

CITY OF MALDEN  
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#405-21

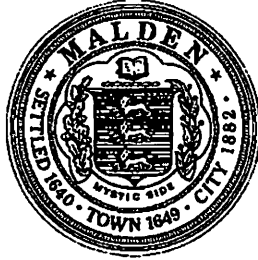
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TO: Honorable Members of the City Council Ordinance Committee  
CC: Michelle Romero, Planning Director  
FROM: Kathryn Fallon, City Solicitor  
DATE: 11/16/21  
RE: City Council Paper #405/2021

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].

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The proposed zoning states its purpose and intent as: “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.*” The proposed zoning states its applicability as: “*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.*”

There are multiple issues with the draft proposed ordinance. First, the stated purpose and intent of the proposed zoning and its applicability directly conflict with the purpose of MGL c. 40A §3 and existing Malden zoning provisions. The decisional law interpreting MGL c. 40A §3 is well-settled and clear. For example: “The Dover Amendment bars the adoption of a zoning ordinance or by-law that seeks to prohibit or restrict the use of land for educational purposes. However, a proviso to the statute authorizes a municipality to adopt and apply “reasonable regulations” concerning bulk, dimensions, open space and parking, to land and structures for which an educational use is proposed. The whole of the Dover Amendment, as it presently stands, seeks to strike a balance between preventing local discrimination against an educational use, and honoring legitimate municipal concerns that typically find expression in local zoning laws.” Trustees of Tufts College v. City of Medford, 415 Mass. 753, 757 (1993), citing Newbury Junior College v. Brookline, 19 Mass. App. Ct. 197, 205 (1985).

Malden has already enacted zoning regulations concerning bulk, height, yard sizes, lot areas, setbacks, open space and parking—those specific items the draft proposed ordinance attempts to regulate via a new Site Plan Review Committee, “SPRC”. Malden Zoning §§12.12.090, 12.12.100, 12.16.060, 12.16.080, 12.16.110, 12.20. Moreover, the determination on compliance with dimensional requirements rests with the Building Commissioner, Malden’s Zoning Official. Malden Zoning §§12.32.020 In addition, the law and Malden zoning contain the variance process through which an applicant may seek to vary such dimensional controls following denial of a building permit by the Building Commissioner for non-compliance with dimensional controls. The authority and jurisdiction to consider variance applications rests with the Malden Board of Appeal, “BOA”. Malden zoning mirrors the law. Malden Zoning §12.32.040. MGL c. 40A §§10-12.

In my opinion, this draft proposed ordinance is an overreach of the jurisdiction of the Building Commissioner and the BOA. Further, in my opinion, the zoning proposed may be construed as an unreasonable regulation or restriction on uses permitted under the Dover Amendment, or a prima facie attempt to regulate religious and educational uses throughout the City. As such, it is inconsistent with MGL c. 40A §3 and would likely be struck down as an attempt to unfairly treat or restrict such uses.

In examining the Canton bylaw approval rendered by the Attorney General in 2016, and the Canton bylaw upon which I was informed outside counsel advised the paper’s proponent to proceed, it must be noted that the Canton bylaw does not sidestep either the statutory process or the jurisdiction of the Canton Board of Appeal in conducting site plan review. Therefore, the analysis provided, which I have not reviewed, is in my opinion in correct.

Finally, any unfavorable zoning decision will be subject to review pursuant to MGL c. 40A§17. The within zoning ordinance will be subject to review pursuant to MGL c. 240 §14A.

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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.