

## 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:
- a) 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).
  - b) 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:
- a) The Committee appears to usurp established role and authority of other City officials and/or Boards and Commissions.
  - b) 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.
  - c) 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.”*

ORDER:

Be it hereby ordained that Section 12 of the Revised Ordinances of 2020 effective 1/1/2020 be amended by adding Section 12.12.300 Site Plan Review

12.12.300 SITE PLAN REVIEW – OTHER

A. Purpose and Intent: To set forth the process to establish reasonable regulations consistent with MGL Chapter 40A Section 3 of the design and layout of new or expanded educational use or religious use of any building, or property.

B. Applicability.

No building or structure with a gross floor area exceeding 10,000 square feet, or surfacing parking exceeding 10,000 square feet for an educational or religious use, shall be constructed or extended, or established in an existing building, except in conformity with a site plan prepared in conformance with this section.

This section shall not apply to properties subject to Special Permit or Site Plan Review otherwise under Section 12, including but not limited to Section 12.12.140 (Site Plan Review RIO), Section 12.12.200 (Malden River Site Plan Review) and Section 12.28.140 (Rowe's Quarry Reclamation and Redevelopment District).

C. Relationship to the Building Permit and Occupancy Permit:

This section shall apply as a pre-condition of the issuance of any building permit, provided that this ordinance / amendment shall not apply to any application for a building permit filed before the posting of the City Council Agenda of the original paper proposing such ordinance / amendment.

D. Site Plan Submission Criteria:

The applicant shall submit 5 copies of a site plan proposal drawn at a scale not to exceed one-inch equals 20 feet (1"=20'). The Site Plan Review materials

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shall be submitted to the Building Commissioner; said office shall forward all materials to the City Clerk for the Site Plan Review Committee. A registered Professional Surveyor or registered Professional Engineer must stamp the submitted site plan.

At a minimum, the submittal materials shall include the following items as applicable:

1. a cover letter generally describing the nature and location of the project;
2. parcel lot lines for the proposed project and abutting parcels; and all easements boundaries, if any;
3. locations of existing and proposed buildings and public/private ways on the project site to allow determination of lot area, setbacks and yard sizes;
4. an architectural plan, which shall include the ground floor plan and architectural elevations of all proposed buildings so as to allow determination of building coverage requirements, the bulk and height of structures;
5. a parking plan to allow determination of parking requirements, including the number of spaces to serve employees, the location of access and egress for employees and deliveries, loading bays, proposed pick-up and drop-off areas for building users (whether on or off-site), pedestrian walkways, bicycle parking and the location of snow storage areas, and solid waste containers, if any;
6. location, material, and size of all signs.
7. Landscaping plan, prepared by a Massachusetts Registered Landscape Architect showing to location of open space, including playgrounds and recreational facilities,

E. Site Plan Review Committee:

1. Composition.

The Site Plan Review Committee (SPRC) shall be comprised of 5 members:

- the Mayor or Mayor's designee;
- the President of the City Council or designee;
- the Ward Councillor representing the property or designee;

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h. Plants lists or schedule with the botanical and common name, quantity and spacing and size of all proposed landscape material at the time of plantings; and - ... [2]

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- the Executive Director or designee of the Office of Strategic Planning & Economic Development;
- One resident appointed by the Mayor and confirmed by the City Council.

The City Council President or his/her designee shall serve as the Chair of the SPRC.

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## 2. Operation.

If the Building Commissioner determines the application requires variances, the Site Plan Review Committee shall provide comments to the Zoning Board of Appeals related to any requests for variances from zoning requirements within the schedule for public comment established by the Zoning Board of Appeals.

The Zoning Board of Appeals may request assistance of architects and engineers and other professionals during its deliberations and require that the applicant assist in paying for review costs consistent with Mass. Gen. Laws, Chapter §53G.

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Only Zoning Board of Appeal members may be party to any vote or agreement.

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A majority of Zoning Board of Appeals members present shall be required to approve any and all site plan review conditions applied to a development under review.

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F. Review Schedule: The SPRC shall publicize and hold in accordance with the Open Meeting Law a project review meeting with the applicant before the Zoning Board of Appeals Hearing schedule to review any zoning variances.

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The Site Plan Review Committee may consider written public comments during its project review meetings. Oral public comments may be consider with consent of the applicant.

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The department head or designee from the following city departments or agencies may provide written recommendations to the SPRC a minimum of

seven (7) days prior to a project review meeting held in conformance with the Open Meeting Law: Inspectional Services, Public Works, Fire Department, Police, Board of Health, Conservation Commission, City Engineer and City Planner.

The SPRC shall hold as many meetings as necessary within any statutory timeframe for review by the Zoning Board of Appeals and provide comments to the Zoning Board of Appeal prior to or during any public hearing to consider zoning variances.

G. Notice: Notice of the project review meeting shall be given in accordance with the provisions of the Open Meeting Law and the City of Malden Zoning Ordinance.

H. Site Plan Review Criteria: The SPRC shall review the site plans and requests for zoning variance and consider the bulk and height of structures, yard sizes, lot area, setbacks, open space, parking and building coverage so as to:

1. Comment to the Zoning Board of Appeals and propose reasonable conditions related to variances for the use and district from established standards for:

- the bulk and height of structures,
- yard sizes
- lot area
- setbacks
- parking, and
- building coverage

Additionally the SPRC review shall review and provide comment on other city permits and licenses the applicant may need or desire to seek for the project:

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2. Comment to the Traffic Commission and the Public Works Commission on any changes to street lay-outs, on-street parking rules, traffic signal improvements, sidewalks and curbs cuts to ensure:  
(a) convenient and safe vehicular, pedestrian and bicycle movement around the site, including travel by public safety and transit vehicles,  
(b) adequate space for off-site loading and unloading of vehicles in legally-established zones for such purpose and that off-site pedestrian crossing plans show will limit adverse off-site traffic and parking impacts, and  
(c) Nearby bus and transit stops and no parking areas established for public safety purposes, have sufficient separation and counter measures to ensure access and efficient passage of transit vehicles.

3. Comment to the City Council or Public Works Commission related to any permits related to lateral connections of utilities across City-owned rights of way including, but not limited to electric, telephone, and fire alarm to buildings and other structures shall be underground in all cases where the property to be served abuts any street where these utilities are installed underground.

4. Comment to the Recreation Commission related to limits on use permits so as to avoid the over use of nearby public open space.

I. Expiration: A Site Plan Review approval will expire on the date that is one year from date of the decision of the Zoning Board of Appeals unless a building permit has been issued or unless otherwise specified by the Site Plan Review Committee.

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Open Space Standard for Schools:

Amend Table 12.12.010 of the Table of Intensity of Uses

For Use - Public or Non-Profit School

Open Space Requirement: 15 square feet of Open Space per Student

15 square feet per student (

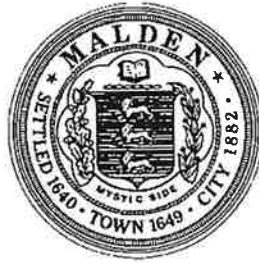
Existing Open Space of Schools  
in Malden

Note: Sf estimated via Google Earth  
Enrollment - Malden Schools - based on Caps  
MC, Cheverus, MVRCS - Actual 2021

School	Facility	Square Foot Play	Square Foot Other Qualifying Open Space	Number of Students	Open Space/ Students (sf per student)	Note
Beebe	Cafeteria Park + Plaza Playground	22901		1024	42	Abutting City Land / School Land
	Plaza Playground	3845				
	Plaza (non-play)		15881			
Ferryway	Play Area	3928		1090	15	City Land School Land Abutting City Park
	Plaza		12702			
	Also used during school: Ferryway Green					
Salemwood	Playground	6814		1030	14	School Land School Land Abutting City Park
	Plaza		7514			
	Also used during school: Roosevelt Field					
Forestdale	Play Area / back plaza	2502		794	15	School Land School Land Abutting City Park
	Entry Plaza		9612			
	Also used during school: Forestdale Park					
Linden	Playground / Rink / Court	42000		878	80	Abutting City Park School Abutting City Park
	Plaza		11668			
	Salem St sideyard		16239			
	Also used during school: Linden Park					
Cheverus School	Playground	3963		337	38	School Land ROW
	Plaza		8885			
MVRCS / Laurel St	Paved Play	13414		1080	15	School Land School Land Walk from School
	Green Frontage		3210			
	Also used during school: Trafton Park					
MVRCS Eastern Avenue	Play Field	None	169			N/A Walk from School
Malden High	Plazas/ Front Yard Also Used during school: Northern Strand		66800	1757	38	School Land Used to Walk / Bike
MVRCS High	Plazas / Building Frontyard Also used: Devir Park		6672	337	20	School Land Walk from School
Malden Catholic	Plazas/ Frontyard Also used during school; Howard / Maplewood Park Lancer Field		26394	663	40	School Land Abutting City Park Abutting School Field

**CITY OF MALDEN**  
**Office of the City Solicitor**  
**215 Pleasant Street, Suite 420**  
**Malden, MA 02148**

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Assistant City Solicitor

**Mark E. Rumley**  
Special Counsel

TO: Honorable Members of the City Council Ordinance Committee  
CC: Michelle Romero, Planning Director  
FROM: Kathryn Fallon, City Solicitor  
DATE: 11/16/21  
RE: City Council Paper #405/2021

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You requested a legal opinion regarding the above-referenced City Council Paper, which proposes amendments to the City's Zoning Ordinance requiring Site Plan Review, conducted by a Site Plan Review Committee, for Non-Residential Uses Allowed by Right in All Zoning Districts. This opinion is offered based review of the following:

1. Paper 405-21 as amended and sent to a joint hearing 9/21/21;
2. 10/14/21 communication from the City Planner;
3. Conferences with the City Planner;
4. Conferences with Councillor Winslow and the City Planner;
5. Review of 8/23/16 Attorney General Letter to Town Clerk of Town of Canton and Canton bylaw, upon which I was informed Paper 405-21 was formulated and upon which outside counsel I was informed supported the legality of Paper 405-21;
6. Massachusetts zoning law; and
7. Decisional law interpreting Massachusetts zoning law.

In my opinion, the proposed zoning as written conflicts with several provisions in our current zoning ordinance, and is inconsistent with Massachusetts zoning law and decisional law interpreting zoning law, including MLG c. 40A §3, the "Dover Amendment".

MGL c. 40A §3 provides in part that: "No zoning ordinance or by-law shall regulate or restrict the interior area of a single family residential building nor shall any such ordinance or by-law prohibit, **regulate or restrict the use of land or structures for religious purposes or for educational purposes** on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a nonprofit educational corporation; **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.**" [emphasis supplied].

DATE: 11/16/21

Memo re: City Council Paper #405/2021

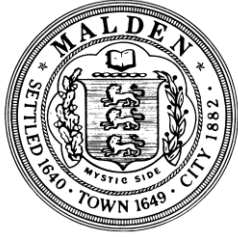
In conferring with Councillor Winslow and the City Planner in an effort to render the proposed zoning consistent with Malden zoning and the zoning law, multiple revision recommendations were made, and those made by the City Planner in the communication of 10/14/21 are referenced and incorporated herein.

Additionally, I make the following recommendations:

- any site plan review process should not apply to uses allowed by right and/or allowed by Dover Amendment which also meet all dimensional regulations
- this proposed zoning should expressly state that it shall not usurp the determination or authority of the Building Commissioner over zoning or permitting
- this proposed zoning should be revised such that any site plan review for uses which require special permitting/variance under existing zoning should not be removed from the special permitting authority and should be conducted in tandem with the public hearing process relevant thereto
- philanthropic use must be defined
- Section B ¶1 should be rewritten
- Section 3 ¶¶1 and 2 should be deleted
- Section D criteria should be submitted to Building Commissioner for review
- Section F site plan to Building Commissioner and Section revised to remove a public review process as inconsistent with the statutory public hearing process
- Section G and H should be stricken as these attempt to wedge an additional SPR process which would only be required if a variance is necessary, and which would fall under the statutory public hearing process
- Section H – these are in large part criteria already regulated by zoning and the authority to regulate cannot be divested from the authorized special permitting authorities
- Section I and J are inconsistent with statutory process

In essence, recommendation is made to revise with qualifying language in multiple aspects of the proposed zoning, and generally that the proposed zoning shall not apply to any by right development which complies with all existing dimensional controls, shall not supersede the Zoning Officer determination on compliance, shall not supersede BOA authority or other special permitting authority, and shall not supersede or disrupt the public hearing process.

Put another way, the process for site plan review should occur during timeframe any petition for zoning relief is initiated, and if the site plan review committee engaged for the special permitting authority does not provide input to the permitting authority on or before the scheduled public hearing date, that shall be deemed as approval or negate the necessity for site plan review and/or involvement. The elongated process is essentially an alteration of the statutory permitting process where permitting is necessary, and therefore arguably would de facto prohibit the use allowed by right and also seriously interfere with the statutory and local permitting processes.



# City of Malden

## Massachusetts

INSPECTIONAL SERVICES  
215 Pleasant Street, 3<sup>rd</sup> Floor  
Malden, Massachusetts 02148  
(781) 397-7000 ext. 2044

October 14, 2021

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

**Re: Amendments of §12.12, Ch.12, Revised Ordinances of 2020, as Amended  
Site Plan Review for Non-Residential Uses Allowed By Right in All Zoning Districts  
City Council Paper #405/2021**

Dear Councilors:

On October 13, 2021, 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 October 13, 2021, a majority of the Planning Board, namely, six of those seven members present and voting, voted to recommend to the City Council the following:

- I. Obtain legal review by the City Solicitor of the proposed amendments and the opinion of the City Solicitor regarding:
  - A. Legality of the proposed amendments with respect to educational uses and religious uses, per M.G.L. c. 40A, §3.
  - B. Proposed provision re: application to all permit applications filed (proposed Section C).
- II. Approval of the proposed amendments, further amended to apply to only educational uses and religious uses, and revised as follows:
  - A. Revise proposed Section A (Purpose and Intent) to read as follows:

“To set forth the process to establish reasonable regulations consistent with MGL Chapter 40A Section 3 of the design and layout of new or expanded educational use or religious use of any buildings or property ~~non-residential buildings allowed by right in any district, including religious and educational institutions.~~”
  - B. Revise proposed Section B (Applicability) to read as follows:

“No building or structure with a gross floor area exceeding 10,000 square feet, or surface parking area exceeding 10,000 square feet, for a ~~non-residential~~ religious or educational use ~~that is allowed by right, including any charitable or philanthropic, religious or educational use or purpose,~~ shall be constructed or extended, or established in an existing building, except in conformity with a site plan bearing an endorsement of approval by the Site Plan Review Committee.”
  - C. Revise proposed Section C (Relationship to Building Permit and Occupancy Permit) to read as follows:

“This section shall apply as a pre-condition of the issuance of any building permit, ~~without regard to the date of the filing of an application for a building or demolition permit,~~ provided this ordinance/amendment shall not apply to any application for a building permit filed before the date of first publication of the notice of public hearing re: this ordinance/amendment.”



- D. Revise proposed Section D (Site Plan Submission Criteria), second sentence, as follows:  
“The Site Plan Review materials shall be submitted to the ~~City Planner~~ **Building Commissioner**; said office shall forward all materials to **the City Clerk for** the Site Plan Review Committee.”
- E. Revise proposed Section F (Review Schedule) as follows:  
Change, “City Planner,” to “City Clerk.”
- F. Revise proposed Section H (Site Plan Review Criteria), first sentence, to read as follows:  
“The SPRC shall review all site plans and set reasonable conditions for the ~~bulk and height of structures, yard sizes, lot area, setbacks, open space, parking and building coverage~~ **design and layout** so as to.”
- G. Revise proposed Section H (Site Plan Review Criteria), subsections 4, 6 and 7, to read as follows:  
4) “Provide ~~adequate space~~ for the off-street loading and unloading, **as required by §12.20 of this Ordinance**, of vehicles, goods, products, materials and equipment incidental to the normal operation of the establishment and require any regular off-site loading and unloading of vehicles be in legally-established zones for such purpose and that the traffic and walking route plans show that those zones will limit adverse off-site traffic and parking impacts.”  
6) “ Provision of on-site open space and recreational facilities **as required by §12.16 of this Ordinance** to serve the needs of the establishment so as to avoid the over use of nearby public open space.”  
7) “In pedestrian-orientated areas, safety improvements, ~~building setbacks~~ and curb cuts reasonably necessary for the continued walkability of people of all ages and abilities passing the site.”

For your reference, attached please find the Planning Report & Recommendation dated October 13, 2021, which was presented at the public hearing.

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 January 11, 2022.**

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

Sincerely,



Michelle A. Romero  
City Planner

Attachment

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

ORDER:

Be it hereby ordained that Section 12 of the Revised Ordinances of 2020 effective 1/1/2020 be amended by adding Section 12.12.300 Site Plan Review

12.12.300 SITE PLAN REVIEW – OTHER

A. Purpose and Intent: To set forth the process to establish reasonable regulations consistent with MGL Chapter 40A Section 3 of the design and layout of new non-residential buildings allowed by right in any district, including religious and educational institutions.

B. Applicability.

No building, structure, or surface parking area exceeding 10,000 square feet, for a non-residential use that is allowed by right, including any charitable or philanthropic, religious or educational use or purpose, shall be constructed or extended, or established in an existing building, except in conformity with a site plan bearing an endorsement of approval by the Site Plan Review Committee.

This section shall not apply to properties subject to Special Permit or Site Plan Review otherwise under Section 12, including but not limited to Section 12.12.140 (Site Plan Review RIO), Section 12.12.200 (Malden River Site Plan Review) and Section 12.28.140 (Rowe’s Quarry Reclamation and Redevelopment District).

C. Relationship to the Building Permit and Occupancy Permit:

This section shall apply as a pre-condition of the issuance of any building permit, without regard to the date of the filing of an application for a building or demolition permit.

The Building Inspector shall not issue a building permit unless and until a Site Plan Review has been completed, and a letter with site plan conditions, if any, has been forwarded to the Building Inspector by the Site Plan Review Committee within the time frame noted in Paragraph F. If the site plan review

letter contains specific conditions, said conditions shall become conditions for the issuance of the building permit, among others, that the Building Inspector may require. Further, the Building Inspector shall not issue a final occupancy permit unless and until all site plan conditions as required by the SPRC have been implemented by the developer.

D. Site Plan Submission Criteria:

The applicant shall submit 10 copies of a site plan proposal drawn at a scale not to exceed one-inch equals 20 feet (1"=20'). The Site Plan Review materials shall be submitted to the City Planner; said office shall forward all materials to the Site Plan Review Committee. A registered Professional Surveyor or registered Professional Engineer must stamp the submitted site plan.

At a minimum, the submittal materials shall include the following items as applicable:

1. a cover letter generally describing the nature and location of the project;
2. parcel lot lines for the proposed project and abutting parcels; and all easements boundaries, if any;
3. locations of existing and proposed buildings and public/private ways on the project site;
4. an architectural plan, which shall include the ground floor plan and architectural elevations of all proposed buildings and a color rendering.
5. a parking plan including the number of spaces to serve employees, the location of access and egress for employees and deliveries, loading bays, proposed pick-up and drop-off areas for building users (whether on or off-site), pedestrian walkways, bicycle parking and the location of snow storage areas.
6. If the parking plan proposes to use off-site areas for any purpose, the materials shall include a traffic study, walking routes from off-site areas to the site and proposed transportation measures designed to ensure that off-site impacts will be consistent with any proposed in the plans;
7. location of solid waste containers, if any;
8. location, material, and size of all signs.

9. Topography and drainage plan, which shall contain the existing and proposed final topography at two (2) foot intervals and plans for handling stormwater drainage, and all wetlands including floodplain areas.

10. Utility plan, which shall include the location of all hydrants, fire alarm and firefighting facilities on and adjacent to the site.

11. Landscaping plan, prepared by a Massachusetts Registered Landscape Architect showing, but not limited to, the following information:

a. location of proposed open space, including playgrounds and recreational facilities, if any;

b. Location and type of proposed site and landscape lighting;

c. Provision for the site surface and sub-surface drainage;

d. Location, general type and quality of existing vegetation, including specimen trees;

e. Existing vegetation to be preserved;

f. Mitigation measures employed for protecting existing vegetation during construction and a sediment control plan;

g. Locations and labels for all proposed plants;

h. Plants lists or schedule with the botanical and common name, quantity and spacing and size of all proposed landscape material at the time of plantings; and

i. Location and description of other landscape improvements, such as landscaped earth berms, walls, fences, screens, sculptures, fountains, street furniture, lights and courts or paved areas.

k. Other Required Information. The application shall also include the following reports and documents.

1. A written statement indicating the estimated time required to complete the proposed project and any and all phases thereof.

2. Drainage calculations by a registered professional engineer.

Stormwater management design must conform to DEP's Stormwater Management Policy or regulations.

3. Certification that the proposal is in compliance with the provisions, if applicable, of the Americans with Disabilities Act and the Massachusetts Architectural Barriers Board.

4. Information specified in Section H, Performance Standards.

E. Site Plan Review Committee:

1. Composition.

The Site Plan Review Committee (SPRC) shall be comprised of 5 members:

- the Mayor or Mayor's designee;
- the President of the City Council or designee;
- the Ward Councillor representing the property or designee;
- the Executive Director or designee of the Office of Strategic Planning & Economic Development;
- One resident appointed by the Mayor and confirmed by the City Council.

The City Council President or his designee shall serve as the Chairman of the SPRC.

2. Operation.

The department head or designee from the following city departments or agencies may provide written recommendations to the SPRC a minimum of seven (7) days prior to a public project review meeting: Inspectional Services, Public Works, Fire Department, Police, Board of Health, Conservation Commission, City Engineer and City Planner.

The SPRC may request assistance of architects and engineers and other professionals during its deliberations and require that the applicant assist in paying for review costs consistent with Mass. Gen. Laws, Chapter §53G.

Only SPRC members may be party to any vote or agreement.

A majority of those present shall be required to approve any and all site plan review conditions applied to a development under review.

A quorum for conducting business shall be 100% of the members.

F. Review Schedule: The SPRC shall hold a public project review meeting with the applicant no later than 45 days after submitting the proposed site plan to the City Planner. The SPRC shall hold as many meetings as necessary within a 65-day review period to review the proposal. However, within 65 days of the submission of the plan to the City Planner the SPRC shall provide recommendations in writing to the Building Inspector. If no action is taken within 65 days, the application shall be deemed approved as submitted and the applicant may apply for a building permit without a Site Plan Review letter.

G. Notice: Notice of the public project review meeting shall be given in accordance with the provisions of this Ordinance. The public shall be given the opportunity to be heard at the public project review meeting.

H. Site Plan Review Criteria: The SPRC shall review all site plans and set reasonable conditions for the bulk and height of structures, yard sizes, lot area, setbacks, open space, parking and building coverage so as to:

1. Protect adjoining premises against detrimental or offensive uses on the site and impacts that would that could substantially undermine existing, allowed uses of such premises and pedestrian-orientated establishments
2. Ensure convenient and safe vehicular, pedestrian and bicycle movement within and around the site, including travel by public safety and transit vehicles
3. Require adequate methods for disposal for sewage, refuse and other wastes resulting from the uses permitted or permissible on the site, and methods of drainage for surface water.
4. Provide adequate space for the off-street loading and unloading of vehicles, goods, products, materials and equipment incidental to the normal operation of the establishment, and require any regular off-site loading and unloading of vehicles be in legally-established zones for such purpose and that the traffic and walking route plans show that those zones will limit adverse off-site traffic and parking impacts,
5. Lateral connections of utilities including, but not limited to electric, telephone, and fire alarm to buildings and other structures shall be

underground in all cases where the property to be served abuts any street where these utilities are installed underground.

6. Provision of on-site open space and recreational facilities to serve the needs of the establishment so as to avoid the over use of nearby public open space.

7. In pedestrian-orientated areas, safety improvements, building setbacks and curb cuts reasonably necessary for the continued walkability of people of all ages and abilities passing the site.

8. Near bus and transit stops and no parking areas established for public safety purposes, sufficient separation and counter measures to ensure access and efficient passage of transit and public safety vehicles.

I. Appeals: Applicants for a Site Plan Review may appeal any and all conditions approved by the SPRC to the Malden Board of Appeal. However, in no instance shall this administrative site plan approval process be construed as a special permit for the purpose of any appeal.

J. Expiration: A Site Plan Review approval will expire on the date that is one year from date of notice of Site Plan Approval to the Building Inspector unless a building permit has been issued or unless otherwise specified by the Site Plan Review Committee.