

PLANNING REPORT & RECOMMENDATION

To: Malden Planning Board
From: Malden City Planner
Date: December 11, 2024
Subject: Zoning Amendments - Site Plan Review for Educational, Religious and/or Childcare Facility Uses (CCP 356/2024), Title 12, Code of the City of Malden (MCC- all § references herein)

PETITION. The petition is made under §12.32.050; the City Council is the petitioner; and Ward 6 Councilor Stephen Winslow is the sponsor. For full text of proposed amendments, see attached petition (CCP 356/2024).

***Note 1:** The City has previously considered zoning amendments to establish site plan review for religious and educational uses (CCP 405/2021) re: which joint public hearings were held on October 13, 2021 and February 9, 2022; this City Council took no final action on this proposal.*

SUMMARY of PROPOSED AMENDMENTS.

1. **Purpose and Intent:** To establish a site plan review process to apply reasonable regulations consistent with M.G.L. Chapter 40A for the design and layout of new or expanded educational use, religious use or childcare facility use of any building, or property.
2. **Applicability (§12.12.500.B):** As proposed, the site plan review regulations will apply to educational use, religious use and/or childcare facility use of the following:
 - a) construction or extension of a building or structure with a gross floor area exceeding 2,500 SF.
 - b) establishment in an existing building.
 - c) construction or extension of “surface parking” exceeding 2,500 square feet.
3. **Relationship to the Building Permit and Occupancy Permit (§12.12.500.C):** The proposed amendment includes the following provision to establish an exemption period and threshold of applicability:
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.
4. **Site Plan Submission Criteria (§12.12.500.D):** The proposed amendment requires submittal materials that are not provided by other Site Plan Review regulations under the City ordinance:
 - *locations of existing and proposed buildings and public/private ways on the project site to allow determination of lot area, setbacks and yard sizes.*
 - *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.*
 - *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.*
 - *location, material, and size of all signs.*
 - *Landscaping plan, prepared by a Massachusetts Registered Landscape Architect showing to location of open space including playgrounds and recreational facilities.*
5. **Site Plan Review Committee (§12.12.500.E):**
 - a) **Composition - Five members:**
 - Mayor or Mayor's designee

- President of the City Council or designee – serves as SPRC Chair
 - Ward Councillor representing the property or designee
 - Executive Director or designee of the Office of Strategic Planning & Economic Development
 - One resident appointed by the Mayor and confirmed by the City Council
- b) Operation: The amendment references the Building Commissioner determining “the application requires variances,” and SPRC providing “comments to the Zoning Board of Appeal related to any requests for variances.”
6. Review schedule (§12.12.500.F).
- a) Meeting schedule: The proposed amendment provides that the SPRC will hold a public project review meeting “before any Board of Appeal hearing to review variances.”
- b) Public comment. The proposed amendment includes the following provision re: public comment: *The Site Plan Review Committee may consider written public comments during its project review meetings. Oral public comments may be considered with consent of the applicant.*
7. Notice (§12.12.500.G). The proposed amendment provides the same notice requirements as those for other public hearings under the zoning ordinance.
8. Site Plan Review Criteria (§12.12.500.H). The proposed amendment states that the SPRC may consider “the bulk and height of structure, yard sizes, lot area, setbacks, open space, parking and building coverage,” per state law (M.G.L. c. 40A, §3).
Proposed amendments also reference, “requests for zoning variance,” “Comment to the Zoning Board of Appeals,” and “conditions related to variances.”
9. Expiration (§12.12.500.I). The proposed amendment provides an expiration date related to a variance decision by the Board of Appeal.

OUTSTANDING CONCERNS: (See **PLANNING RECOMMENDATION** for revisions to address).

1. “Surface parking area.” The proposed amendment and current zoning ordinance do not define or provide use or other regulations for “surface parking area” (§§12.12.030 and 12.32.060); the later provides:
- 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).
2. Dimensional provisions re: “exceeding 2,500 square feet.” Whereas the proposed amendment contains a dimensional restriction, it appears necessary to update existing categories to establish different sets of regulations for these uses based on size. The current City zoning ordinance provides the following dimensional controls (§12.16):

Use	Area (SF)	Frontage	Front yard	Side yard	Both side yard	Rear yard	Min. Usable Open Space	Coverage Principal Bldg	Coverage Accessory bldg.	Density	Max. height
Day Care Center	10,000	50'	10'	10'	20'	20'	20**	50%	15%	-	30' and 2 stories
Public or Non-Profit School	10,000	50'	20'	10'	20'	20'	0.07~	50%	20%	-	50' and 4 stories
Religious Facilities	10,000	50'	20'	10'	20'	20'	-	50%	20%	-	-

****Square Feet per Child-** For the purpose of Day Care Centers, usable open space shall include areas as small as 100 square feet per area with a minimum width in any direction of 10 feet and may include porches and terraces and paved areas.

~ Square foot of open space per square foot of primary classroom space.

3. Relationship to Building and Occupancy permit (§12.12.500.C). The proposed amendment is inconsistent with state law and City ordinances.
 - a) Exemption/Applicability. The proposed amendment uses the date of posting of the City Council agenda (on which the proposed amendment is filed) as the date the exemption begins/threshold when proposed amendments apply. This is significantly earlier than the exemption period provided by state law and the City's historical extension of the exemption:
 - *Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law required by section five. (M.G.L. c.40A, §6).*
 - 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.
 - b) Other Site Plan Review regulations of the City ordinance (§§12.12.130 & 12.12.140/Residential Incentive Overlays; §12.12.200/Malden River; §12.12.400/ MBTA Communities Zoning Overlays; §12.28.140/Rowe's Quarry Reclamation and Redevelopment District) provide:
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 SPRC within the time frame noted in Section 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.
4. Review Schedule, Public Comment (§12.12.500.F). The proposed amendment (to regulate the format of public comment which may be considered) is inconsistent with the requirement for all other public hearings and public project review meetings required under the City zoning ordinance.
5. Expiration (§12.12.500.I). The proposed amendment is inconsistent with the expiration provision in other Site Plan Review regulations of the City ordinance (§§12.12.130 & 12.12.140/Residential Incentive Overlays; §12.12.200/Malden River; §12.12.400/ MBTA Communities Zoning Overlays; §12.28.140/Rowe's Quarry Reclamation and Redevelopment District), which is:
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.
6. Statutory Exemptions (M.G.L. c.40A, §3, commonly known as the Dover Amendment). State law provides that no zoning ordinance shall "prohibit, regulate or restrict the use of land or structures for religious purposes or educational purposes," or prohibit or require a special permit for child care facilities use; "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." These provisions have been interpreted by the courts throughout extensive case law, which must be reviewed for applicability to proposed amendments. The proposed amendment contains numerous references to variances and/or Board of Appeals in:
 - Section 12.12.500.E.2 (Site Plan Review Committee, Operation). first sentence; para. 2, 3, 4.
 - Section 12.12.500.H (Site Plan Review Criteria). first sentence; item 1.

7. Child care Facilities. The proposed amendment does not specify which kind of childcare facility will be subject to the proposed site plan review. Currently in Malden are two kinds of childcare facilities licensed by the state Department of Early Education and Care:
- *Family Child Care, sometimes referred to as "home daycare", is child care provided in someone's home where the caretaker is not related to the children. Family Child Care programs are small in size and have no more than 10 children; a Family Child Care provider can care for up to 8 children in their home by themselves depending on the ages of the children; if a Family Child Care provider works with an EEC-approved assistant, they can care for up to 10 children in their home.*
 - *Group and School Age Child Care programs provide early education and care for young children in a non-residential setting such as a school or community center. These programs include several types of early education and care such as: Out-of-school time programs that operate before/after school or during the summer; Center-based care for infants, toddlers, preschool, or Kindergarten age children; Early Head Start and Head Start programs.*
- (as per <https://www.mass.gov/guides/find-a-licensed-family-group-or-school-age-child-care-program>)

The state law specifies applicability: "the term 'child care facility' shall mean a child care center or a school-aged child care program, as defined in section 1A of chapter 15D." (M.G.L. c. 40A, §3).

APPLICATION and EXEMPTIONS: The amendments will apply to new construction and new use/occupancy of existing buildings, unless exempt by City ordinance (§12.28.010); the express language of the amendment; state law (M.G.L. c. 40A, §6), which exempts the subject of a building permit or special permit issued before the first publication of notice of the public hearing (November 22, 2024); or the state Permit Extension Act (Section 280 of Chapter 238 of the Acts of 2024).

Note 2: *Land part of an Application for Tentative Approval of Preliminary Plan filed under the subdivision control law (M.G.L.c.41, §81S) is exempt from proposed amendments, given that the submission of a preliminary plan freezes the zoning in effect at the time of submittal for 8 years, provided that a definitive plan is submitted and approved within 7 months (M.G.L. c. 40A, §6). There are two pending Applications for Tentative Approval of Preliminary filed that would be subject to this exemption:*

1. *Permit Application # CMID-069527-2024 filed on November 14, 2024.*
2. *Permit Application # CMID-069525-2024 filed on November 14, 2024.*

The Planning Board is scheduled to review both petitions at a public meeting on December 11, 2024. Part of the land in #1 is the subject of an application filed to construct a non-profit school gymnasium at 31 Granite Street, which is the subject of an administrative appeal of the Building Commissioner's decision that the project is subject to site plan review (Permit Application # CMID 069474-2024) filed on November 6, 2024. The Board of Appeal is scheduled to hold a public hearing on this appeal on December 18, 2024.

EFFECTIVE DATE: The effective date is the date of the City Council's vote to ordain the amendments (§12.32.050.F). The Council must act on the amendments 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 December 11, 2024, **the final date for action is March 11, 2025.**

STANDARD of REVIEW: The Planning Board's review and recommendation of the 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:

- I. Obtain review of the proposed amendments by the City Solicitor and opinion of the City Solicitor re: legality of the proposed amendments and consistency with M.G.L. c. 40A, §3.
- II. Approval of the proposed amendments, as submitted, subject to the above-referenced review and opinion of the City Solicitor, and with the following revisions:

- A. Section 12.12.500.A (Purpose and Intent). Add “or childcare facility use”
- B. Section 12.12.500.B (Applicability).
 - 1) Delete the phrase, “with a gross floor area exceeding 2,500 square feet, or surface parking exceeding 2,500 square feet.”
 - 2) Add the following provision:
 “Site Plan Review shall be required for child care facilities identified by M.G.L. c. 40A, Section 3, namely, Group and School Age Child Care programs, as defined by the state Department of Early Education and Care.”
- C. Section 12.12.500.C (Relationship to the Building Permit and Occupancy Permit).
 Delete the proposed provision in its entirety and insert in its place:
 “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 SPRC within the time frame noted in Section 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. Section 12.12.500.E.2 (Site Plan Review Committee, Operation).
 - 1) Delete the first sentence in its entirety (begins, “If the Building Commissioner determines the applications requires variance....the Zoning Board of Appeals.”)
 - 2) In second, third and fourth paragraphs, delete “Board of Appeal” and insert, “SPRC.”
- E. Section 12.12.500.F (Review Schedule).
 - 1) Delete the first sentence in its entirety and insert in its place:
 “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 Building Commissioner. 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 Building Commissioner the SPRC shall provide recommendations in writing to the Building Commissioner. 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.”
 - 2) Delete the second paragraph in its entirety.
 - 3) Delete the last sentence in its entirety.
- F. Section 12.12.500.H (Site Plan Review Criteria).
 - 1) From the first sentence, delete the phrase “and requests for zoning variance and.”
 - 2) From item 1., delete phrases, “Comment to the Zoning Board of Appeals and” and “variances for.”
- G. Section 12.12.500.I (Expiration).
 Delete the first sentence in its entirety and insert in its place:
 “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.”