

Executive Session Meeting Minutes regarding Paper 217-24
Legal Review of Pending Litigation Currently Being Handled by Solicitor's Office
April 30, 2024

Order: That the City Council will vote to go into Executive Session with legal counsel for the City regarding legal review of pending litigation currently being handled by the Solicitor's Office for the purposes of Exemption Three Massachusetts General Laws Chapter 30A Section 21(a)(3) to discuss strategy with respect to litigation, where such discussion in open meeting may have a detrimental effect on the litigation position of the City, if so declared by the chair. And if so allowed by the Body, to admit Maria Luise, Special Assistant to the Mayor.
(Roll Call Required)

During the Council meeting on April 30, 2024, a motion was made by Councillor Colón Hayes, seconded by Councillor Crowe to enter into Executive Session, order was approved by an 8-0 roll call vote.

Yea- Colón Hayes, Condon, Crowe, Linehan, McDonald, Sica, Taylor, Winslow

Nea- Zero

Absent- Councillors O'Malley and Spadafora were absent.

Did not vote- Simonelli

In attendance were Councillors Colón Hayes, Condon, Crowe, Linehan, McDonald, Sica, Simonelli, Taylor, Winslow.

Councillors O'Malley and Spadafora were absent.

Also in attendance was City Clerk Carol Ann Desiderio, Clerk of Committees Lisa Cagno, and City Solicitor Alicia McNeil.

The meeting opened with City Solicitor Alicia McNeil giving a reminder to all parties present that Executive Session (ES) must remain in confidence only between the parties who are in attendance. What is discussed in this session may not be shared with staff, spouse, or anybody for that matter. The City of Malden has active cases ongoing and nothing should be done that would risk leaking the City's position, for any reason at all. Attorney McNeil offered an opportunity to those present to ask further questions on ES or the laws pertaining to ES; no one responded so she proceeded.

The reason for this evening's meeting is because Council President Winslow asked City Solicitor Alicia McNeil for an update on some of the pending litigation her office is currently overseeing.

The first case Solicitor McNeil presented was City of Malden v. Zeraschi. Robert Zeraschi owns the open-air parking lot located at 235 Washington Street across from Oak Grove Train Station. This case has been going on for nearly five years. Malden used to charge a \$50 application fee on open air lots but then the Council voted to update the ordinance and raise the fee to \$100 per spot, paid annually. Zeraschi refused to apply for the open-air parking license, his refusal led to the City's Compliance Officers to begin writing tickets for every daily violation. The ticket fees grew to \$100,000.

Instead of payment of fines, Zeraschi took the City to court. Both parties filed for summary judgment, which would end up dismissing the case. The case progressed to an appeal at the Superior Court. The judge who had been overseeing this case passed away and a new judge was tasked with taking up the case. That judge reviewed the years long file and rendered a decision within the past

month ruling against the City. Solicitor McNeil submitted a notice of appeal, which had to be done within thirty days, as a matter of preserving the City's rights. The Council may make the decision if they wish for her to move forward with the appeal or not.

The plaintiff's argument was that the \$100 per spot application fee was not a fair fee, it was more of a tax. The court sided with the plaintiff that the application fee served more as a tax because if it were a regulatory fee, the City would be able to prove the amount is based on the costs related to regulating the parking lot. Examples of this would be a documented procedure of the police department monitoring the parking lots for crime and theft. The City's evidence presented in this case did not show the City had regulatory expenses to justify the fee, thus making the \$100 an unlawful tax.

This case has been appealed twice. The first time it went to Appellate Court, the court sent it back down asking for affidavits with more information regarding the justification of \$100 application fee. No appeal may be made for the sole purpose of defending the City's fee structure because that was already appealed and sent back down. The lower court stated the City knew specifically what the Appellate Court was looking for, the City had their chance to provide all necessary information and the evidence submitted was not detailed enough. Councillor McDonald suggested making the argument that it's not reasonable to have such a tight interpretation of fee costs.

Reading from the court's decision Solicitor McNeil stated, *"The current open-air parking lot license application fee is not reasonably designed to compensate the City for its anticipated regulation-based expenses and is therefore an unlawful tax. Any exactions made by the City to date on Zeraschi related to the license application fee including any citations for nonpayment and or resulting penalties are void and they may not be enforced. Nothing in this declaration shall prevent the City from imposing a licensing fee under M.G.L 148, Section 56 and the ordinance, in the future, that is reasonably designed to compensate it for its anticipated regulation-based expenses. Zeraschi shall be required to apply for a license to operate his open-air parking lot following the City's imposition of a lawful application fee."*

Solicitor McNeil's recommendation to the Council is to immediately update the ordinance because there are a number of open-air renewal petitions that have been tabled pending the outcome of this case. The court is not claiming the \$100 fee is too much, it is stating the fee has to be reasonably designed only to offset costs. Councillor McDonald pointed out that there are many unrecognized costs that go into outdoor parking, including storm water runoff management, greenhouse gas, line striping, increased traffic. Solicitor McNeil also advised that the ordinance must also be updated to state, if the petitioner is issued a ticket for violating an ordinance, petitioner has the right to appeal through the Municipal Hearing Officer. The court was displeased this wasn't made clear through the written ordinance, even though it is stated on the ticket. It also should be written on the ticket that license holder has a right to appeal through a court of law.

Councillor Winslow asked if the open-air parking lots could theoretically be banned via the zoning ordinance. Councillor Sica does not recommend banning parking lots; there are a number of companies that tow for the City and need outdoor parking lots to store the vehicles. There are DOT requirements for these tow companies to store cars, they can't just park them in any unregulated place.

Councillor Colón Hayes expressed her opinion that we do not appeal this case any further because the Solicitor's Office already has too many cases to handle, the City would be better served by fixing the ordinance and moving forward.

Councillor Sica believes the City should go through with the appeal because a new judge walked into the middle of the case after having the same judge overseeing the case for years, perhaps something was overlooked. The original judge overseeing the case did not indicate the open-air fee was exorbitant.

Councillor McDonald believes the City should go through with the appeal because losing this case may bring into question all of the City's fees and licensing costs, which has the potential to lose a lot of revenue if those too are struck down.

Councillor Winslow advocates for regulating the use of open-air parking lots through zoning ordinance instead of fees.

In response to Councillor Crowe's question, Solicitor McNeil stated she is unable to advise whether this is a winnable appeal or not because at this time, she does not know enough about the case to respond in confidence.

Councillor Colón Hayes made a motion that the Council instruct Solicitor McNeil to drop the appeal on City of Malden v. Zeraschi. This motion failed for lack of a second.

Councillor McDonald requested further information from Solicitor McNeil as to her professional opinion on whether pursuing this appeal is worthwhile. He is concerned that dropping the appeal would have wide-range implications for dozens of other licensing fees throughout the City. Solicitor McNeil agreed to do some further research into this case to determine if the City has any other options at its disposal.

Solicitor McNeil then reported out on two other large litigations ongoing with the City.

Benevolent Botanicals (BB) et al v. City of Malden, which is scheduled for trial in October. BB continues to express a desire to settle the case. Solicitor McNeil has refused based on Council instructions from September 26, 2023 asking her to inform BB that the Council will not entertain any future offers which ask the Body to presuppose any terms outside of their authority or jurisdiction.

Tufts Construction, Inc is suing the City of Malden and individually City Engineer Yem Lip; Malden is representing Engineer Lip in this case

The basis of the suit is that Tufts Construction had a contract stating a particular material would be used in a contract for hire job; the company used a lesser quality material but charged Malden for the higher priced product. Malden offered to pay for the job with the lower quality material prices; Tufts is arguing they substantially completed the work and therefore should be paid at full price. Malden owed Tufts roughly \$500,000 and paid approximately half of that amount. Tufts Construction is suing for the rest of that amount, and also suing Yem Lip for defamation and suing the City of Malden for interference with business relationships.

In another case involving the same company, Malden is being sued for \$36,000, which is owed to Tufts Construction, Inc. from the City.

Mr. Tufts, owner of Tufts Construction, Inc. was indicted in Federal Court for tax fraud, evasion, not paying fair wages. Mr. Tufts plead out and was sentenced to probation. The Plea Agreement

states, in pertinent part: “[W]ithout the written approval of the U.S. Attorney, Defendant agrees not to transfer, or to cause or allow anyone else to transfer... (b) any other asset in which the Defendant has an interest.”

In light of the requirement contained in this provision, the City of Malden advised Tufts that it would hold the check until the City of Malden receives a written approval of the U.S. Attorney as required by the guilty plea in the criminal case. Tufts refused this request to obtain permission to receive the funds, instead choosing to file suit to collect said amount.

The purpose of this Executive Session was for informational purposes only. There is no ask and therefore no need for a vote. However, Solicitor McNeil will look further into options for appeal on the Zeraschi case as requested by Councillor McDonald.

With the close of discussion, a motion was made by Councillor Sica, seconded by Councillor Taylor to exit Executive Session, motion passed by the following roll call vote:

Yea- Colón Hayes, Condon, Crowe, Linehan, McDonald, Sica, Simonelli, Taylor, Winslow

Nea- Zero

Absent- O’Malley, Spadafora

Executive Session was adjourned at 8:48 PM.

Minutes compiled by City Clerk Carol Ann Desiderio.

Pursuant to M.G.L. c. 30A, s. 22(g)(1), and with the approval of Council President Winslow and City Solicitor McNeil, on August 26, 2024 eleven members of the Malden City Council were offered a one month period of time to review fourteen sets of executive session minutes dating back to April 2021 in the privacy of the City Clerk’s Office. It was explained that any questions or amendments may be submitted to the City Clerk and a date would be set to meet in Executive Session for further discussion. Otherwise, if there were no objections, on behalf of the Body, Council President Winslow would be tasked with the approval of said minutes.

After the one-month review period had expired, on September 29, 2024, Council President Winslow authorized the approval of all draft executive session minutes. Among those fourteen drafts, this set was included.

Approval process organized and overseen by City Clerk Carol Ann Desiderio.

Pursuant to M.G.L. c. 30A, s. 22(g)(1), and with the approval of Council President Linehan and City Solicitor McNeil, a periodic review of fifteen sets of Executive Session minutes was completed to determine if a number of minutes warranted continued non-disclosure. As of April 9, 2026 Council President Linehan, under the advice of counsel from Solicitor McNeil, has now ordered the City Clerk to release the executive session minutes from the meetings of 4/20/2021, 3/8/2022, 2/28/2023, **4/30/2024**, 6/25/2024, 7/24/2024, and 3/11/2025.

Approval process organized and overseen by City Clerk Carol Ann Desiderio.