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VIA E-MAIL

July 27, 2022

Sarah Mellish, Chair
Manchester Zoning Board of Appeals
Manchester Town Hall
10 Central Street
Manchester-by-the-Sea, MA 01944-1399
E-mail: hunterg@manchester.ma.us; mellishs@manchester.ma.us; browns@manchester.ma.us

Re: SLV School Street, LLC / Comprehensive Permit Application
Outstanding Public Health, Safety and Environmental Issues

Dear Ms. Mellish and Members of the Board:

This firm represents the Citizens Initiative for Manchester Affordable Housing, Inc. ("CIMAH") with respect to the G.L. c. 40B residential housing development (the "Project") proposed at 0 School Street in Manchester-by-the-Sea (the "Property"). The Manchester Zoning Board of Appeals (the "Board") is nearing the end of its hearing on the application for a Comprehensive Permit filed by SLV School Street, LLC (the "Applicant").

As the Board prepares to close the hearing and begin its deliberations, we write to highlight some of the critical, unresolved public health, safety and environmental issues presented by the Project. The Board has received from parties other than the Applicant credible, consistent testimony and supporting evidence throughout the course of its hearing outlining the health, safety and environmental issues that would result from construction of this massively oversized Project. Key information has not been provided by the Applicant, however, and crucial questions remain unanswered despite the fact that these issues were identified months ago by the peer-review consultants and other professionals reviewing the Applicant's plans, and discussed at length by the Board.

As you know, the Board must balance the need for affordable housing "against the statutorily authorized interests in the protection of the safety and health of the town's residents, development of improved site design and building design, and preservation of open space." *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 31 (2006). Each of the issues outlined below relates directly to the proposed Project's impacts on public health, safety, and the environment, and thus warrant the Board's continued attention and careful consideration.

As we have mentioned previously, the Board should not feel pressured into granting waivers from requirements related to important local health, safety or environmental issues, or granting a conditional approval of the Project based upon promises of compliance with state standards. The Board is authorized to deny the Applicant's waiver requests unless and until it is satisfied that they are necessary to make the project economic.

If the Project as proposed cannot be adequately conditioned to address these important local concerns, the Board may deny a Comprehensive Permit, or deny waivers and/or explore whether the number of dwelling units could be reduced without rendering the Project uneconomic.

THE PROJECT'S VERY LONG, STEEP AND WINDING DRIVEWAY THREATENS PUBLIC HEALTH AND SAFETY

As discussed during the hearing, the length and design of the Project's proposed driveway create significant public safety issues. The driveway would wind its way up an approximately 1,900 feet climb – at grades up to 8% – from School Street and around the proposed building before finally reaching the parking garage at the top of the Property.[1] This single access requiring a long, steep and circuitous drive is a symptom of the fundamental problem with the Project as proposed, namely, it is a maximum build design shoehorned into a constricted, environmentally sensitive site.

THE PROJECT LACKS NECESSARY EMERGENCY ACCESS

Every single engineer who has independently reviewed the Project has called for a second, emergency access drive due to the length, grade and design of the proposed driveway.[2] The Applicant has made clear that the Project cannot be redesigned to make the driveway safer or provide an additional emergency access because of environmental and topographical constraints.[3]

Thus, the Board's record establishes the Project's insufficient access would create unsafe conditions for residents. In our opinion, this in and of itself is an appropriate basis for denial of this Project. Decisions from the Housing Appeals Committee and Massachusetts courts show that insufficient or unsafe access is a legitimate basis for denying a project proposed under G.L. c. 40B.[4]

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[1] The access, traffic and parking issues outlined herein have been raised in written reports and presentations from the Board's peer-review consultant on traffic, Greg E. Lucas, P.E., PTOE, RSP of Environmental Partners ("EP"), as well as David Black, C.Eng. ("Black"), Beals Associates, Inc. ("BA") and Stantec Consulting Services, Inc. ("Stantec").

[2] EP Memorandum, February 3, 2022, pp. 6-7; BA Letter, February 8, 2022, p. 1; Black Memorandum, January 21, 2022, p. 2; Stantec report, January 11, 2021.

[3] See https://www.youtube.com/watch?v=k2SDv0GMSI0 at 1:35:50 and 2:06:05.

[4] *Lexington Woods, LLC v. Waltham ZBA*, HAC No. 02-36 (Feb. 1, 2005); *O.I.B Corp. v. Braintree ZBA*, HAC No. 03-15 (Mar. 27, 2006); *Green View Realty, LLC v. Holliston ZBA*, HAC No. 06-16 (Jan. 20, 2009); *Simon Hill, LLC v. Norwell ZBA*, HAC No. 09-07 (Oct. 13, 2011); *Burley Street, LLC v. Wenham ZBA*, HAC No. 09-12, (Sept. 27, 2010); *Zoning Bd. of Appeals of Canton v. Housing Appeals Comm.*, 76 Mass.App.Ct. 467, 469–470 (2010) (denial

Simple common sense dictates that the Project's long, steep and winding driveway "design will impact emergency response times and poses the potential for the multi-story 136-unit building to be effectively cut off from surrounding roads in severe weather … ."[5] "Given the long cul-de-sac length, coupled with the proposed site driveway's horizontal and vertical curvature, the Applicant should provide two effective accesses to serve this site in a safe and efficient manner … ."[6]

The Board's peer-review consultant has also recommended that the main driveway be located across from Atwater Avenue, in order to create a safer intersection.[7] The Applicant has indicated that this request is impossible to meet, again due to the Property's physical constraints.

In attempting to justify the proposed access, the Applicant relies almost entirely on the narrow, equivocal opinion provided by Fire Chief Jason M. Cleary. Chief Cleary has opined that an emergency access "is not required" because the driveway can accommodate the Fire Department's apparatus and meets the basic design criteria to satisfy the state Fire Code.

Chief Cleary also acknowledges, however, that "a second access road for emergency vehicles would be ideal."[8] Indeed, the Applicant and Fire Chief have studiously avoided the question of what it would mean for the proposed driveway to be blocked or impassable during an emergency. Fire alarms and sprinklers would not help a resident suffering from a medical (or other, non-fire related) emergency if an ambulance is delayed or unable to reach the building.

The Board must weigh Chief Cleary's comments against the other evidence in the record regarding the sufficiency of access, and consider all of the evidence received in light of its' members expertise, experience, and knowledge of the Property in particular and the Town of Manchester-by-the-Sea in general. In other words, the Board must determine whether the health and safety of residents in a huge, 232-bedroom development would be adequately protected by a single access via a 1,900-foot-long, winding, steep driveway.

Satisfaction of the state Fire Code's minimum requirements is not determinative of that question; rather, it is merely one piece of evidence for the Board to consider. As discussed in previous submittals, "[c]ompliance with State standards … is not necessarily the end of the inquiry" for the Board, and there is precedent for a Comprehensive Permit being denied where an important local health or safety issue "is not adequately protected by compliance with applicable State standards." *Reynolds v. Zoning Bd. of Appeals of Stow*, 88 Mass. App. Ct. 339, 348-350 (2015).

That is the case here. The Board's record demonstrates that compliance with state Fire Code does not make the Project's driveway safe.

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of a Comprehensive Permit may be upheld where it is based upon findings that the project would create "significant safety concerns" as opposed to mere "inconveniences", related to traffic).

[5] BA Letter, February 8, 2022, p. 1.

[6] Stantec report, January 11, 2021.

[7] EP Memorandum, February 3, 2022, p. 6.

[8] Letter from Chief Cleary, January 21, 2022.

THE APPLICANT HAS NOT REQUESTED A WAIVER FROM THE ZONING BYLAW'S CAP ON THE LENGTH OF COMMON DRIVEWAYS

The proposed driveway's 1,900-foot length greatly exceeds the maximum length of 500 feet for common driveways established by Manchester Zoning Bylaw, § 6.2.8. The Applicant has not, however, requested a waiver from that requirement. In fact, the Applicant has confirmed that "we are not going to amend our waiver request list" to address this issue, taking the position that no waiver is necessary because the entrance is not a "subdivision road", but a "driveway".[9]

The Board's record does not support the Applicant's conclusion. The Board's peer-review consultant has noted the lack of "justification for this non-conforming design element" and questioned "whether alternative designs were considered which can provide conformance with Zoning By-Law requirements."[10]

As support for its position, the Applicant baldly states that "we spoke to the Manchester Planning Department who spoke directly to the Town's Building Inspector/Zoning Enforcement Officer", who purportedly opined that the Project's driveway is not a common driveway. Despite our repeated requests, the Applicant has not provided a formal written opinion from the Building Inspector confirming the conclusion that is being attributed to him. The Applicant has not even bothered to clarify exactly who in the Planning Department they spoke to.

In our opinion, the Board's record lacks any reliable justification for why no waiver is required for a 1,900-foot long driveway serving a proposed 232-bedroom residential development, and the Board can and should deny the Project for failure to comply with this requirement of the Zoning Bylaw.

THE PROJECT WOULD NOT PROVIDE SAFE PEDESTRIAN AND BICYCLE ACCESS

The Board's record does not support a determination that the Project would safely accommodate pedestrians and bicyclists on the Property, or on adjacent streets. This fundamental design flaw is another sign of the Project being too large for the Property.

The Massachusetts Architectural Access Board issued an advisory opinion dated July 15, 2021 making clear "that 521 CMR 20.2 would require an accessible route to the public way."[11] In other words, state law requires that the Applicant provide an "accessible route" for pedestrians – including individuals with disabilities – to reach School Street.[12]

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[9] E-mail from Mr. Engler dated February 16, 2022.
[10] EP Memorandum, February 3, 2022, pp. 6-7.
[11] 521 CMR 20.2 requires that "[w]ithin the boundary of the site, an accessible route(s) shall be provided from accessible parking, accessible passenger loading zones, and public streets or sidewalks to the accessible building entrance they serve. The accessible route(s) shall coincide with the route for the general public."
[12] 521 CMR 5.00 defines the term "accessible" as "[a] site, building, facility or portion thereof that complies with 521 CMR and that can be approached, entered, and used by persons with disabilities. When the term 'accessible' is used, it shall mean both physical and communication accessible unless otherwise noted in 521 CMR." That regulation further defines "accessible route" as "[a] continuous, unobstructed path connecting all accessible

As discussed during the Board's February 9, 2022 hearing, the Architectural Access Board's advisory opinion confirms a mandate under state law that the Project include an "accessible route" for pedestrians to reach School Street.[13] The state Supreme Judicial Court has left no doubt that the Applicant must comply with 521 CMR 20.2, as G.L. c. 40B "may only be relied on to remove locally imposed barriers to affordable housing, not State law … ." *Groton Zoning Board of Appeals v. Housing Appeals Committee*, 451 Mass. 35, 41 (2008).

Police Chief Todd J. Fitzgerald has also raised this issue in a letter to the Board dated January 31, 2022, stating that: "one item in my opinion that needs to be addressed is the sidewalk access for pedestrians entering and exiting the driveway of the proposed facility", including "ensur[ing] that a connecting sidewalk, proper lighting and pedestrian crossing lights are installed" along School Street in the Project's vicinity. Chief Fitzgerald concludes that "[t]hese items are important components and safety features that should be required … to allow for safe access by foot and bicycle traffic along School Street."

The Project's proposed pedestrian access is, at best, deficient.[14] The Applicant has essentially offered a sidewalk running alongside the steep, winding, 1,900-foot long driveway. This route would present a challenging hike for most healthy adults; as noted by Beals Associates, the "grade of the proposed drive does not meet ADA requirements."[15] It is unclear how the sidewalk could be designed to provide an "accessible route" to and from School Street for individuals with disabilities, elderly residents or young children. Furthermore, CIMAH understands that school-age residents of the Project would be required to walk to school, making the need for actual, safe access for all manner of pedestrians an even more severe problem.

The Applicant has apparently given no thought to access for bicyclists. Beals Associates' comment regarding pedestrians applies equally to cyclists, who would be "forced into the roadway where hundreds of trips will be generated throughout the day, as provided by the Applicant's TIA, creating unsafe conflicts between [cyclists] and drivers".[16]

In our opinion, the Project's design is inadequate to safely accommodate pedestrians and cyclists, creating yet another significant public safety concern for residents.

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elements and spaces within or between buildings or facilities. Interior accessible routes may include corridors, floors, ramps, elevators, lifts, and clear floor space at fixtures. Exterior accessible routes may include parking, access aisles, curb cuts, crosswalks at vehicular ways, walks, ramps, and lifts."

[13] The Board has received evidence, including testimony from the chair of the Town's Select Board, that the Select Board has formally voted to extend the existing sidewalk along School Street to the Property if the Project proceeds.

[14] CIMAH notes that the Applicant has not even incorporated an ADA-compliant sidewalk into their formal site plans for the Project, but merely provided a sketch of where it would be located without confirming that it would not change any of the components of the driveway, snow removal plans or other problematic aspects of the Project's design.

[15] BA Letter, February 8, 2022, p. 1.

[16] BA Letter, February 8, 2022, p. 1.

THE PROJECT'S INSUFFICIENT PARKING WOULD EXACERBATE ACCESS AND TRAFFIC PROBLEMS

Parking is a critical consideration in light of the fact that the Property's location will require all residents to have a car. The Project would provide parking for only 242 vehicles (far short of the 383 spaces required by the Zoning Bylaw), with less than 20 visitor spaces and very limited space for delivery service vehicles.[17] Once again, the Applicant must request a waiver from this requirement because the Project's scale is beyond the Property's carrying capacity.

In attempting to justify this 140-space deficit, the Applicant has repeatedly compared the Project to other developments with lower parking ratios. Those other projects, however, are located in different communities and are in far closer proximity to public transportation, grocery stores and other amenities, significant and fundamental differences which mean that residents of those developments do not need cars.

For this Project in Manchester-by-the-Sea, the Board's peer-review consultant has recognized that cars would be a necessity, as even "residents who patronize the MBTA commuter rail at the Manchester-by-the-Sea Station are still highly likely to drive to the station given the 1.7 mile distance to the station."[18] The bottom line is that the "[l]ack of connections to public transportation, bicycle infrastructure, and sidewalks along School Street do not compensate for the insufficient parking spaces offered by the Applicant."[19]

Furthermore, visitors will also have no choice other than to drive to the Property. The mere 16 or 17 spaces allotted to visitor parking, and a small and narrow loading zone directly alongside the access road, make it easy to predict that guests' cars and delivery vehicles will be parked along the driveway during busy weekends or holidays, congesting an already unsafe roadway, creating another impediment to safe access for vehicles, cyclists and pedestrians, and further complicating snow removal and other site management issues.

In our opinion, the Board should view the combined effect of limited resident and visitor parking as a public safety concern and contributing factor to the Project's insufficient, unsafe access.

THE PROJECT WILL HAVE UNNACCEPTABLE NEGATIVE IMPACTS ON THE NATURAL ENVIRONMENT

The Board is in receipt of written comments and testimony from two highly qualified and well-respected experts regarding the Project's unacceptable negative impacts on sensitive natural resources. Specifically, Patrick Garner and Scott Horsley have presented the Board with compelling, unrebutted evidence that the Project would negatively impact vernal pools on the Property. As with the issues discussed above, these illegal alterations stem directly from the size of the Project and physical characteristics and constraints of the Property.

[17] BA Letter, February 8, 2022, p. 2.
[18] EP Memorandum, February 3, 2022, p. 8.
[19] BA Letter, February 8, 2022, p. 2.

In their most recent submittals, Messrs. Horsley and Garner opined that the Project would substantially and illegally reduce both the quantity of water entering vernal pools (due to post-development impacts on watershed area, impervious surface, runoff velocity and groundwater feeding the vernal pools), and the quality of that water (due to the proximity of impervious surfaces, resulting in runoff carrying salt, sand, chemicals and metals to the vernal pools).[20]

As explained by Messrs. Horsley and Garner, these adverse impacts to the Property's vernal pools would qualify as an illegal alteration under the state Wetlands Protection Act, G.L. c. 131, § 40 and MassDEP's implementing regulations.[21]

The Applicant, meanwhile, has essentially requested a blanket waiver from the Manchester-by-the-Sea Wetlands Bylaw and Regulations without adequately justifying the need for a waiver from each individual section. The Board's peer-review consultant has recognized the Applicant's failure to justify a number of these waiver requests, including Wetland Bylaw sections 2.2 (definition of alter), 4.1.1 (jurisdiction), 9.8 (Riverfront Area requirements), 9.9 (wetland replication) and Regulations section 4.4.2 (delineation and review of vernal pools).[22]

We urge the Board to consider each of the Applicant's waiver requests individually. The Board may deny the Applicant's requests for waivers from local rules and regulations unless and until it has been proven that application of those requirements would render the project uneconomic. 760 CMR 56.05(6)(b).

If the Applicant maintains that denial of any of its requested waivers would effectively kill the Project, as it has suggested previously, we remind the Board that it may "deny a Comprehensive Permit as not Consistent with Local Needs if the Board finds that there are no conditions that will adequately address Local Concerns", even if the Town's stock of low and moderate income housing is below ten percent. 760 CMR 56.05(8)(b)(3); *Hingham v. Department of Hous. & Community Dev.,* 451 Mass. 501, 504 n. 6 (2008) (quoting *Zoning Bd. of Appeals of Greenfield v. Housing Appeals Comm.,* 15 Mass.App.Ct. 553, 557 (1983)). The term "Local Concerns" is defined to include "the need … to protect the natural environment … ." 760 CMR 56.02.

TRAFFIC GENERATED BY THE PROJECT WOULD FURTHER DEGRADE POOR CONDITIONS ON NEARBY ROADS AND INTERSECTIONS

The Board's record establishes that the Level of Service ("LOS") for several intersections in the Property's vicinity are already at LOS "F" (failing) under existing conditions, and the

[20] Garner Letters, June 6, 2022 and July 13, 2022; Horsley Letter, July 13, 2022.
[21] CIMAH requests that, if the Board does decide to approve the Project (which CIMAH does not support), it include a condition requiring that infrastructure for water and sewer to the Property be constructed prior to any work being performed on the Property itself, to avoid the Project's significant environmental impacts if the Applicant is unable to complete construction of the Project. The Board's record includes testimony from the Applicant's consultants regarding the significant cost associated with directional drilling to extend both water and sewer lines to the Property.
[22] Beals and Thomas Letter, July 12, 2022, pp. 8-16.

Project would significantly increase volumes during peak hours.[23] The Board's peer-review consultant has noted that the "study area intersections are at or near capacity presently and in need of mitigation to support additional traffic load."[24]

EP has recognized that "[t]he impact of the project … is notable. The suggested studies and conceptual design do not address construction of potential improvements, which would be required for project mitigation to be realized." Indeed, "[t]he increases in delay and queue from the corrected analysis further confirm an intersection in need of mitigation to support additional traffic load."[25]

CIMAH strongly encourages the Board, at a minimum, to follow EP's recommendation that the Applicant not only fund a design study to determine what mitigation is necessary and appropriate, but also be accountable for a "fair-share" contribution to cost of roadway improvements, including pedestrian and bicycle accommodations and traffic calming measures.[26]

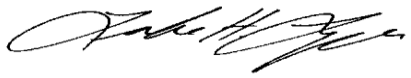
CONCLUSION

We strongly urge the Board to consider these health, safety and environmental issues, along with all of the other testimony presented during the hearing, and deny the Project. In our opinion, the Project's design creates traffic, transportation, site access and natural resource issues that threaten public health and safety and the environment, and the Project cannot be conditioned in a manner that would adequately protect these important local concerns.

The Project's inability to comply with local or state laws on these and other topics primarily stems from its scale relative to the Property's size and physical and environmental constraints. The Applicant has repeatedly indicated that the Project cannot be redesigned to avoid these impacts, leaving the Board little choice on how to proceed.

Thank you for your continued consideration of, and attention to, these important issues. Please do not hesitate to contact me should you have any questions

Very truly yours,



Luke H. Legere

cc: George X. Pucci, Esq.
Jason R Talerman, Esq.
Daniel C. Hill, Esq.

[23] Vanasse & Associates, Inc. Letter, January 27, 2022, Tables 6A and 8R. CIMAH also question the Applicant's consideration of future growth near the Property, which mentions only a planned church and says nothing about proposed development off Atwater Avenue which we understand to be under consideration by the Planning Board.
[24] EP Memorandum, February 3, 2022, p. 5.
[25] EP Memorandum, February 3, 2022, p. 5.
[26] EP Memorandum, February 3, 2022, p. 10.