



July 27, 2022

**BY ELECTRONIC MAIL: hunterg@manchester.ma.us
AND FIRST-CLASS MAIL**

Ms. Sarah Mellish, Chair
Manchester Zoning Board of Appeals
Manchester Town Hall
10 Central Street
Manchester-by-the-Sea, MA 01944-1399

Re: Application for Comprehensive Permit – School Street, Manchester

Dear Chair Mellish:

As you know, this firm represents the Manchester Essex Conservation Trust (“MECT”) in the above-referenced matter. Through the course of this public hearing, we have commented on a variety of project design issues, through our civil engineering consultant, John Chessia, our traffic engineer, David Black, our hydrologist, Scott Horsley, and our wetlands scientist, Patrick Garner. Despite material plan changes that have included the abandonment of on-site sewage disposal for a municipal sewer connection, the Project still presents unmitigable threats to public safety and the environment. On these issues, the Developer has flatly refused to compromise, essentially daring the Board to deny the comprehensive permit.

There are ways to mitigate these adverse impacts, including most obviously by reducing the size and scale of the Project. However, the design changes necessary to address the “local concerns” presented here would be substantial given the site’s unique and challenging topographical and wetland characteristics. Under Chapter 40B, the law prohibits zoning boards from endeavoring to redesign projects, even if such efforts are made in good faith and in advancement of the public interest. Therefore, the Board’s best and only available option for its comprehensive permit decision here is a denial, not an approval with conditions. We respectfully propose the following draft “findings” that the Board could adopt in light of the substantial evidence collected during its public hearing over the last several months.

Proposed Findings for Comprehensive Permit

1. Under Chapter 40B, the Board’s comprehensive permit decision is evaluated under a “consistent with local needs” standard. Section 20 of the statute frames the “consistent with local needs” standard as weighing the need for housing against “*the need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces.*”

A. Impacts on the Natural Environment

2. A significant portion of the Project site drains to vernal pools. The proposed site development will change drainage patterns due to the construction of impervious surfaces and stormwater routing to various infiltration and rain garden structures.
3. Vernal pools are highly sensitive to hydrologic alterations. More specifically, their habitat is impacted by alterations to hydroperiod – changes in water depth and associated duration. Hydroperiods are directly related to groundwater recharge rates. The Spring months of March, April, and May are particularly critical.
4. The Board received “water budget analyses” for the vernal pools on the Project site from wetlands scientist Patrick Garner (dated June 6, 2022), and water resources consultant Scott Horsley (dated July 13, 2022), who were retained by the Manchester Essex Conservation Trust.
5. A “water budget” is a comparison of pre- and post-development surface and groundwater conditions regarding changes to watershed areas, impervious areas, and water velocity and volume changes entering the vernal pools. In Matter of Bosworth, the Massachusetts Department of Environmental Protection (DEP) confirmed that a vernal pool’s water budget “must be sustained post-development” in order to protect Wildlife Habitat and Vernal Pool Habitat from adverse impacts due to work in the 100-foot buffer zone, stating that:

It is well known that vernal pool habitat is particularly susceptible to impacts from certain work in the buffer zone because of the habitat’s relative fragility. Vernal pool habitat is sensitive to changes in water, light, and chemical influences. **Generally, in order for vernal pool habitat to continue to function and co-exist with nearby development its water budget must be sustained post-development.** If surface runoff is redirected or groundwater recharge in proximity to the vernal pool is reduced by impervious surfaces, then the vernal pool water budget could be adversely impacted, potentially resulting in adverse impacts to the vernal pool habitat. Land use changes, such as clearing, increases in impervious surfaces, and changes in the watershed can increase or decrease water runoff, which could alter the amount of water received by a vernal pool, destroying the water budget that is necessary to sustain the habitat of that pool. Vernal pools with a significantly disturbed watershed generally have a higher pH, more mineral substrate, and more algae, which negatively impacts the habitat.... **This susceptibility to changes in light, chemicals, or water is why in similar cases project applicants have performed detailed assessments to determine how work in the buffer zone will impact the vernal pool habitat, particularly its water budget.**

Matter of Bosworth, OADR Docket No. WET-2015-015, Recommended Final Decision (February 17, 2016) adopted by Final Decision (March 14, 2016) (emphasis added,

internal citations omitted); see also Matter of Scott Nielsen and The Levi-Nielsen Company, Inc. (April 12, 2010) (improperly-designed stormwater system that deprives a vernal pool of its water budget would fail to meet the Act’s performance standard for BVW under 310 CMR 10.55(4)).

6. Mr. Garner’s and Mr. Horsley’s water budget analyses determined that the Project will cause water *quantity* and water *quality* alterations to the vernal pools that are not permitted under the Massachusetts Wetlands Protection Act (the “WPA”), G.L. c. 131, §40, and the regulations promulgated thereunder at 310 CMR 10.00 *et. seq* (the “Regulations”).
7. These vernal pool alterations would also fail to meet the performance standards under Manchester-by-the-Sea’s General Wetlands Bylaw and accompanying Wetlands Regulations (collectively, the “Bylaw”) that afford even greater protection to vernal pools than the state standards.
8. Specifically, Bylaw Section 1.2.2 protects “vernal pools as an additional resource area recognized by the Town as significant, but not included in the Act.” The Bylaw further protects the area within 100-feet of vernal pools as a “Vernal Pool Resource Area,” with an additional 100-foot buffer zone around it containing an inner 30-foot “no disturb” zone and a 50-foot “no build” zone.
9. The Project encroaches on the “no build” and “no disturbance” zones associated with the vernal pools as defined under the Bylaw and Regulations.
10. The Bylaw also contains a more robust definition of “Alter” than the state standards, recognizing “cumulative” and “incremental” impacts in section 2.2.13.
11. The Applicant’s “Bylaw Buffer Exhibit” dated May 24, 2022 shows the extent of proposed work within these areas.
12. The Applicant has failed to show that proposed alterations to the vernal pools’ water budgets will not destroy the viability of the vernal pools post development. For example, Mr. Garner’s June 6, 2022 Vernal Pool Water Budget Analysis found that post-development, “alterations to all VP hydrologic components occur — that is, watershed areas, impervious areas, runoff velocity, and volume are altered.” See Garner correspondence dated 6-6-22, p. 7. As a result, the volume of water in the northerly VP would decrease as much as 68% post-development. Such “[v]olumetric changes alter the VP water elevation, and consequently, alter the Wildlife Habitat conditions for the VP. Volumetric alterations may also appreciably change the hydroperiod (i.e., the duration of flooding) of the pool.” See Garner correspondence dated 7-13-22, p. 3.
13. Mr. Horsley’s hydrologic analysis dated July 13, 2022 also found that “significant reductions in groundwater recharge of 40 – 50% will result from the proposed development during the critical Spring season” resulting in “lowered water levels and

impairment of the wildlife habitat conditions in the northern vernal pool.” See Horsley correspondence dated 7-13-22, p. 6.

14. The Applicant speculated that volumetric reductions to the northern vernal pool would not occur because of that pool’s connection to Sawmill Brook. However, the Applicant failed to provide any evidence of this hydrologic connection, such as photographic documentation or water elevation data to show a permanent connection between Sawmill Brook and the northern vernal pool.
15. A defining characteristic of vernal pools is the absence of fish, which would eat the egg masses of vernal pool-dependent species. It is unlikely, therefore, that Sawmill Brook – which was recently designated a Coldwater Fish Resource – could be completely connected to the northern vernal pool, which was certified by the Commonwealth of Massachusetts.
16. Water *quality* entering the vernal pools will also be altered by the Project. Mr. Horsley determined that “runoff from impervious surfaces in close proximity to the northern vernal pool, including road runoff containing salt and sand, polyaromatic hydrocarbons (PAHCs), benzopyrene, and heavy metals associated with tire rubber and vehicle emissions, will alter the water quality of the northern vernal pool, impairing wildlife habitat. There are no proposed BMPs to mitigate these impacts.” See Horsley correspondence, 7-13-22, p. 6.
17. Mr. Garner also found that the Wildlife Study prepared by the Applicant failed to demonstrate that the Project protects vernal pool water quality, which are Class A Outstanding Resource Waters under the state Clean Waters Act. He commented that the Wildlife Study “ignores and is silent about the Project’s likely alterations to the VPs water quality, including changes to salinity, oxygen demand, pH values, and temperature of the VPs.” See Garner correspondence, 7-13-22, p. 4.
18. We note that our wetlands peer review consultants, Beals and Thomas, did not fully evaluate the Project’s impacts on the vernal pools, because they only considered the information provided by the Applicant. Beals and Thomas did not conduct independent analysis of hydrologic impacts or the vernal pool water budgets, nor did it review Mr. Garner’s or Mr. Horsley’s water budget analyses.
19. Therefore, the requested waivers related to vernal pool impacts cannot be granted. The information provided by the Applicant cannot support a finding that the vernal pools on the Site will continue to be viable post-development, due to water quality and water quality alterations.
20. To obtain a waiver of the Bylaw or Regulations, the Bylaw requires an “alternatives analysis” and an assessment of “significant immediate and cumulative adverse effects”. Section 9.7 states:

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. (emphasis added).

21. No alternatives analysis has been provided by the Applicant. It is possible that if the Project were reduced in size, the loop road circling the building could be kept outside of these “no build” and “no disturbance” zones. However, this type of alternative plan was not provided or evaluated.
22. Mr. Horsley commented that the site is adjacent to Sawmill Brook, a cold-water fishery that is highly sensitive to thermal impacts. The extensive clearing of trees and the construction of impervious surfaces will dramatically impact the microclimate and specifically the temperature of stormwater that is recharged to groundwater. Groundwater in the immediate area has been measured at 47 degrees F and provides an important cooling baseflow to the stream under existing, pre-development conditions. Stormwater runoff from solar-heated impervious surfaces can exceed 95 degrees F (Thompson et al, 2008). On this basis, a cumulative impact analysis of thermal impacts should have been provided.
23. Section 12 of the Bylaw states that the burden of proof for the required impact analyses is on the applicant. In section 12.1 it states:

“Except where a higher burden of proof is specified in this By-Law or any rules and regulations promulgated hereunder, the applicant shall have the burden of proving by a preponderance of credible evidence that the work proposed in the NOI will not have adverse effects, immediate or cumulative, upon the Resource Area”.

There has been no analysis or evidence presented by the Applicant with respect to probable impacts of the Project on the hydrologic regime of the vernal pools or the thermal impacts to the cold-water fishery stream.

B. Impacts to Public Safety

24. The Project would be served by a long (approx. 1,800 feet) dead-end driveway from School Street. The driveway has a “boulevard” entrance, which transitions to a single, 24-foot-wide road.
25. The elevation at the School Street entrance is 51 feet (above sea level), and rises to 114

feet at the end of the driveway.

26. The maximum grade of the driveway is 8%, on the west side of the building. The driveway is essentially an un-closed loop that snakes around the exterior of the building. For most of the length of the driveway, the outer side of the driveway slopes steeply away from the pavement; the inside of the driveway also features steep slopes at the outset.
27. The Manchester Zoning Bylaws restricts the length of common driveways to 500 feet. See, ZBL, § 6.9.8. The Applicant stated at the February 9th hearing session that it does not need a waiver from this provision because it is not proposing a subdivision. However, Section 6.9.8 does not apply to subdivisions, it applies to any “common driveway,” which this is. The Planning Board’s Road design standards, found in the Planning Board’s Subdivision Rules and Regulations, also restrict the length of dead-roads to 500 feet.
28. The public safety implications of extremely-long dead-end roads has been a frequent topic in Chapter 40B appeals before the state Housing Appeals Committee. The seminal case was a project denied by the Waltham Board of Appeals in 2002, which featured a 1,000-foot dead-end access driveway serving a 36-unit project. The access road climbed 75 feet from its intersection on Lexington Street to the entrance of the project’s building, on top of a hill. The maximum grade of the driveway was 10%, with steep slopes on both sides. There was testimony provided in that case, and cited approvingly by the Housing Appeals Committee, that if the access road was blocked, “emergency personnel would be required to climb the access road or adjacent hill by foot, carrying heavy gear, increasing response time by 45 minutes.” It was also observed that automatic sprinklers inside the building improves fire protection, but are “not a substitute for access to the site for firefighting, and they do not protect against medical emergencies.”
29. The Housing Appeals Committee has affirmed several local zoning board decisions restricting the use of long, dead-end roads similar to the one presented here. In its decisions on this issue, the Housing Appeals Committee has stated that the width of the proposed road “is rarely the most important factor. More typically it is the number of units isolated on the single-access roadway and the length of the roadway, as well as unusual factors specific to the site that are most important.”
30. Based on a survey of Housing Appeals Committee decisions provided by the counsel to the Manchester Essex Conservation Trust, this Project would have, by comparison, the largest number of housing units served by a dead-end road, and the second longest dead-end road.
31. During the February 9th hearing session, the Fire Chief dismissed comparisons of this Project Site with two recent house fires in town. Specifically, he referenced a fire at 30 University Lane that occurred after a snow storm in 2019, in which fire apparatus could not climb the steep driveway leading up to the house. He noted that the driveway was

steeper than what is proposed here. The Chief also referenced a house fire on Old Essex Road last summer, where water pressure in the hydrant was deficient due to the location being at the “dead-end” of a water main.

32. However, the situation at Old Essex Road is present with this Project site as well – there is currently no municipal water service in School Street north of Route 128, and the Applicant intends to extend the water main across Route 128, terminating with a “dead-end,” at the top of Shingle Place Hill.
33. The Applicant has not demonstrated that the Project’s steep and long dead-end driveway can adequately protect future residents of the Project, or provide sufficient access for fire protection. Protecting the future building and its residents, as well as all of the undeveloped land surrounding Shingle Place Hill, is a “local concern” that outweighs any need to produce more affordable housing.

C. The Project’s Stormwater Management Arrangements are Inadequate

34. The Applicant is proposing an overflow drainage connection from a stormwater facility labeled “bio-retention area / rain garden #2” to an existing 18” culvert that runs underneath School Street. The stormwater facility is proposed to be adjacent to the Project’s entrance on School Street.
35. According to the plans, runoff will be diverted from the stormwater facility adjacent to School Street, to the culvert that runs under School Street. The connection to the culvert will necessarily require excavation of School Street, and a perforation of the existing culvert in order to make the physical connection.
36. The culvert headwall on the Project site is located within a wetland area, and was presumably installed to prevent flooding of School Street during periods of seasonal high water within the wetland. The culvert’s outlet is located on Assessor’s Parcel 43-21, which is owned by the Town. School Street is a public way, and therefore is also owned by the Town.
37. The Applicant has not provided any evidence to the Board that it has the necessary easement rights either in the School Street right-of-way or in Parcel 43-21 that would allow the construction and installation of a drainage line and manhole, and the artificial channeling of runoff onto town land.
38. The Board’s powers under Chapter 40B do not extend to forcing Manchester-by-the-Sea to relinquish its real property interests, or to convey easements. The proposed discharge of stormwater into the culvert would exceed the scope of the culvert’s utility under existing conditions, which prevents the adjacent wetland from overtopping onto School Street.

D. The Project's Wastewater Management Arrangements are Inadequate and Unproven.

39. Originally, the Project's estimated 25,000 gallons per day of domestic sewage flow was going to be treated and discharged on-site, through a state-permitted wastewater treatment facility ("WWTF"). On March 25, 2022, nearly five months into the Board's six-month public hearing, the Applicant abandoned the on-site WWTF design and instead proposed a connection to the Town's sewer system.
40. There are no municipal sewers in School Street north of Route 128. The Applicant has proposed to extend the Town's sewer system from a point on School Street "south of Hidden Ledge Road" (according to Site Plan sheet C-104) approximately 3,700 linear feet.
41. The Applicant has stated that its water and sewer infrastructure will be reviewed by the DEP. However, water and sewer connections and extensions are regulated by the Town, through the application of state laws and local regulations and policies. The water and sewer distribution systems are owned and maintained by the Town, through its Department of Public Works.
42. Manchester's sewer system is regulated by federal and state statutes that protect the environment. A consolidated permit is issued every five years, commonly referred to as the "NPDES permit," which is an acronym for "National Pollutant Discharge Elimination System." The NPDES permit is issued jointly by the federal Environmental Protection Agency ("EPA"), which administers the federal Clean Water Act, and the state Department of Environmental Protection ("DEP"), which administers the state Clean Waters Act. The current permit was issued in 2020 and expires in 2025.
43. The NPDES Permit contains a number of restrictions on the operation of the Town's plant, including a cap on the average monthly effluent flow of 670,000 gallons per day. There are also water quality standards that must be met, with frequent monitoring, sampling and reporting.
44. The treatment plant discharges effluent into Salem Sound (Manchester Bay) at the end of a 9,000-foot-long pipe. The discharged effluent must comply with concentration limits set for total suspended solids, dissolved oxygen, and pathogens. The pathogen requirements derive from a federal study (a "TMDL") that identifies Salem Sound as in need of particular protection from sources of fecal coliform and *Enterococci* contamination. See, 2019 "Fact Sheet" accompanying the draft NPDES Permit, p. 13. The TMDL report identified stormwater runoff and wastewater discharges as the primary sources of this type of pollution. Id.
45. The prior NPDES permits regulated effluent flow both on a monthly and annual basis. However, the current 2020 NPDES permit only imposes an "average monthly" effluent

flow limit. Thus, under the current permit, the 670,000 gpd limit must be met on a monthly basis, not an annual basis.

46. Salem Sound is designated under the state surface water quality regulations as a “Class SA” surface water, which waters are “excellent habitat for fish, other aquatic life, and wildlife, including for their reproduction, migration, growth and other critical functions, and for primary and secondary contact recreation.” 314 CMR 4.05(4)(a). The regulation states that “these waters shall be suitable for shellfish harvesting without depuration (Approved and Conditionally Approved Shellfish Areas), and that “these waters shall have excellent aesthetic value.” Id.
47. Manchester’s sewer system has been under an Administrative Consent Order with the DEP since 2013. The Consent Order was imposed because effluent flows to the plant exceeded 80% of the effluent limit established in the 2011 NPDES permit (670,000 gpd), which required the Town to notify DEP and to propose mitigation to reduce flow. The Town did not timely respond to those requirements, and consequently DEP imposed a sewer connection moratorium and ordered the Town to develop and implement a plan to reduce stormwater infiltration and inflow (“I/I”).
48. I/I is extraneous water that enters the sewer system during wet weather and seasonal high groundwater conditions, and which reduces the system’s capacity to transfer sewage flow to the plant.
49. The Town subsequently engaged a wastewater engineer to study the I/I problem and to develop a “comprehensive wastewater management plan” (“CWMP”). The CWMP, which was completed in 2016, specifically identified I/I as a significant limiting factor to plant expansion. Specifically, according to the CWMP, a 2013 study found that 273,000 gpd of peak infiltration enters the sewer system, and that 1,473,000 gallons of inflow enters the system during a design storm event. CWMP, pp. 19, 83.
50. The connection moratorium was lifted by DEP last December. However, effluent flows are still higher than allowed under the NPDES permit – according to the Town’s meter data, the average daily effluent flow in February, 2022 was 736,000 gallons per day.
51. There is a third regulatory process that is relevant here – the state Ocean Sanctuaries Act (“OSA”), G.L. c. 132A, §§ 12A, et seq.. This statute prohibits wastewater outfall pipes along most of the Massachusetts coastline, but “grandfathers” certain wastewater plants that pre-date the enactment of the law (including Manchester’s outfall pipe).
52. The OSA requires a state permit for any “*increase in volume or change in location of an existing discharge.*” G.L. c. 132A, § 12A (definition of “modified discharge”).
53. Unlike the NPDES permitting process, the OSA does not set discharge “limits” for wastewater plants; rather, it provides a regulatory review process for proposed increases in volumetric flow, and imposes strict criteria for such approvals, including

demonstrating compliance with any applicable TMDL reports.

54. The OSA could be interpreted as requiring “modified discharge” approval for any material increases in flow to the Town’s system (an “existing discharge”), subject to the criteria in the statute and the associated regulations. The Applicant provided no clarification during the public hearing as to whether this Project, which will add 25,000 gpd of sewage to the Town’s plant, triggers review and approval under the OSA.
55. State regulations issued by DEP require developers to provide I/I mitigation of at least a 4:1 ratio as a condition of approval of any new sewer extension project. “Such mitigation shall require that four gallons of infiltration and/or inflow be removed for each gallon of new flow to be generated by the new sewer connection or extension, unless otherwise approved by the Department.” 314 CMR 12.04(2)(d).
56. When the volume of sewage flow exceeds the capacity of the sewer mains that deliver raw sewage from customers to the treatment plant, the systems can be surcharged, resulting in “sanitary sewer overflows,” or “SSO’s.”
57. A pipe’s capacity is a function of a number of variables, including hydraulics, volume of sewage flow, and volume of I/I that enters the systems and displaces capacity for the sewage flow. State sewer regulations, 314 CMR §§ 12.08(8) and (9), expressly prohibit sewer connections or extensions that would result in SSOs.
58. The Applicant provided a sewer capacity analysis that was well documented and included metering of actual conditions (dry weather) downstream. However, the proposed demands and/or mitigation were not reviewed by an outside technical review consultant familiar with the Town’s system or evaluated through incorporation into a system-wide model.
59. The Town’s DPW Director recommended in his March 30, 2022 memorandum that “at a minimum, a capacity analysis of the collection system would need to be completed.” He further opined that “a full design peer review and final approval by DPW should be required.”
60. Contrary to the Applicant’s assertions, information submitted by the Applicant’s consultants demonstrates the School Street sewer does not have adequate capacity to safely serve the added demand. The Project’s capacity analysis presented a reasonable estimate of peak wastewater flow, but accounted for no contribution from I/I.
61. The Project’s “School Street Existing Sewer Capacity Table” shows three (3) sections where dry weather peak flow is expected to require 90% or more of the available pipe capacity leaving no effective capacity to accommodate any I/I component during wet weather events.

62. The Applicant suggested any capacity concerns can be addressed by storing wastewater on-site and pumping during periods of low demand. This strategy, although intuitively logical, is impractical for many reasons. First and foremost, peak system demand is largely determined by I/I contribution, which lacks predictability and as such cannot be incorporated into any daily pumping strategy that will ensure site discharge does not overlap with a period of high inflow/infiltration.
63. Second, storing wastewater for later discharge is not advisable due to production of hydrogen sulfide gases. When wastewater sits, either in a tank or a force main, hydrogen sulfide is produced and eventually discharged to downstream collection systems where it can be corrosive to pipes. If the Project intends to rely on a delayed discharge strategy, it should have provided a specific methodology and address any potential consequences.
64. Moreover, the Project does not propose to extend the gravity sewer system as contemplated in the town's Comprehensive Wastewater Management Plan (CWMP) for Study Area 6, instead proposing a force main for a single user (the Project). The proposed sewer improvements benefit the Project exclusively, and do not provide a practical means of connecting other properties.
65. Installation of a force main that serves a single user makes it more difficult to extend the gravity sewer, since the route would be encumbered by the Project sewer. This is wholly inconsistent with the Town's CWMP, and is not just a hypothetical concern given the planned redevelopment of the Manchester Athletic Club property.
66. The Applicant's proposed sewer extension would require extensive construction and the permanent installation of utilities within the right-of-way of state Route 128. The Applicant has provided no evidence that it asked for, much less can obtain, the necessary easements from the Commonwealth of Massachusetts for this extension.

* * *

The Manchester Essex Conservation Trust has carefully considered the ramifications of a comprehensive permit denial. Its conclusion is that the conditions the Board would reasonably want to impose on the Project would likely be stripped away by the Housing Appeals Committee on an appeal by the Applicant, based on prevailing precedent.¹ As such, applying the balancing test set forth under Section 20 of the statute under the definition of "consistent with local needs," the analysis mandates a denial of this comprehensive permit.

Thank you for your attention to these matters.

Very truly yours,

/s/ Daniel C. Hill

Daniel C. Hill

¹ For the record, we do not agree with that precedent, and are confident that once challenged in court, the HAC's assumed authority to strike conditions without a predicate demonstration of "uneconomic" effect will end.