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**VIA E-MAIL**

March 1, 2022

Sarah Mellish, Chair  
Manchester Zoning Board of Appeals  
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**Re: SLV School Street, LLC / Comprehensive Permit Application  
Unresolved Public Safety Issues**

Dear Ms. Mellish and Members of the Board:

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

The Board’s discussion of traffic, transportation and site access associated with the Project has revealed a number of critical outstanding issues not yet addressed by, and/or requiring additional information from, the Applicant.<sup>1</sup> Each of the issues outlined below relates directly to the proposed Project’s impacts on public safety, and thus warrant the Board’s continued attention and careful consideration.

At the outset, 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 Board has significant other powers as well, including downscaling the Project and denying waivers. For example, the Board may deny the

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<sup>1</sup> These issues have been raised previously 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.

## McGREGOR LEGERE & STEVENS

Applicant's requests for waivers from local rules and regulations unless and until it has proven that application of those requirements would render the project uneconomic. 760 CMR 56.05(6)(b).<sup>2</sup>

The Legislature charged the Board to 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). “Compliance with State standards ... is not necessarily the end of the inquiry”, and denial may be appropriate where the Board finds that 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).

The Project’s impacts on traffic and emergency response unquestionably relate to “protection of the safety and health” of Manchester’s residents. Therefore, the Board should not feel pressured into granting waivers from requirements related to these or other important local health or safety issues, or granting a conditional approval of the Project based upon 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.

### **VEHICULAR AND EMERGENCY ACCESS**

The Project’s proposed driveway would climb approximately 1,900 feet along a circuitous path from School Street, up a hill and around the proposed building at grades reaching 8%, finally ending at the proposed parking garage at the top of the Property. The length and design of the proposed driveway create significant public safety issues – which the Board’s members have rightly identified during the hearing – and reflect the fact that this is a maximum build Project shoehorned into a constricted, environmentally sensitive site.

Each engineer who has independently reviewed the Project has flagged the need for emergency access due to the length, grade and design of the Project’s proposed driveway.<sup>3</sup> Indeed, during a January 14, 2021 Board of Selectmen’s meeting, Mr. Engler agreed with the Board’s peer-review traffic consultant that the Project as proposed is “less safe” than it would be

<sup>2</sup> The Board may review the Applicant’s *pro forma* or other financial submittals to determine whether proposed conditions or waiver denials would render the Project uneconomic, including whether reducing the number of the Project’s proposed dwelling units would render it uneconomic where reduction is not otherwise “justified by a valid health, safety, environmental, design, open space, planning, or other local concern that directly results from the size of a project on a particular site ... .” 760 CMR 56.05(6)(a)(4).

<sup>3</sup> EP Memorandum, February 3, 2022, pp. 6-7; BA Letter, February 8, 2022, p. 1; Black Memorandum, January 21, 2022, p. 2; Stantec Consulting Services, Inc. report, January 11, 2021.



## McGREGOR LEGERE & STEVENS

with an emergency access, and confirmed that the Applicant “cannot provide a second means of egress to this site ... for wetland reasons and other environmental reasons, topography”.<sup>4</sup> Although Fire Chief Jason M. Cleary has opined, in a letter dated January 21, 2022, that “a second fire/access road 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, his letter also acknowledges that “a second access road for emergency vehicles would be ideal.”

Chief Cleary’s narrow opinion that the state Fire Code’s minimum requirements are met does not mean that the driveway would protect public health and safety – it is merely one piece of evidence for the Board to consider.<sup>5</sup> As discussed above, “[c]ompliance with State standards ... is not necessarily the end of the inquiry”, 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*, 88 Mass. App. Ct. at 348-350.

It is well established that insufficient or problematic access creating unsafe conditions for residents is an appropriate basis for denial of 40B proposals.<sup>6</sup> The decision on whether the driveway offers sufficient, safe access for residents and emergency responders ultimately falls to the Board, notwithstanding the Fire Chief’s perspective on the state Fire code and accommodation of the Department’s apparatus.

In other words, the Board is not bound by the Fire Chief’s opinion. Rather, the Board should weigh Chief Cleary’s comments that the Project meets the state Fire Code 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.<sup>7</sup>

For example, the Board should consider the common-sense comments from Beals Associates that the long and steep 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 such as the recent ice storm.”<sup>8</sup> In fact, dangerous conditions

<sup>4</sup> See <https://www.youtube.com/watch?v=k2SDv0GMSI0> at 1:35:50 and 2:06:05.

<sup>5</sup> Comments by the Applicant and Fire Chief focused primarily on the building itself, while skirting the question of what it would mean for the proposed driveway to be blocked during an emergency. As at least one Board member correctly pointed out, fire alarms and sprinklers will not help a heart-attack victim if an ambulance is delayed or unable to reach the building. We also note that the Project plans do not show any sprinklers in the garage.

<sup>6</sup> *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 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).

<sup>7</sup> Board members have expressed a healthy skepticism, and understandable discomfort, around the idea of approving a 232-bedroom residential development for which the lone access is via a long, winding and steep driveway.

<sup>8</sup> Similarly, Stantec Consulting Services, Inc.’s January 11, 2021 report states that “[g]iven 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, even if one of those accesses, while maintained during all seasons, is gated and used only during emergency conditions.”



## McGREGOR LEGERE & STEVENS

caused by the driveway's grade, design and length would present a hazard for all vehicles, not just emergency vehicles.<sup>9</sup> Beals Associates notes that the proposed "access drive along the east side of the building parallels a 25-foot-high drop-off due to the proposed retaining wall presenting safety concerns for pedestrians and drivers."<sup>10</sup>

Additionally, the mere 16 or 17 spaces allotted to visitor parking, and a small and narrow loading zone directly alongside the access road, could reasonably be expected to result in guests' cars and delivery vehicles being positioned in the driveway and impeding safe access.<sup>11</sup>

Furthermore, 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 – during the Board's February 9, 2022 hearing, the Applicant stated that no waiver is necessary because the entrance is not a "subdivision road", but a "driveway".<sup>12</sup> The Board should request further clarification from the Applicant on this point, including a justification for why no waiver is required for a 1,900-foot long driveway serving a proposed 136-unit residential development.<sup>13</sup>

### **PEDESTRIAN AND BICYCLE ACCESS**

As designed, the Project utterly fails to safely accommodate pedestrians and bicyclists both on the Property and on adjacent streets. This fundamental design flaw is another symptom of the Project being crammed into a constrained site.

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<sup>9</sup> Chief Cleary raised another public safety issue during his comments at the Board's February 9, 2022 hearing, when he mentioned that residents could be expected to congregate outside of the building during a fire or other emergency. The Project's plans do not designate areas for residents to gather during emergencies, and no such areas are immediately apparent due to the lack of undeveloped space (a result of the Property's constraints and the size of the Project, the building would sit on what is essentially a blasted bedrock plateau surrounded by steep slopes and retaining walls, leaving very little space between the building and the vertical drop). Those areas should be identified on the Project plans to ensure that there is adequate space for all of the residents to stand at a sufficient distance from the building, with room for fire fighters and equipment, to ensure the residents' safety. CIMAH would expect that any such areas would be separated from the building by a distance that is at least equal to the height of the building, to be out of harm's way should the building collapse, and would be outside any areas where fire fighters and equipment could be expected to deploy so that residents are not in the middle of an active fire zone. CIMAH would also note that any areas which are beyond fences or road barriers, steeply sloped and/or designated for snow storage should not be considered as appropriate for this purpose.

<sup>10</sup> BA Letter, February 8, 2022, p. 2.

<sup>11</sup> It is also worth noting that EP has questioned the proposed driveway's location and recommended that it be located across from Atwater Avenue in order to create a safer intersection. The Applicant has indicated that this request is impossible to meet due, once more, to the Property's physical constraints. EP Memorandum, February 3, 2022, p. 6.

<sup>12</sup> EP has noted that Chief Cleary's opinion "does not provide justification for this non-conforming design element, nor does it address whether alternative designs were considered which can provide conformance with Zoning By-Law requirements." EP Memorandum, February 3, 2022, pp. 6-7.

<sup>13</sup> We have seen an e-mail from Mr. Engler dated February 16, 2022 which states in no uncertain terms that "we are not going to amend our waiver request list" to address this issue. As support for this position, Mr. Engler 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. At a minimum, the Board should require the Applicant to clarify exactly who they spoke to, and obtain a formal written opinion from the Building Inspector confirming the conclusion that is being attributed to him.



## McGREGOR LEGERE & STEVENS

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.”<sup>14</sup> In other words, state law requires that the Applicant provide an “accessible route” for pedestrians – including individuals with disabilities – to reach School Street.<sup>15</sup> This has not been done.

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. 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 provides no route – accessible or otherwise – for any pedestrians, other than walking along the steep, winding, 1,900-foot long driveway.<sup>16</sup> Beals Associates correctly points out that, “[w]ithout sidewalks, pedestrians are 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 pedestrians and drivers,” particularly because the steep “grade of the proposed drive does not meet ADA requirements.”<sup>17</sup>

The Project’s design is woefully inadequate with respect to pedestrian and bicycle accommodations, creating another significant public safety concern for residents.

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<sup>14</sup> 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.”

<sup>15</sup> 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 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.”

<sup>16</sup> CIMAH understands that school-age residents of the Project would be required to walk to school. If that is the case, the lack of sidewalks and other accommodations for pedestrians is even more glaring.

<sup>17</sup> BA Letter, February 8, 2022, p. 1.



### TRAFFIC AND MITIGATION

As noted by the Board’s peer-review consultant, the “study area intersections are at or near capacity presently and in need of mitigation to support additional traffic load.”<sup>18</sup> Indeed, the Level of Service (“LOS”) for several intersections in the Property’s vicinity are already at LOS “F” (failing) under existing conditions, and the Project would significantly increase volumes during peak hours.<sup>19</sup>

Environmental Partners has recognized that “[t]he impact of the project as illustrated in Table 6A associated with comment 8 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.”<sup>20</sup>

CIMAH strongly encourages the Board to follow Environmental Partners’ 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.<sup>21</sup>

### PARKING

As designed, the Project would provide parking for 242 vehicles, well short of the 383 spaces required by the Zoning Bylaw.<sup>22</sup> The Property’s location will require all residents to have a car. In addition, 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.”<sup>23</sup> Once again, the Applicant’s waiver request seeking relief from this requirement is necessary because of the scale of this Project on a severely restricted Property.

The Applicant attempts to justify this 140-space deficit by comparing the Project to other developments with lower parking ratios, however, this is an “apples-to-oranges” comparison due to the locations of those other projects, particularly proximity to public transportation, grocery stores and other amenities that make cars a luxury rather than a necessity. As noted by Environmental Partners, 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.”<sup>24</sup>

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<sup>18</sup> EP Memorandum, February 3, 2022, p. 5.

<sup>19</sup> 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 active consideration by the Planning Board.

<sup>20</sup> EP Memorandum, February 3, 2022, p. 5.

<sup>21</sup> EP Memorandum, February 3, 2022, p. 10.

<sup>22</sup> BA Letter, February 8, 2022, p. 2.

<sup>23</sup> BA Letter, February 8, 2022, p. 2.

<sup>24</sup> EP Memorandum, February 3, 2022, p. 8.



**McGREGOR LEGERE & STEVENS**

The Property's location will also dictate that visitor access be by car. As noted above, the Project provides less than 20 visitor spaces and very limited space for delivery service vehicles. In our opinion, the Board could reasonably view the combined effect of limited resident and visitor parking as a public safety concern.

**CONCLUSION**

As discussed previously during the Board's hearing and outlined above, the Project's design presents traffic, transportation and site access issues that threaten public health and safety. We expect that other aspects of the Project with significant implications for public health and safety (including construction management, stormwater and wastewater issues, many of which also present environmental issues) will come to light as the hearing proceeds. Much of the Project's inability to comply with local or state laws on these and other topics stems directly from its scale relative to the Property's size and physical and environmental constraints.

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.

