the WPA as a subset of wildlife habitat, it must first be certified by the Massachusetts Division of Wildlife & Fisheries Natural Heritage and Endangered Species Program (NHESP). Once certified, certain performance standards become active for wildlife habitat for the Resource Area the Vernal Pool is present within. However, those protections only occur within the resource area itself and do not extend outside of the resource area (e.g. the Buffer Zone or non-jurisdictional areas if there is no Buffer Zone). Further, certification protects vernal pools under the federal Clean Water Act and the associated state Water Quality Certification Program via classification as a Class B Outstanding Resource Water. New direct discharges of fill or stormwater to certified Vernal Pools are *prohibited*.

On-site, only the C-series wetland has been certified by NHESP. The "D," "O," and "N," series wetlands are classified as 'Potential Vernal Pools' (PVP) by the NHESP. ESI is currently in the process of verifying whether or not the on-site PVPs are indeed vernal pools.

As a final note, it has been my observation that areas on-site that hold water do not appear to be entirely natural. Historic aerial photography shows land clearing and earth moving activities in close proximity to the subject area dating back to the early 1950's. That, and the disturbance associated with the construction of the cinema in the 1970's, it is likely that the IVW's and/or ILSF's present are man-made and the remnants of earth moving activities. In our opinion, based on over 20 years of experience assessing wetlands, this is highly likely to be the reason why there are so many oddly-shaped, isolated wetlands in the immediate vicinity.

Site Plan Meets State Wetlands Protection Act (WPA) Standards

After reviewing on-site conditions and the site plans, it is clear that all work will occur either within Buffer Zone or non-jurisdictional areas. There is no plan to alter wetland Resource Areas. Further, it is clear that there will be no direct discharges of stormwater to Resource Areas, but will be treated in through Low Impact Development design in non-jurisdictional areas or the Buffer zone in accordance with the Stormwater Standards.

Certified and Potential Vernal Pools will be protected as part of the current design. As mentioned above, protections under the WPA and 310 CMR 10.00 only apply to certified Vernal Pools, and even if all potential Vernal Pool areas were certified, only those portions of the Vernal Pools within Resource Areas receive protection. All work is proposed in Buffer Zone or non-jurisdictional areas. Further, stormwater design under the Stormwater Standards will assure that even with work

proposed away from Vernal Pools, they will receive the highest level of water quality protection currently available.

Conclusion

It is important to note that if the ZBA waives the local Wetlands Protection Bylaw & Regulations that the Seekonk Conservation Commission will still have controlling authority under the WPA and 310 CMR 10.00 and have the ability to impose conditions on work that will adequately protect Resource Areas on-site. DEP would also have authority, upon appeal, to issue a Superseding Order that conditions or denies work. According to *Zoning Board of Appeals of Holliston v. HAC*, 80 Mass.App.Ct. 406, 414 (2011), it is incumbent on the board [Conservation Commission] to identify a local interest protected by those aspects of the by-law that are stricter than the WPA and demonstrate that such interest outweighs the regional need for low and moderate income housing.'

It is our opinion that extensive and historic disturbance throughout the area limits the value and jurisdiction of the on-site wetlands under the WPA. Further, applicant's design both avoids wetland Resource Areas in their entirety, and provides stormwater discharge treatment in accordance with the Stormwater Standards. There are no interests regarding wetland protection that would meet the threshold found in *ZBA of Holliston v. HAC* and outweigh the need for low and moderate income housing in this area. On-site wetlands may still be protected via an Order of Conditions from the Conservation Commission, and indeed, wetland functions and values will be benefited through the current stormwater design.

Should you have any questions regarding this report, please do not hesitate to call at (401) 741-3263 or by using the other contact information above.

Sincerely,
Ecosystem Solutions, Inc.
Brandon B. Faneuf, M.S., Principal
PWS, RPSS, CWB, CPESC

