



City of Malden

Massachusetts

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February 15, 2022

Malden City Council
Malden City Hall
215 Pleasant Street
Malden, MA 02148

**Re: Amendments of Title 12.12, Code of City of Malden
Site Plan Review for Educational and Religious Uses in All Zoning Districts
Amendments of Title 12.16, Code of City of Malden
Dimensional Controls, Open Space Requirements for Public and Non-profit Schools
City Council Paper #405/2021 as Amended**

Dear Councilors:

On February 9, 2022, the Planning Board and City Council Ordinance Committee jointly held a public hearing regarding the above-referenced proposed amendments.

As a result of the public hearing, on February 9, 2022, a majority of the Planning Board, namely, all seven of those seven members present and voting, decided to recommend to the City Council disapproval of the amendments as proposed and to also recommend the following:

1. Re: proposed amendment of Title 12.12, Site Plan Review for Educational and Religious Uses.
 - a) Inclusion of the following language if any amendments are ordained:
"This ordinance/amendment shall not apply to any application for a special permit or building permit filed before the date of first publication of the notice of public hearing re: this ordinance/amendment (January 21, 2022)."
 - b) Inclusion of the following language if the amendments are ordained:
"This ordinance shall not apply to an application for permitting that complies with dimensional controls and parking requirements and requires no variance by Board of Appeal."
2. Re: proposed amendment of Title 12.16, Open Space Requirements for Public and Non-profit Schools.
 - a) Research and consider using professionally prepared site survey plans of the existing school properties when considering open space requirements.
 - b) Research and consider including language, "per student based on student occupant load."
 - c) Research and consider amendments to "Usable Open Space Requirements in All Districts" (§12.16.080) to establish specific provisions that would apply to schools.
 - d) Inclusion of the following language if any amendments are ordained:
"This ordinance/amendment shall not apply to any application for a special permit or building permit filed before the date of first publication of the notice of public hearing re: this ordinance/amendment (January 21, 2022)."
 - e) Consider creating/amending open space requirements for all other non-residential uses.

For your reference, enclosed please find the Planning Report & Recommendation dated February 9, 2022, with attachments, which was presented at the public hearing.

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Finally, please be advised, that, if the City Council fails to act on the amendments within ninety (90) days of the date the public hearing closed, a new duly advertised public hearing must be held. Accordingly, **the final date for action is May 10, 2022.**

I am available to discuss and answer any questions regarding the Planning Board's recommendations. Please do not hesitate to contact me. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Michelle A. Romero".

Michelle A. Romero
City Planner

Enclosure

CC: Greg Lucey, City Clerk
Kathryn Fallon, City Solicitor
Mayor Gary Christenson

PLANNING REPORT & RECOMMENDATION

To: Malden Planning Board
From: Malden City Planner
Date: February 9, 2022
Subject: Zoning Amendments/CCP #405/2021, as amended
Site Plan Review for Educational and Religious Uses (§12.12)
Open Space Requirements for Public and Non-profit Schools (§12.16)
Title 12, Chapter 12, Code of City of Malden (MCC) (*all references herein*)

PETITION: This petition is made by the City Council (§12.32.050) and was filed by sponsor Ward 6 Councilor (former Councilor-at-Large) Stephen Winslow (for full text of amendments see attached City Council Paper 405/2021, as amended).

PROCEDURAL:

- The Planning Board and City Council Ordinance Committee held a joint public hearing on October 13, 2021 re: the original/first version of the paper (attached).
- The Planning Board made an advisory recommendation to the Council via correspondence dated October 14, 2021 (attached), which included obtain the opinion of the City Solicitor re: the legality of the amendments re: educational and religious uses per M.G.L. c.40A, §3.
- City Solicitor Kathryn Fallon provided an opinion via memorandum to City Council Ordinance Committee dated November 16, 2021 (attached).
- The City Council Ordinance Committee met on November 16, 2021; at this meeting, the Committee, City Solicitor and City Planner discussed the amendments, Planning Board recommendations and City Solicitor's opinion.
- The City Council sponsor revised the proposed amendments.
- The City Council Ordinance Committee recommended and filed the revised amendments with the City Council on December 7, 2021 (CCP 405/2021 as amended).
- Based on changes appearing to be substantive, the City Council referred the revised amendments to Planning and Ordinance Committee for a new public hearing, with new notice given, in accordance with state and local ordinance.
- The City Solicitor's additional guidance as a result of review of the revised amendments with the City Planner are incorporated in this Report at Notes 2, 3, 4, 5, 6 and 7. Note: The City Solicitor's November 16, 2021 memorandum remains relevant to the current revised amendments and as noted above is attached to this Report and Recommendation.

SUMMARY of PROPOSED AMENDMENTS:

- A. Site Plan Review for Educational or Religious Uses.** The proposal is to create a Site Plan Review process that would be required for projects that involve:
- change of use and extension of existing buildings or construction of new buildings, with a gross floor area greater than 10,000 SF; and/or
 - extension of existing or construction of new surface parking areas exceeding 10,000 SF; and
 - religious use, or
 - educational use, and
 - property in all zoning districts.
- B. Open Space Requirements for Public and Non-profit Schools.** The proposed amendment will establish open space requirements. As proposed, 15 square feet of open space per student would be required. In support of the proposal, the City Council sponsor provides a spreadsheet of information (attached), "*Existing Open Space of Schools in Malden*," which includes, "Note: SF estimated via Google Earth, Enrollment-Malden Schools-based on Caps; MC, Cheverus, MVRCS-Actual 2021."

CURRENT ORDINANCE:

A. Site Plan Review for Educational and Religious Uses.

- 1) **Educational and Religious Uses.** These institutional uses are allowed by right in all zoning districts, as indicated by, “Yes,” on the Table of Use Regulations (§12.12.030).

Note 1: The existing prohibition of Non-profit Schools in the Industrial 1 and 2 zoning districts (§12.12.030) appears contrary to M.G.L. c. 40A, Section 3.

- 2) **Surface Parking Areas.** The current ordinance contains no definition, use category or other regulation for “surface parking area” (§§12.12.030 and 12.32.060).

A parking area located on a property that is used by a building on that property is subject to requirements regarding layout, including dimensions, aisle width; landscaping and screening (§12.20) and is considered part of the principal use of the building/property.

A stand-alone surface parking lot that is the principal use of a property is regulated as an Offsite Parking Facility (§12.12.030).

- 3) **Dimensional Controls and Parking Requirements.** Educational and religious uses must comply with applicable Dimensional Controls and Parking, Loading and Screening Regulations, or may seek a variance (§§12.16, 12.20).

- B. Open Space Requirement for Public and Non-profit Schools.** The current ordinance contains no open space requirements for public and non-profit schools (§12.16.010), or for any other institutional uses, or for any business or industrial uses (§12.16).

Existing regulations provide, “Usable Open Space Requirements in All Districts” (§12.16.080):

- A. Usable open space shall consist of areas for active or passive recreational use and shall not be used or considered for off-street parking or vehicular access or egress.
- B. Each usable open space area shall be a minimum of one thousand (1000) square feet in area and shall have a minimum clear width of twenty (20) feet with a maximum grade not greater than eight (8) percent in any direction. Areas for usable open space may include tennis courts, basketball courts, swimming pools, lawns, walks, benches or other active or passive recreational facilities.
- C. In all zoning districts, open space requirement may not be met by indoor recreational facilities. All open space shall be pervious, visible to the public and a minimum of 50% shall be located in yard setback areas, where setbacks are required.
- D. The area between the street line and any building line set by the Public Works Commission of the City of Malden shall not be included as usable open space.

OUTSTANDING CONCERNS:

A. Site Plan Review for Educational and Religious Uses.

Many of the following issues and outstanding concerns were discussed at the first joint public hearing on October 13, 2021 and raised in the Memorandum dated November 16, 2021 from City Solicitor Kathryn Fallon to the City Council Ordinance Committee.

- 1) **General Concerns.**

- The legality of the proposed site plan review ordinance to regulate so-called “Dover amendment” uses, specifically, religious and educational uses.
- Inconsistencies and conflicts of the proposed site plan review process with City and state zoning laws and other City ordinances.

Note 2: The City Solicitor has provided the following additional guidance:

- A. *It is important to note the applicability of what can be regulated under Dover Amendment: M.G.L. c. 40A, §3 "...provided, however, that such land or structures may be subject to **reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.**" Our zoning already regulates these criteria.*
- B. *Please keep in mind that regulations even if properly procedurally enacted can still be struck down as unreasonable; i.e., if the regulation is too restrictive, thus preventing a use permitted under the Dover amendment, it will not survive legal challenge. Religious and educational uses are permitted uses by law, and that includes new and expanded uses. An ordinance which attempts to regulate these uses is unlawful. What is permissible is reasonable dimensional controls*, which already exist in our current zoning.*
**As noted above, open space requirements are not regulated in our zoning for any institutional, or business or industrial uses.*
- C. *Important definitions under M.G.L c. 40A, §1A:*
"As of right": development that may proceed under a zoning ordinance or by-law without the need for a special permit, variance, zoning amendment, waiver or other discretionary zoning approval.
"Permit granting authority": the board of appeals or zoning administrator.
"Special permit granting authority": (depends on applicable zoning ordinance)...shall include the city council, board of appeals, planning board, or zoning administrators as designated by zoning ordinance...for the issuance of special permits.

2) Applicability (Section B).

Note 3: The City Solicitor previously recommended to include the following provision, and noted further that these preliminary reviews and determinations are within the jurisdiction of the Building Commissioner: "The [proposed] ordinance does not apply to an application for a project [permit] that complies with dimensional and parking requirements and requires no variance by Board of Appeal."

3) Relationship to the Building and Occupancy Permit (Section C).

Per state statute, this amendment/ordinance would not apply to a building permit or special permit issued prior to the date of first publication of the notice of public hearing re: this amendment/ordinance (January 21, 2022). Applications for permits that are in the processing stage when publication occurs are not protected; historically, the City interprets, in consideration of a petitioner's good faith reliance on current regulations, that proposed amendments do not apply to applications filed prior to the first publication of the notice of public hearing.

The amendment proposes to use the date of posting of the City Council agenda; this would be an earlier date than that provided by statute or City's historical extension of the exemption.

Note 4: The City Solicitor recommends deletion of Section C, based on the following guidance:

- A. *"...pre-condition of the issuance of any building permit": this is in conflict with regulatory and statutory processes in place; whether or not to grant a permit is determined by the Building Commissioner; this language is too broad.*
- B. *"...posting of the City Council Agenda" as a threshold date: As to applicability of the ordinance, if enacted, a section can be included to specify that the ordinance shall not apply to applications filed prior to the first date of publication of the hearing notice. Posting of City Council agenda is not historically or statutorily used as an effective date for applicability purposes. As explained to the Rules and Ordinance Committee, the City has historically not applied zoning amendments to any applications filed or in processing stages when publication occurs. This includes any applications for any permits filed or in processing stages when publication occurs. First publication occurred on January 21, 2022.*

- 4) **Site Plan Submission Criteria (Section D).** [See also **7) Site Plan Review Criteria (Section H)** below]. The provisions appear to be unnecessary, to a point of possibly being considered unreasonable, because they require the submission materials to include information “to allow determination,” review and consideration of areas already regulated:
- by existing zoning regulations re: dimensional controls (lot area, setbacks, yard sizes/areas, building coverage, bulk and height of structures); and parking requirements (number of spaces, loading bays, snow storage areas, bicycle parking, landscaping).
 - by other existing ordinances re: solid waste and signs.
- 5) **Site Plan Review Committee (Section E).** The purpose and role of an independent Site Plan Review Committee is unclear and in potential conflict with existing ordinances because:
- The Committee appears to usurp established role and authority of other City officials and/or Boards and Commissions.
 - Committee composition is not related to matters to be regulated by the proposed ordinance:
 - Members are not required to have any particular expertise re: technical areas proposed to be considered by site plan review (with potential exception of the Strategic Economic department staff person, depending on the position).
 - Most members (3/5) are elected officials.
 - Committee Operation provisions (paragraphs 2, 3 and 4) appear to seek to regulate and establish procedures for the Board of Appeal.
- 6) **Review Schedule (Section F) and Notice (Section G).**
- Note 5: The City Solicitor notes that many of the recommended revisions were not made.*
- Section F adds an additional public hearing process inconsistent with that required by zoning law.*
 - The recommendation was made previously to delete Section G because an attempt to wedge a separate public hearing process which does not exist at law, and which would fall under the statutory public hearing process and timeline contained in M.G.L. c. 40A, §15.*
 - Site plan review should occur in tandem with the Board of Appeals hearing process, and by the Board of Appeals as conducted and determined by the Board of Appeals.*
- 7) **Site Plan Review Criteria (Section H).** [See also **4) Site Plan Submission Criteria (Section D)** above]. The proposed provisions appear to be unnecessary, to a point of possibly being considered unreasonable, given they require review and comment by the Committee of matters and criteria already under purview and authority of:
- Building Commissioner.
 - Board of Appeal.
 - City staff, and other Boards and Commissions (Department of Public Works Commission, Traffic Commission, Board of Health, Sign Design Review Committee, City Engineer, City Council, License Board) with expertise and which administer existing permitting/licensing regulations in the subject areas (signs, solid waste, street layouts, on-street parking, traffic signal improvements, sidewalks, curb-cuts, utilities connections, parks use permits).

As proposed, the ordinance also requires review and comment by the Committee re: “other city permits and licenses the applicant may need or desire for the project:”

- Already subject to review and approval by other Boards and Commissions per other ordinances.
- Existing ordinances already allow opportunity for comment by City officials.

Note 6: The City Solicitor previously recommended deletion of Section H and notes that the criteria contained in H are already regulated under current zoning.

OUTSTANDING CONCERNS:

B. Open Space Requirements for Public or Non-profit Schools.

The following information was provided by Building Commissioner Nelson Miller:

- Open space requirements for any use or building are not regulated by the Massachusetts State Building Code.
- Any metric may be used to determine open space, i.e., number of students, size of building.
- To base open space requirements on the number of students, it is recommended to use the occupant load, not enrollment.
- The occupant load of a school building is regulated by state Building Code and includes students and staff.
- The student occupant load (maximum number of students allowed in the building) is determined by combining the total occupant loads for individual spaces occupied by students.
- To base open space requirements on the total size of the school does not take into consideration the several different types of spaces within a school which have varying layouts and occupant loads and would not be an accurate way to determine the overall need of open space.

The proposed requirement, 15 square feet of open space per student, is based on information provided in the spreadsheet, “*Existing Open Space of Schools in Malden.*”

- This information appears to be a preliminary estimation and to ensure reliability should be verified and revised, if necessary, based on actual open space areas depicted on professionally prepared site survey plans of school properties.
- Additional language is recommended to specify, “per student based on student occupant load.”
- It is unclear whether existing regulations, “Usable Open Space Requirements in All Districts” (§12.16.080) (See **CURRENT ORDINANCE, Section B** above) are appropriate for schools or should be amended to provide regulations specific to schools.

Note 7: The City Solicitor provides the following opinion:

There are no open space requirements in our zoning for institutional, business or industrial uses, so carving out zoning that only applies to educational uses could be challenged as an unreasonable attempt to regulate educational use permitted by law under the Dover Amendment.

APPLICATION and EXEMPTIONS: The amended ordinance if approved will apply to new lots and new buildings and new use and occupancy of existing buildings on existing lots, unless exempt per M.G.L. c. 40A, §6, as a preexisting nonconforming use or building (§12.28.010); the subject of a building or special permit issued before the first publication of notice of the public hearing (January 21, 2022); land part of an approved and endorsed Approval Not Required or Definitive subdivision plan; or express language of the amendment. For discussion of statutory exemption, the City’s historical extension of the exemption, and alternative exemption date proposed by the amendment, see **Section 3** above.

Note 8: Three applications for demolition permits were filed prior to the date of first publication of the notice of public hearing re: this amendment: 12-24 Lebanon Street (Permit Application # CMID-039265-2021 filed on September 22, 2021); 28 Lebanon Street (Permit Application # CMID-039281-2021 filed on September 22, 2021); and 17 Columbia Street (Permit Application # CMID-039297-2021 filed on September 23, 2021). See below for recommended language to extend the exemption to applications filed before the date of first publication of the hearing notice.

EFFECTIVE DATE: The effective date of an amendment is the date of the City Council’s vote to ordain the amendment (§12.32.050.F). The Council must act on the amendment within ninety (90) days after the public hearing closes, otherwise, a new duly advertised public hearing must be held (§12.32.050.D); accordingly, if the public hearing closes on February 9, 2022, the final date for action is May 10, 2022.

STANDARD of REVIEW: Planning Board review and recommendation of proposed zoning changes should be directed by *substantive planning objectives, community need and general welfare.*

PLANNING RECOMMENDATION (*Prepared prior to the public hearing*): That the Planning Board recommends to the City Council:

1. Disapproval of the amendments of Title 12.12 as proposed.
2. Approval of the amendment of Title 12.16 as proposed, in concept, subject to the following:
 - a) Modify, if necessary, based on actual open space areas depicted on professionally prepared site survey plans of the existing school properties.
 - b) Inclusion of the following additional language: "per student based on student occupant load."
 - c) Consider amendments to "Usable Open Space Requirements in All Districts" (§12.16.080) to establish specific provisions that would apply to schools.
3. Inclusion of the following language if any amendments are ordained:
"This ordinance/amendment shall not apply to any application for a special permit or building permit filed before the date of first publication of the notice of public hearing re: this ordinance/amendment."
4. Inclusion of the following language if the amendment of Title 12.12 is ordained:
"This ordinance shall not apply to an application for permitting that complies with dimensional controls and parking requirements and requires no variance by Board of Appeal."