

Draft Decision
&
Memorandum
Reasonable Accommodation

Special Permit Application

Alta Behavioral Health, LLC

400 Donald J. Lynch Blvd

Assessors Map 26, Parcel 29

City Council

From: City Council
Sent: Wednesday, April 24, 2024 12:58 PM
To: David Doucette; Don Landers; Donald Landers (donald_landers@msn.com); John Irish; Karen Boule; Kathleen Robey; Mark Vital; Mark Oram; Mike Ossing; Robert Preciado; Sean Navin; Trey Fuccillo; Teona Brown
Cc: Jeremy McManus; Jason Grossfield; Thomas DiPersio; Tin Htway; Steven Kerrigan; Wilson Chu
Subject: FROM ATTY. TINE: Alta Behavioral Health, Donald Lynch Blvd. - AMENDED Proposed Decision on Special Permit Application
Attachments: Alta Behavioral - draft special permit 4-24-24.docx
Importance: High

Attached is an amended draft decision in response to City Engineer DiPersio's suggestion that the dimensional info be included in the decision.

It is found in the findings section as described below.

KB

From: atine tinelaw.com <atine@tinelaw.com>
Sent: Wednesday, April 24, 2024 8:11 AM
To: City Council <citycouncil@marlborough-ma.gov>
Cc: Karen Boule <kboule@marlborough-ma.gov>
Subject: Re: Comment from City Engineer: Alta Behavioral Health, Donald Lynch Blvd. - Proposed Decision on Special Permit Application

**I hope this addresses the issue, please let me know.
The distancing requirement of subsection C of Section 650-31 is not met. Below is the text from that section.**

(2)

Within 1,000 feet of:

(a)

A school (as defined in § 517-2 of the Code of the City of Marlborough, as amended) located within the City of Marlborough;

(b)

A recreational facility (as defined in § 517-2 of the Code of the City of Marlborough, as amended); or

(c)

A park (as defined in § 517-2 of the Code of the City of Marlborough, as amended);

I added the bolded language to paragraph 9 in the revised proposed findings.

IN CITY COUNCIL

Marlborough, MA
April __, 2024

ORDERED:

DECISION FOR SPECIAL PERMIT

IN CITY COUNCIL

Special Permit Application of:
Alta Behavioral Health LLC
55 Concord Street, Suite 111
North Reading, MA 01864
Order No. 24-1009099

Locus:
400 Donald J Lynch Blvd.
Assessors Map 26, Parcel 29

DECISION ON A SPECIAL PERMIT CITY COUNCIL ORDER NO. 24-1009099

The City Council of the City of Marlborough hereby **GRANTS** the application of Alta Behavioral Health LLC, as provided in the DECISION and subject to the following Procedural Findings and Findings of Facts and Conditions.

Decision date: April __, 2024

The Decision of the City Council was filed in the Office of the City Clerk of the City of Marlborough on the _____ day of April, 2024.

APPEALS

Appeals, if any, shall be made pursuant to Massachusetts General Laws, c. 40A, §17 and shall be filed within twenty (20) days after the date of the filing of this Notice of Decision in the Office of the City Clerk of the City of Marlborough, Massachusetts.

A TRUE COPY

ATTEST: _____ City Clerk

**In City Council
Marlborough, Massachusetts
April , 2024
Decision on a Special Permit Application**

The City Council of the City of Marlborough hereby GRANTS the application for a Special Permit to Alta Behavioral Health LLC, a Massachusetts limited liability company having a mailing address of 55 Concord Street, Suite 111, North Reading, MA 01864 as provided in this Decision and subject to the following Findings of Facts and Conditions.

1. Alta Behavioral Health LLC, a Massachusetts limited liability company having a mailing address of 55 Concord Street, Suite 111, North Reading, MA 01864, is herein referred to as “Applicant.”

2. Applicant is the lessee of certain real property located at 400 Donald J Lynch Blvd., Marlborough, MA, as shown on the Marlborough Assessors Maps as Map 26, Parcel 29 (the “Premises”). The land is entirely located in a Limited Industrial (“LI”) zoning district.

3. The Applicant, on or about February 9, 2024, filed with the City Clerk of the City of Marlborough an application for a Special Permit under the provisions of Mass. Gen. Laws c. 40A, § 3, the Americans with Disabilities Act, and Marlborough Zoning Ordinance Article VI, Section 650-31 B(1)-(7). The Applicant intends to operate a nonresidential/outpatient facility licensed under 105 CMR 164 as a substance abuse treatment program in an existing building at 400 Donald J. Lynch Boulevard, Marlborough, MA.

4. In connection with the Application, Applicant filed a Special Permit Application, certified list of abutters, filing fee and attachments (i.e. Exhibit A with information to satisfy the Special Permit requirements).

5. Pursuant to the Rules and Regulations of the City Council and applicable statutes of the Commonwealth of Massachusetts, the City Council established a date for a public hearing for the permit application and the City Clerk caused to be advertised said date and the Applicant sent notice via certified mail of said hearing to abutters entitled to notice under law.

6. The Marlborough City Council, pursuant to Mass. Gen. Laws c. 40A, held a public hearing on March 25, 2024, concerning said application. The hearing was opened and closed at that meeting.

7. Applicant presented testimony at the public hearing detailing the Application, and describing the nature of its intended services to be provided and its impact in making these services more available and convenient to residents of the community. No one spoke against the proposed Special Permit. In addition, Applicant presented additional detailed project information at the Urban Affairs Committee meeting which occurred on _____. All comments by those attending the City Council public hearing have been duly considered in making this decision.

8. Applicant provided further written and oral documentation to the City Council's Urban Affairs Committee regarding its Application, in the course of the Urban Affairs Committee meeting referred to above.

9. Applicant has requested a reasonable accommodation under State and Federal Law with respect to its proposed use at the Premises, specifically, relief from Marlborough Zoning Ordinance Article VI, Section 650-31 C, which imposes distancing requirements for the proposed use at the Premises, which may impair or prevent the proposed use due to the proximity of facilities of the type identified in subsection C of Section 650-31 of Article IV. The Premises do not meet the distancing requirements of subsections C(2)(a) and C(2)(b) as the Premises will be located within 1000' of a school (Crossroads School Inc., 295 Donald Lynch Blvd, Marlborough, MA 01752) and likely a recreational facility (given the broad definition in § 517-2 of the Code of the City of Marlborough).

10. The Applicant argues that a municipality is required to reasonably accommodate disabled persons by modifying its zoning policies, practices and procedures and may not intentionally discriminate against disabled persons. *Dadian v. Village of Wilmette*, 269 F.3d 831 (7th Cir. 2001). 28 C.F.R. § 35.130(b)(7) states: A public entity shall make *reasonable modifications* in policies, practices, or procedures when the modifications are *necessary* to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity. The failure to provide a reasonable accommodation that is reasonable and necessary is discrimination.

BASED UPON THE ABOVE, THE CITY COUNCIL MAKES THE FOLLOWING FINDINGS OF FACT AND TAKES THE FOLLOWING ACTIONS:

A) The City Council finds that Applicant has complied with all the Rules and Regulations promulgated by the Marlborough City Council as they pertain to the Application.

B) The City Council finds that the proposed use of the Premises, subject to the conditions imposed below, will not be in conflict with the public health, safety, convenience and welfare and will not be detrimental or offensive. Further, the City Council finds that the proposed use of the Premises, is consistent with the use allowed by Special Permit under Article VI, Section 650-31 and any adverse effects of the proposed use will not outweigh its beneficial impacts to the City or the neighborhood. In addition, the City Council finds that the outpatient services to offered to individuals in recovery from substance use will provide a significant benefit to the residents of the City.

C) The City Council finds that the individuals the Applicant intends to provide services to at the Premises are a protected class, as a result of disability, under the Americans with Disabilities Act and M.G.L. c. 40A, Section 3, para. 4. The City Council finds the relief requested from Marlborough Zoning Ordinance Article VI, Section 650-31 C, is reasonable and necessary, given without said relief the limitations imposed by subsection C of Section 650-31 would prevent locating the subject use at the Premises. Further, the City Council is mindful of an opinion letter dated June 12, 2017, from the Office of the Attorney General concerning a proposed bylaw from the Town of Milbury to add a “distancing requirement” substantially

similar to that existing in the subject Article VI of the City's code and the concerns expressed by the Attorney General with said distancing requirement.

D) The City Council, pursuant to its authority under Mass. Gen. Laws c. 40A, §§ 3, 6 and 9, the Americans with Disabilities Act, and under Article IV, § 650-31 of the Marlborough Zoning Ordinance, GRANTS the Applicant a Special Permit to operate a nonresidential/outpatient facility licensed under 105 CMR 164 as a substance abuse treatment program in an existing building at 400 Donald J. Lynch Boulevard (the "Project") with a reasonable accommodation under the Americans with Disabilities Act in the form of a waiver from having to comply with subsection C of Section 650-31 of Article IV, SUBJECT TO THE FOLLOWING CONDITIONS:

1. Compliance With Building Regulations. Buildout and modification of the Premises to be occupied shall be in accordance with all applicable building codes in effect in the City of Marlborough and Commonwealth of Massachusetts.
2. Application and Documents. All plans, drawings, site evaluations, and documentation provided by the Applicant as part of this Special Permit Application are herein incorporated into and become a part of this Special Permit and become conditions and requirements of the same.
4. Compliance with Local, State and Federal Laws. The Applicant agrees to comply with all rules, regulations, and ordinances of the City of Marlborough, Commonwealth of Massachusetts, and the Federal Government as they may apply to the construction, maintenance, and operation of Applicant's use at the Premises, as supplemented by applicable conditions of this Special Permit.
5. Incorporation of Plans and Drawings. All terms, conditions, requirements, approvals, plans, and drawings provided by the Applicant as part of this Special Permit Application and as amended during the application/hearing process before the City Council and/or the City Council's Urban Affairs Committee, are herein incorporated into and become part of this Special Permit and become conditions and requirements of the same, unless otherwise altered by the City Council.
6. Compliance of Signs with Sign Ordinance. All building signage at the subject location shall comply with the City of Marlborough Sign Ordinance in effect at the issuance of the special permit without a variance.
7. Fire Protection. Fire protection systems shall be acceptable in all respects to the City of Marlborough Fire Chief or their designee.
8. Safety. The Applicant's Premises will be locked, even during program hours (office hours). The front desk will be staffed during program hours and patients will be required to sign-in and sign-out. A waiting area will be used within the Premises to minimize congestion and wait time outside the Premises for pick-ups.

9. In accordance with the provisions of Mass. Gen. Laws c. 40A, § 11, the Applicant, at its expense, shall record this Special Permit in the Middlesex South Registry of Deeds after the City Clerk has certified that the twenty-day period for appealing this Special Permit has elapsed with no appeal having been filed. After recording but prior to issuance of a Building Permit, Applicant shall provide the City Council and the City Solicitor's office with a copy of the recorded Special Permit.

10. Unless the context otherwise clearly requires, all references in the above conditions to "Applicant" shall also refer to Applicant's successors and assigns.

Yea: _____ - Nay: _____ - Absent: _____

ADOPTED

In City Council

Order No. 24-1009099

Adopted: _____ 2024


Approved by Mayor

Date: _____ 2024

A TRUE COPY

ATTEST: _____ City Clerk

MEMORANDUM

TO: Planning Board
FROM: Thomas Urbelis, Town Counsel
CC: Paul Materazzo and Jacki Byerley
RE: Application by Medico 140, LLC – “Reasonable Accommodation”
DATE: May 17, 2022 

With regard to the applicant’s request that the Board grant a “reasonable accommodation” the Board has received correspondence dated April 11, 2022 from Attorney Mark Bobrowski, correspondence dated April 15, 2022 from Attorney William H. Sheehan, III and an email dated April 26, 2022 from Attorney Bobrowski. Those communications are the starting point for this memorandum.

REASONABLE ACCOMMODATION STANDARD

The Fair Housing Amendments Act defines discrimination to include “a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford (a handicapped individual) equal opportunity to use and enjoy a dwelling.” 42 U.S.C. §3604(f)(3)(B). To prevail on such a reasonable accommodation claim, a plaintiff must show a qualifying handicap, the defendant’s actual or constructive knowledge of that handicap, a request for a specific accommodation that is both reasonable and necessary to allow the handicapped individual an equal opportunity to use and enjoy the particular housing, and the defendant’s refusal to make the requested accommodation. See Astralis Condo Ass’n v. Secretary of U.S. Dept. of Housing & Urban Development, 620F.3d, 62, 67 (1st Cir 2010). In a similar vein, the Americans With Disabilities Act requires that a public entity “make reasonable modifications in policies, practices, or procedures when.....necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program

or activity.” 28 C.F.R. §35.130(b)(7)(i). (emphasis supplied) See Summers v. City of Fitchburg 940 F.3d 133 (1st Cir. 2019)

It appears that all parties here agree that addiction is a handicap as described in the applicable laws under consideration. The reasonableness requirement calls for a factbound balancing of the benefits that would accrue to the handicapped individual against the burdens that the accommodation would entail to the Town. See Summers supra.

As stated by the First Circuit in Summers supra:

“The burdens that may be given weight in this balancing include both financial costs and practical detriments to the City, as well as less tangible effects on the public. See Valencia, 883 F.3d at 968. Typically, “(a)n accommodation is ‘reasonable’ when it imposes no ‘fundamental alteration in the nature of the program’ or ‘undue financial and administrative burdens’” on the defendant. Batista v. Cooperativa de Vivienda Jardines de San Ignacio, 776 F.3d 38, 43 (1st Cir. 2015) (quoting Howard v. City of Beavercreek, 276 F.3d 802, 806 (6th Cir. 2002)). Thus, a plaintiff is not entitled to a waiver of a zoning or building-code rule if the waiver “is so ‘at odds with the purposes behind the rules that it would be a fundamental and unreasonable change.’” Valencia, 883 F.3d at 968 (quoting Oconomowoc Residential Programs, Inc. v. City of Milwaukee, 300 F.3d 775, 784 (7th Cir. 2002)).”

REASONABLE ACCOMMODATION REQUEST

The applicant is requesting a reasonable accommodation with relation to the number of parking spaces and the backing of vehicles onto a street or way as referenced in Section 5.1.5.2.d of the Zoning By-Law.

With regard to parking spaces, the Board’s peer reviewer agrees with the applicant’s engineer that 153 parking spaces is adequate. Attorney Sheehan’s letter describes why he and his engineer disagree with that conclusion. It is up this Board to determine whether to accept the position of the applicant’s engineer and the Town’s peer reviewer or the position of Attorney Sheehan and his client’s engineer in accordance with the reasonableness standard as discussed above.

With regard to the issue of backing out of parking spaces into a street or way, on March 23, 2022, Christopher Clemente, the Town’s Building Inspector sent a memorandum which states:

It is my understanding that the currently proposed site plan (Ranger Engineering Group-Sheet CS1001 rev 3/17/2022) at 140 Haverhill St. complies with and further meets the intent of Article VIII § 5.1.5.

Article VIII § 5.1.5 and specifically §5.1.5.2.d intent is to prevent motor vehicles from backing out of parking spaces into a street or way as defined in Article VIII. In the plan referenced above vehicles would be backing out of parking spaces into an aisle within the parking lot contained entirely on private property. The definitions of “street” and “way” are contained within § 10.1 and in neither case does the area the motor vehicles are backing into meet the definition of “street” or “way”. I further find no record within the Building Division, the Town Clerk or the Planning Board of the proposed aisle ever having been accepted or maintained by the Town as a street or way (public or private) as defined under Article VIII § 10.1.

Attorney Sheehan’s letter criticizes the Building Commissioner’s interpretation of the Zoning By-Law, but the letter does not cite any Court decision which is contrary to the Building Commissioner’s interpretation.

However, G.L. ch. 40A Section 7 states that the Building Commissioner “shall be charged with the enforcement of the Zoning Ordinances or By-Law”. Also, Section 9.1.1 of the Andover Zoning By-Law states: “This by-law shall be administered by the Inspector of Buildings.”

Therefore, with regard to Section 5.1.5.2.d, based upon the foregoing, I recommend that the Board give substantially more consideration to the opinion of the Building Inspector rather than argument of Attorney Sheehan.

As offered by Attorney Bobrowski in his letter, with regard to both the number of parking spaces and the issue of backing of vehicles, an approval by this Board to the applicant’s reasonable accommodation request should include “a condition referring this matter to the Zoning Board of Appeals for further zoning relief.” That offer may be taken into account by this Board as to whether the applicant’s request for accommodations is reasonable. Thus, if you grant the requested reasonable accommodation, the applicant would still be required to go before the Zoning Board of Appeals.

OTHER OBJECTIONS EXPRESSED TO A REASONABLE ACCOMMODATION

One of the objections made in Attorney Sheehan's letter is that the proposed facility is not a dwelling under the Fair Housing Amendments Act. Attorney Sheehan's objection relating to a dwelling is not made with reference to the Americans With Disabilities Act, and the Massachusetts Zoning Act's anti-discrimination provision in G.L. c.40A Section 3.

Furthermore, the federal case of 901 Ernstron Road LLC v. Borough of Sayreville Zoning Board of Adjustment Civ No. 18-2442 (D.N.J. 2018), which is a case cited by Attorney Sheehan, states: "FHA and FHAA violations must involve dwellings, and the Third Circuit has found that rehabilitation facilities qualify as dwellings for the duration of a patient's time in treatment."

Other objections to a reasonable accommodation include claims that neighbors would be harmed due to public safety and traffic concerns. Such concerns must be substantiated by expert testimony and not merely anecdotal observations or argument by counsel.

A very recent Land Court case which highlights the need for expert testimony regarding a public safety concern is Mayer v Mental Health Association, Inc. 29 LCR 519(2021). The plaintiffs appealed from the issuance of a building permit, upheld by the Holyoke Board of Appeals, to the defendant who intended to use its property as a residential rehabilitation center for individuals with a dual diagnosis of mental illness and substance abuse. In discussing whether the plaintiffs had standing, the Land Court stated in part:

"In addition, there is a dearth of admissible evidence in this record from which the court could conclude that MHA's use does create a safety risk. As noted in Standerwick (v. Zoning Board of Appeals of Andover 447 Mass. 20(2006)), where the issue was whether the plaintiffs' claims of increased crime or vandalism provided them with standing, the court noted (1) that it was established through discovery that the plaintiffs had no factual basis for their claims, (2) that the trial judge determined that "this concern was 'beyond the scope of common knowledge, experience and understanding,'" and (3) that "expert evidence was therefore necessary to establish aggravement." Standerwick, 447 Mass. At 36. In the absence of expert evidence, plaintiffs' discovery responses "were, as the judge found, nothing more than unsupported 'apprehension and speculation.'" *Id.* The same is

true here, where the risk of harm posed by MH's residents is not a matter of common knowledge, experience or understanding."

In this matter there is evidence from engineers regarding public safety. As stated on page 41 of the January 19, 2022 report of Bayside Engineering:

"Review of the proposed facility and access plan shows that in relation to roadway capacity, traffic safety, and traffic impacts upon the surrounding roadway network, the proposed project will meet safety standards and have a minimal impact on existing traffic conditions. With the proposed access, in conjunction with the mitigation measures described above and maintaining sight distances from Haverhill Street to High Street (clear sight lines along frontage), safe and efficient access can be provided to the clientele of the proposed facility and to the motoring public in the area."

Also with regard to traffic safety, at the April 26, 2022 meeting of the Planning Board, when Andover Public Safety Officer Glen Ota was told that the number of trips generated by the proposed facility was substantially fewer than trips generated by the former facility, he stated that answered his question as far as Andover Police is concerned.

The March 25, 2022 Hayes Engineering report states:

"The parking if allowed to continue as proposed offers significant safety issues with the fifty-four backing out spaces onto the rights of way. The proposed design requires pedestrians to randomly cross the rights of way or walk within the right of way to access the buildings. The combination of these proposed conditions creates numerous motor vehicle conflict points that will significantly impact the use and safety of the rights of way for both the proposed uses as well as the continued use of the property located at 138 Haverhill Street."

Thus, you may take into account what Officer Ota told you and you may agree with, or disagree with any of the engineering reports which have been presented to you.

There was discussion as to the proposed facility and its effect upon the character of the neighborhood. One of the documents which is part of your record is the Zoning Board of Appeals decision dated September 3, 2021 in which that Board stated:

"The Board finds that the subject proposal is an improvement over the existing poor-condition, non-conforming building. The Board finds that the proposed buildings are less non-conforming than the existing building and will not be derogatory to the adjacent neighborhood or a detriment to the public good. The Board finds that the proposed outpatient clinic, and overnight withdrawal/detoxification facility will not derogate from the intent or purpose of the By-Law. The Board agrees that the requested variance relief for the addiction treatment center can be granted as a "reasonable accommodation" for a

protected group of persons (See Granada House Inc. v. City of Boston, 1997 WL 106688 Massachusetts Superior Court).

In response to a question from the Chair at the Planning Board's April 26, 2022 meeting, I advised this Board that the fact that Attorney Sheehan's client has sued the Zoning Board should have no effect upon this Board's decision.

CONCLUSION

This memorandum is intended to provide a measure of guidance for the Board in its consideration of the requested reasonable accommodations. Under the circumstances of this case, in my opinion, this Board may, if it chooses to do, provide a reasonable accommodation as requested by the applicant. I plan to attend the Board's hearing on May 24, 2022 at which time the Board will have further deliberation on this issue.

City Council

From: City Council
Sent: Thursday, April 11, 2024 4:39 PM
To: Mike Ossing
Cc: Kathleen Robey
Subject: From Asst. Solicitor McManus: Special Permit Decision - Alta Behavioral Health, LLC - 400 Donald Lynch Blvd
Attachments: Ltr - Council - 4-11-24.pdf

From: Jeremy McManus <jmcmanus@marlborough-ma.gov>
Sent: Thursday, April 11, 2024 4:36 PM
To: City Council <citycouncil@marlborough-ma.gov>
Cc: Jason Grossfield <jgrossfield@marlborough-ma.gov>; Mayor Christian Dumais <MayorChristian@marlborough-ma.gov>; Ryan Egan <regan@marlborough-ma.gov>
Subject: Special Permit Decision - Alta Behavioral Health, LLC - 400 Donald Lynch Blvd

Hi Karen,

Attached please find correspondence to the City Council regarding the above-referenced special permit application. Please let me know if you have any questions.

Best,
Jeremy

Jeremy P. McManus
Assistant City Solicitor
City of Marlborough
City Hall, 4th Floor
140 Main Street
Marlborough, MA 01752
T: (508) 460-3771
F: (508) 460-3698
jmcmanus@marlborough-ma.gov

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City of Marlborough

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JASON D. GROSSFIELD
CITY SOLICITOR

JEREMY P. MCMANUS
ASSISTANT CITY SOLICITOR

BEATRIZ R. ALVES
PARALEGAL

April 11, 2024

Michael H. Ossing, President
Marlborough City Council
City Hall
140 Main Street
Marlborough, MA 01752

Re: City Council Order No. 24-1009099
Special Permit Decision, Alta Behavioral Health, LLC, 400 Donald J. Lynch Blvd.

Dear Honorable President Ossing and Councilors:

You have asked for a legal opinion regarding whether the City Council may grant the above-referenced special permit with a waiver of the zoning requirement prohibiting narcotics detoxification and/or maintenance facilities from being within 1,000 feet of a school (“1,000 Foot Regulation”). See City Ord., § 650-31(C)(2)(a). The applicant has requested this waiver as a reasonable accommodation under the Americans with Disabilities Act, 42 U.S.C. § 12132 (“ADA”). In my opinion, the City Council may grant the waiver.

It is well settled that individuals in recovery from substance abuse qualify as “disabled” for purposes of the ADA. See 28 C.F.R. § 35.108(b)(2); Crossing Over, Inc. v. City of Fitchburg, 98 Mass.App.Ct. 822, 825 (2020). Therefore, in interpreting similar zoning schemes, courts have held that zoning laws facially violate the ADA when they impose requirements on narcotic treatment facilities that do not apply to similar uses unless a “legitimate, nondiscriminatory reason” justifies the difference. See Affinity Healthcare Grp. Voorhees, LLC v. Twp. of Voorhees, No. 22-2769, 2024 WL 195471, at *5 (3d Cir. Jan. 18, 2024). Under the City of Marlborough zoning ordinance, uses similar to the proposed use – such as medical offices/clinics and dental clinics – are not required to be a particular distance from schools in the districts allowing them. See City Ord., § 650. Further, it is unclear that a legitimate, nondiscriminatory reason has justified the 1,000 Foot Regulation¹. In my opinion, the 1,000 Foot Regulation is therefore susceptible to legal challenge under the ADA². See Habit Mgmt., Inc. v. City of Lynn,

¹ Records on file with the City Clerk regarding the City Council’s 2009 passage of the 1,000 Foot Regulation, including reports of the public hearing and of the Legislative & Legal Affairs Committee, reference, for example, “protection of certain neighborhoods” generally. However, courts have required corroborating evidence before concluding that protecting the health and safety of the community is a legitimate, nondiscriminatory reason to treat disabled individuals differently. See Oconomowoc Residential Programs, Inc. v. City of Milwaukee, 300 F.3d 775, 786 (7th Cir. 2002) (“Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion [of disabled individuals]. The City has not presented any valid evidence that the residents who this group home seeks to serve will present a threat either to their own safety or the safety of others.”) (internal citations omitted).

² This office notes that the 1,000 Foot Regulation may also be susceptible to legal challenge under other state or federal laws, including but not limited to G.L. c. 40A, § 3.

235 F. Supp. 2d 28, 29 (D. Mass. 2002) (Saris, J.) (holding that City of Lynn zoning ordinance prohibiting methadone clinics within certain distance of schools violated ADA where no nondiscriminatory reason justified distance requirement).

Recognizing this, the applicant has asked that the City Council waive the 1,000 Foot Regulation as a reasonable accommodation under the ADA. The ADA requires that “[a] public entity...make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” See 28 C.F.R. § 35.130(b)(7)(i). Whether a request for an accommodation is reasonable therefore requires a case-by-case evaluation. In the zoning context, courts have held that “a plaintiff is not entitled to a waiver of a zoning or building code rule if the waiver is so at odds with the purposes behind the rule that it would be a fundamental and unreasonable change.” Summers v. City of Fitchburg, 940 F.3d 133, 140 (1st Cir. 2019). In my opinion, it is permissible for the City Council to find that waiving the 1,000 Foot Regulation for this application, which involves a proposed use in an existing office building that is hundreds of feet away from the school in question and across a major double-laned roadway, would not be a fundamental and unreasonable change to the zoning scheme. See id. at 140-41. I am happy to review the draft decision to incorporate the waiver.

Please contact me if you have any questions or concerns.

Respectfully,



Jeremy P. McManus
Assistant City Solicitor

cc: J. Christian Dumais, Mayor
Jason D. Grossfield, City Solicitor