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VIA ELECTRONIC MAIL & USPS

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Malden City Council
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RE: Proposed Illegal Zoning Amendment Targeting the Mystic Valley Regional Charter School

Dear Chairman Ioven and Councilor Winslow:

Nixon Peabody LLP represents Mystic Valley Regional Charter School ("MVRCS"); I am writing to you in connection with the proposed zoning amendment (No. 356-24) ("Proposed Amendment") that purports to impose a patently illegal site plan approval process on religious and educational uses, and to express the strong opposition of MVRCS to it.

For numerous reasons, the Proposed Amendment is illegal under G.L. c. 40A, § 3, second paragraph, which is commonly referred to as the "Dover Amendment." First, the Proposed Amendment, as initially presented, targeted only religious and educational uses, which are both protected under the Dover Amendment. This is clearly improper. See *Bible Speaks v. Board of Appeals of Lenox*, 8 Mass. App. Ct. 19 (1979) (invalidating special permit and site plan approval requirements imposed only on religious and educational uses).¹ The fact that the amendment has been revised to include daycare uses is mere window dressing and does not alter the original intent.

Second, while targeting religious and educational uses is bad enough, the real target of the Proposed Amendment is MVRCS. Targeting the properties of a particular entity for more restrictive treatment is improper. *W.R. Grace & Co. -Conn. v. City Council of Cambridge*, 56 Mass. App. Ct. 559, 569 (2002) (such targeting may constitute reverse spot zoning); *Cumberland Farms, Inc. v. Jacob*, 2015 WL 5824402, at * 5 (Land Ct. 2015) ("Zoning can only deal with use, without regard to ownership of the property involved or who may be the operator of the use.") (internal quotation marks and citation

¹ The Proposed Amended has since been amended to include another protected use – childcare uses. This, however, does not alter the primary intent of the Proposed Amendment.

omitted).² Proof that the Proposed Amendment is targeted at MVRCS includes, without limitation, the following:

- The Proposed Amendment was first introduced at a City Council hearing exactly one week after MVRCS met with the Building Commissioner to discuss MVRCS's request for a determination that its plans for a much needed gym project at 31 Granite Street ("Gym Project")³ complied with applicable zoning, as modified by the Dover Amendment. Indeed, in introducing the Proposed Amendment at the September 24, 2024 City Council meeting, its sponsor stated that the impetus behind presenting the amendment was a recent discussion he had with the Building Commissioner regarding the application of the Dover Amendment to a newly proposed project. Further, during the meeting, another City official commented that there is "one sizeable property we probably all know we're referring to."
- It was clear from questions and comments at the meeting that the Proposed Amendment is being pushed at this time so that it could be applied to the Gym Project.⁴
- A similar amendment had been contemplated several years ago, but was not adopted. Shortly thereafter, Malden Catholic, which the sponsor of the Proposed Amendment strongly supports, obtained zoning relief for a 70,000 square foot school project at 50 Crystal Street. The circumstances and timing suggest that the prior amendment was effectively pulled to enable Malden Catholic's school building project to proceed, and has been reintroduced now to harm only MVRCS.⁵
- A recent Facebook post by the Proposed Amendment's sponsor acknowledges – indeed, effectively boasts – that he submitted the Proposed Amendment in response to MVRCS's request for a zoning determination regarding the Gym Project. The sponsor's post focuses entirely on MVRCS – it criticizes MVRCS for not engaging in "outreach" with him concerning the request for a zoning determination (something that is not required by the Zoning Act or the Zoning Ordinance) and for taking steps to trigger a zoning freeze to protect MVRCS in the event the City Council enacts the unlawful Proposed Amendment (which is precisely the type of

² While such targeting is improper regardless of the circumstances, it reflects an additional level of bad faith here insofar as it applies to MVRCS's properties in Maplewood Square. By agreement signed in early January, 2022, the City of Malden and MVRCS made certain commitments regarding those properties, which included that the City's promise to "restrict any additional ordinances, zoning or regulations that would apply to The Parcels to the requirements that existed at the time, which MVRCS purchased said properties." (Agreement, Section V). While MVRCS honored its commitments, the Proposed Amendment, if adopted and applied to the Maplewood Square properties, would violate the spirit, if not the letter, of one of the City's key promises.

³ The Gym Project consists of the construction of an approximately 6,554 square foot prefabricated steel building with an outside décor similar in fashion and color to MVRCS's athletic facility at 576 Eastern Avenue, three-quarters of a mile away. The building will house a standard, 74-foot long Middle School basketball court. Travelling between class and gym will be within the confines of MVRCS's school yards at all times, which will minimize disruption to the general neighborhood. Relatedly, adding the gym's recreational space – which will be heated when the weather is cold and air conditioned when the weather is hot – to the School's campus will reduce the need for the students to use Trafton Park.

⁴ The comments by City Councilors on this point, however, were inaccurate.

⁵ Regardless, had the proposed amendment been adopted when originally proposed, it would have been illegal for several of the reasons noted herein.

protection the State law freeze is intended to provide), but does not even attempt to make a case that the Proposed Amendment is reasonably necessary to address anything other than potential development by MVRCS.

Third, the Proposed Amendment imposes undue burdens on protected religious and educational uses. To provide a non-exhaustive list of examples: (1) the Proposed Amendment imposes, on a protected use, one of the few site plan review requirements that applies anywhere in the City, without any valid basis to do so;⁶ (2) while the Dover Amendment is intended, in large part, to remove local prejudices from zoning determinations,⁷ the proposed make-up of the Site Plan Review Committee is overtly political and virtually guarantees that local prejudices will play a role in its decisions (indeed, comments at the meeting reflect a desire to enable residents to chime in on what is “good” for their neighborhoods, which is not the Dover Amendment standard); (3) the Proposed Amendment purports to allow the Site Plan Review Committee to hold an unlimited number of meetings (§ 12.12.500.F), thereby unnecessarily driving up the cost of the process; (4) the Proposed Amendment imposes no time limit on the review process, thereby allowing the Site Plan Review Committee to extend the process indefinitely at its whim;⁸ and (5) the Proposed Amendment imposes numerous and specific requirements on the types of plans that must be submitted (§ 12.12.500.D(2)-(7)), thereby unnecessarily increasing the cost of the approval process, without any rational basis for doing so. For many projects, such as for MVRCS’s Gym Project, only a minimal amount of information is needed in order to make a determination as to whether the project requires an accommodation from dimensional requirements, and such a determination is needed **before** the applicant is forced to incur substantial expense to draw up more particularized plans.⁹ See *Trustees of Tufts College v. City of Medford*, 415 Mass. 753, 759-60 (1993) (“Excessive cost of compliance with a requirement imposed on an educational institution, without significant gains in terms of municipal concerns, might also qualify as unreasonable regulation of an educational use.”).

Fourth, the Proposed Amendment’s sponsor stated, at the September 24, 2024 City Council meeting, that the Proposed Amendment’s purpose was to relieve the Building Commissioner of his obligation to determine whether the particular dimensional regulations, as applied to an educational project, are “reasonable” under the Dover Amendment. To make this determination, the appropriate authority must decide whether compelling compliance with such regulations “would substantially diminish or detract from the usefulness of a proposed structure, or impair the character of the institution’s campus, without appreciably advancing the municipality’s legitimate concerns.” See *Trustees of Tufts College*, 415 Mass.

⁶ The only other examples pertain to Planned Developments (§ 12.12.120), Multi-family Housing and Mixed-use Developments in the MBTA Communities Multi-Family Overlay District (§ 12.12.400), large scale mixed-use projects in the Rowe’s Quarry and Reclamation and Redevelopment District (§ 12.28.140), projects in the Residential Incentive Overlay District (§§ 12.12.130 and 12.12.140), and projects along the Malden River (§ 12.12.200).

⁷ See *Boyajian v. Gatzunis*, 212 F.3d 1, 6-8 (1st Cir. 2000) (noting that the Dover Amendment was intended to address and prevent the all-too familiar scenario where local permitting authorities discriminate against protected uses under the guise of addressing what, in other instances, are legitimate concerns, such as traffic and neighborhood character).

⁸ The Proposed Amendment purports to link site plan review with the process for reviewing a “zoning variance[]” (§ 12.12.500.F), but variances typically are inappropriate where the Dover Amendment applies. See *Trustees of Tufts College v. City of Medford*, 415 Mass. 753, 759-60 (1990) (an accommodation under Dover Amendment “cannot be achieved by insisting that an educational institution seek a variance to obtain permission to complete its project”));

⁹ By means of example, plans showing easements and elevations, which are required by the Proposed Amendment, have no bearing on whether the Dover Amendment requires a relaxation of side yard and rear yard setback requirements for the Gym Project.

at 759. However, the Proposed Amendment does not mention this standard at all, and certainly does not direct the Site Plan Review Commission to make the necessary determination; in fact, it intentionally adds different and burdensome provisions. The Proposed Amendment, therefore, does not serve the purpose articulated by its sponsor. This is yet more proof that the Proposed Amendment advances no legitimate zoning objective, and instead is intended to make it more difficult and expensive for MVRCS to obtain the necessary zoning approvals.

Fifth, the Proposed Amendment not only fails to apply the standard required under the Dover Amendment, it also provides no standard whatsoever, especially insofar as review of a protected project's dimensional components is concerned. (§ 12.12.500.H.1). This would effectively vest the commission with standardless discretion over whether to grant site plan approval. This, in turn, constitutes yet another violation of the Dover Amendment. See *Bible Speaks*, 8 Mass. App. Ct. at 33 (holding that special permit and site plan approval conditions that "invest the [permitting authority] with a considerable measure of discretionary authority over an educational institution's use of its facilities . . . create[s] a land use regulation for such institutions which is antithetical to" the Dover Amendment's protections). It also independently violates the black letter rule that **any** zoning ordinance that vests an approval authority with standardless discretion is void for vagueness. See *MacGibbon v. Bd. of Appeals of Duxbury*, 356 Mass. 635, 637-38 (1970) (noting that a zoning regulation is subject to annulment where it provides the decision maker with "untrammeled discretion" or "unbridled fiat"); *Cumberland Farms*, 2015 WL 5824402, at *7 (invalidating a bylaw provision because the standard it imposed – namely, requiring the permitting authority to determine whether a project would "detract from the established character of the location" and "contribute a diverse and appropriate blend of business" – was "subjective and vague"; the Proposed Amendment here is even more problematic, as it identifies **no** standard).

Sixth, the Amendment is irrational on its face. Currently, Chapter 12 (*i.e.*, all provisions that begin with "12.12") pertains to "Use Regulations," and Section 12.12.020 states as follows:

The use regulations of this ordinance shall not prohibit, regulate, or restrict the use of land, buildings, or structures for religious purposes or for educational purposes on land owned or leased by the Commonwealth of Massachusetts or any of its agencies, subdivisions, or bodies politic or by a religious sect or denomination, or by a non-profit educational corporation, or by the City of Malden, excluding any of its agencies, subdivisions, or bodies politic.

The Proposed Amendment purports to add the site plan requirement as Section 12.12.500, which would make it yet another Use Regulation. If adopted, therefore, the Proposed Amendment – which purports to regulate protected religious and educational uses – would be rendered unenforceable by application of both Section 12.12.020 and the Dover Amendment. And, the City Council cannot avoid this result by responding to this letter through eliminating Section 12.12.020 (the Dover Amendment, which this section mirrors, would continue to apply) or moving the site plan language out of the Use Regulations. This is because it is clear that the City Council properly views the site plan review requirement to be a Use Regulation, regardless whether it engages in gamesmanship by trying to re-categorize that requirement. Indeed, the City Council has placed every other site plan review requirement in the Use Regulations chapter, with the only exception being one that applies to Rowe's Quarry Reclamation and Redevelopment District (§ 12.27.140), which involves a unique area of land and a highly particularized goal.

Seventh, while the Proposed Amendment is intended to impose onerous requirements on MVRCS, the Proposed Amendment, even if adopted, cannot be applied to MVRCS's largest properties, because MVRCS's recent submission of subdivision plans has triggered a zoning freeze for those properties. See G.L. c. 40A, § 6, para. 5. While MVRCS submitted the subdivision plans solely for the purpose of obtaining the freeze and has no intention of implementing the project shown in the plans, Massachusetts' appellate courts have made clear that this is an entirely appropriate exercise of a property owner's rights. *KinderCare Learning Centers, Inc. v. Town of Westford*, 62 Mass. App. Ct. 924, 925 (2004) (noting that

the subdivision freeze “has the effect of rewarding sham submissions, filed with no intention of implementation, but solely to secure a zoning freeze”).

Additionally, there are various other features of the Proposed Amendment that are deeply problematic, including but not limited to the following: (1) it includes several provisions pertaining to variances, even though the Dover Amendment, as the Proposed Amendment’s sponsor acknowledged at the September 24, 2024 meeting, makes it improper to require a variance for a protected use (*see also Trustees of Tufts College*, 415 Mass. at 759-60 (an accommodation under Dover Amendment “cannot be achieved by insisting that an educational institution seek a variance to obtain permission to complete its project”)); (2) it does not indicate the number of votes that are required for site plan approval (curiously, it addresses only the vote necessary for the Zoning Board of Appeals to act on a variance application, which, as noted, does not apply to religious and educational uses (§ 12.12.150.E)); (3) it provides no guidance as to whether conditions may be imposed (except to the extent that a variance is sought which, as noted, should not happen with a protected use); and (4) it does not identify any mechanism for administrative or judicial appeal. However, because making discrete changes to any of these provisions would not cure the fatal defects that are discussed above, there is no need to discuss these provisions any further.

* * *

It is no secret that there are some in Malden who, for political reasons, dislike the MVRCS and want to impede, if not stop, MVRCS from fulfilling its educational mission.¹⁰ However, it is the City Council’s duty to resist efforts to achieve any such result. For the City Council to push the Proposed Amendment forward with full knowledge that it is illegal for the reasons noted above would remove any pretense that the City Council is attempting to advance reasonable zoning objectives or that its intent is not to target MVRCS.

It is important to note that MVRCS’s state-chartered mission is to provide a top-quality education to all of its students. Whatever the motives may be of those who would like to interfere with MVRCS’s mission, any action that improperly impedes MVRCS’s mission necessarily harms not only MVRCS, but also the students whom MVRCS serves, many of whom are Malden residents. MVRCS ranked **first** in the State in the 2024 Grade 10 combined average for meeting or exceeding expectations on the MCAS test (none of its sending Districts, including Malden, are near that level), and ranks near the top for other categories and other grades as well. Any improper interference with MVRCS’s ability to help its students to continue reaching this high level of achievement (with or without the MCAS) would be problematic in any scenario, but it is especially problematic considering that 67% of the students that MVRCS serves are minorities that have historically been underserved. Impeding MVRCS’s ability to build and improve its facilities in order to continue to provide a top-flight education would directly harm MVRCS’s students, while disproportionately impacting minorities (because they make up the bulk of the student body).

Because the stakes are so high, MVRCS is evaluating all possible legal options it may have in the event that the City Council continues its effort to target MVRCS for more onerous treatment than is permitted under the law. The better result, for MVRCS, MVRCS’s students, the involved City officials, and the Malden community at large, is for the City to treat MVRCS in accordance with the law. In this instance, this requires that the Proposed Amendment be rejected in its entirety.

I would be happy to discuss this matter with you directly, if you would like to do so.

¹⁰ Indeed, while not the focus of this letter, there are other instances in which MVRCS has been singled out for adverse treatment by City officials.
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Charles Ioven, Planning Board Chair, City of Malden
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Sincerely,

/s/ Jennifer R. Schultz



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cc: Michelle Romero, City Planner, City of Malden
Nelson Miller, Building Commissioner, City of Malden