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June 16, 2025

Yi-An Huang
City Manager
Cambridge City Hall
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Re: *Response to City Council AR 25-53 of June 2, 2025, Requesting a Legal Opinion Regarding Religious and Institutional Use Zoning and the Marasao et al. Zoning Petition; and*
Response to the Planning Board's May 20, 2025 Request for a Legal opinion Regarding the Marasao et al. Zoning Petition

Dear Mr. Huang:

I am writing in response to the above-mentioned Council Order and Planning Board request for opinion. Specifically, the City Council requested a legal opinion outlining, in light of current zoning including the most recent Multifamily Zoning Amendments, the ability of Cambridge to regulate institutional and religious uses in C-1 residential districts and what state and federal law allows in terms of local restrictions, if any, for institutional and religious uses, and in particular offer any guidance as to the application of state and federal law to the Council's consideration of the Marasao et al. Petition. Additionally, the Planning Board requested guidance with the following questions:

- What impact does the Religious Land Use and Institutionalized Persons Act (RLUIPA) and the Dover Amendment have as to what the city can and cannot do with regards to religious uses? What is the relationship between the two?
- What are the potential issues around regulation of educational uses? Can they be treated separately? Or would changing the zoning of religious uses require greater institutional expansion?
- What would constitute a "reasonable regulation," and are there any regulations, like environmental regulations, that can be imposed?

Below I will address state and federal law governing zoning of religious and other institutional uses, and provide guidance for the City Council and Planning Board in considering the Marasao et al. Zoning Petition.

A. Marasao et al. Zoning Petition

The pending zoning petition was filed by Mushla Marasao, et al. (group of 10 or more registered voters), represented by “Lubavitch of Cambridge, Inc.” The Petition seeks to remove gross floor area (GFA) and floor area ratio (FAR) limitations for religious uses, permit conforming additions to nonconforming structures without limitation for religious uses, and permit religious uses with the same dimensional limitations as residential uses, except that in a Residence C-1 district permeable open space would not be required, buildings would be permitted up to 6 stories and 74 feet above grade without meeting inclusionary housing requirements, and buildings taller than 35 feet and 3 stories above grade would not be required to notify neighbors and hold a meeting.

The Petition is further described in the Community Development Department’s Report dated May 15, 2025. Please note that Lubavitch of Cambridge, Inc. is also involved in legal action with the City and the Board of Zoning Appeal concerning the use of property located at 38-40-48-54-56 Banks Street, but this opinion does not address the pending litigation.

B. The Dover Amendment

The Dover Amendment is the common name for a provision in the state Zoning Act, G.L. c.40A, §3, that provides protections from zoning to religious and nonprofit educational uses. The relevant language in the statute is:

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 added.)

1. The Dover Amendment and Use Regulations

Pursuant to the language above, a city cannot prohibit religious uses and non-profit educational uses anywhere in the city. Therefore, these uses must be allowed in all districts. However, the City received special legislation in 1979, which was amended in 1980, that altered how the Dover Amendment applied in Cambridge. Chapter 565 of the Acts of 1979 states:

Notwithstanding the provisions of section three of chapter forty A of the General Laws, the City of Cambridge is hereby authorized to regulate and restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by a religious sect or denomination, or by a nonprofit educational

corporation within all residentially zoning districts which require a lot area of one thousand two hundred (1,200) square feet or more per dwelling unit.

The 1979 Act originally stated that it did not apply to land owned by Harvard. However, the 1980 amendment expanded the above language so that it now applies to land owned by Harvard. News articles from 1979 stated that this measure was put in place out of concern that institutions were buying up land in residential neighborhoods and competing with individuals in the real estate market. The goal was to allow the City to regulate religious and nonprofit educational uses in lower density residential districts.

This special legislation is still in place, but the recent Multifamily Zoning Amendments have removed the minimum square feet per dwelling unit requirements in the Zoning Ordinance. As a result, this special legislation does not presently apply in any zoning district in the City. Therefore, the City cannot prohibit religious uses and non-profit educational uses anywhere in the City, and the City will need to amend the Institutional Use Regulations section of the Zoning Ordinance to address this.

2. The Dover Amendment and Reasonable Dimensional Regulations

Although the City cannot prohibit the use of land for religious and nonprofit educational uses anywhere in the City, it is permissible to impose reasonable dimensional regulations on religious and nonprofit educational uses. Whether a dimensional requirement is reasonable as applied to a religious or nonprofit educational use is a fact specific analysis that must be made on a case-by-case basis. Trustees of Tufts College v. Medford, 415 Mass. 753, 759 (1993). A city is not required to have separate dimensional provisions that apply just to religious or nonprofit educational uses, nor is a City required to exempt a religious or educational use from all dimensional requirements. Id. “Because local zoning laws are intended to be uniformly applied, an educational [or religious] institution making challenges [to zoning requirements] will bear the burden of proving that the local requirements are unreasonable as applied to its proposed project.” Id. Therefore, dimensional requirements that apply to multiple types of uses, including religious and nonprofit educational uses, can be applied and will be presumed reasonable, unless the religious or nonprofit educational institution meets its burden of proving that the dimensional requirement are unreasonable as applied to a specific proposed project. Id.

There are several ways that religious or nonprofit educational institutions may prove that dimensional requirements are unreasonable. Martin v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints, 434 Mass. 141, 151 (2001). These include proving that a dimensional requirement detracts from the usefulness of the structure, imposes excessive costs on an applicant, or impairs the character of a proposed structure, without significant gain in terms of municipal concerns. Id.

C. RLUIPA

RLUIPA is a federal law that prohibits the government from implementing a land use regulation that “imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution,” unless the government carries its burden to show the

regulation furthers a compelling governmental interest and is the least restrictive means of doing so. 42 U.S.C. § 2000cc(a)(1).

By its terms, RLUIPA does not provide that religious entities are entirely exempt from land use regulations. Rather, it precludes imposition or implementation of land use regulations in a way that imposes a substantial burden on the entity unless the government demonstrates that the imposition of the burden is the least restrictive means of furthering a compelling governmental interest. Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of West Linn, 192 Or. App. 567 (2004), *aff'd and rem'd*, 338 Or. 453 (2005).

The following are examples of what the courts have found constitute substantial burdens:

- denial of a church's request to expand its facility, where current "facility was not adequate to accommodate its religious practice" (Fortress Bible Church v Feiner, 694 F.3d 208, 219 (2nd Cir. 2012));
- denial of permit constituted substantial burden where the temple's "attendance regularly exceed[ed] the [old property's] 521-person capacity," and turning congregants away "frustrated" the temple's religious messages (Redeemed Christian Church of God (Victory Temple) Bowie, Maryland v. Prince George's Cnty., Maryland, 485 F. Supp. 3d 594, 604 (D. Md, 2020), *aff'd* 17 F.4th 497 (4th Cir. 2021));
- finding that "it would substantially burden the Chabad to have a smaller shul," and "that the Chabad's religious exercise would be substantially burdened in the absence of a sizable Kosher kitchen" (Chabad Lubavitch of Litchfield Cnty., Inc. v. Borough of Litchfield, Conn., 2017 WL 5015624, at *20-22 (D. Conn. Nov. 2, 2017)).

These are all examples of courts finding that imposing zoning regulations on religious uses that did not have large enough buildings to accommodate their religious practices was a substantial burden.

However, in another case a court has found that a religious institution did not meet its burden of showing a substantial burden when the religious institution argued that its building was too small and it was not economically feasible to buy another property, but the city historic district commission found that one half of current building space was leased to commercial tenants, and expansion or renovation of current building would have solved some of organization's limitations (Episcopal Student Foundation v. City of Ann Arbor, 341 F. Supp. 2d 691 (E.D. Mich. 2004)). These cases taken together suggest that if a religious organization does not have enough room for its religious practices in its current space, and the only option is to expand that space, that will likely be found to be a substantial burden.

For a city to deny a land use permit on the basis of a compelling government interest, the city must have factual support that a compelling government interest would be implicated, and not just speculation. Tucker v. Collier, 906 F.3d 295 (5th Cir. 2018); Roman Catholic Archdiocese of Kansas City in Kansas v. City of Mission Woods, 337 F. Supp. 3d 1122 (D. Kan. 2018). The compelling government interests must directly affect public health, safety and welfare. Redeemed Christian Church of God (Victory Temple) Bowie, Maryland v. Prince George's County, Maryland, 17 F.4th 497 (4th Cir. 2021); United States v. City of Troy, 592 F. Supp. 3d 591 (E.D. Mich. 2022). There is a case based out of the Town of Lenox where the

Court found there was no compelling governmental interest because concerns regarding traffic, public safety, etc., were not compelling interests because the regulations only applied to non-municipal educational use or any religious use, but a municipal educational use at the same property would have been allowed. See Mintz v. Roman Catholic Bishop of Springfield, 424 F. Supp. 2d 309, 323 (D. Mass. 2006). Pursuant to the Town of Lenox case, a court would likely not find that the impacts of a larger building, such as impacts on light, air, traffic and parking, are compelling government interests if a building the same size and intensity of use could be allowed for a nonreligious use. See Id.

Finally, even if the government has articulated a compelling government interest, it has to impose the least restrictive means of furthering that interest. Denial of a land use permit is likely not the least restrictive means if there are conditions that can be put on the permit to address the compelling government interest. For example, if a government is able to prove that a religious use will negatively impact traffic, denial of a land use permit will likely not be the least restrictive means to address that interest if the government can condition the permit to require traffic mitigation measures. (Westchester Day School v. Village of Mamaroneck, 417 F. Supp. 2d 477, 207 Ed. Law Rep. 129 (S.D. N.Y. 2006) (measures existed to mitigate any potential increase in traffic caused by the project, including retiming traffic lights, widening approaches, adding turning lanes, re-routing traffic, a more aggressive busing program, or an enrollment cap).

Unlike the Dover Amendment, RLUIPA only applies to religious uses. As with the Dover Amendment, RLUIPA requires a fact specific, case by case analysis. Therefore, RLUIPA does not require that a city have separate dimensional provisions that apply just to religious uses, nor is a City required to exempt a religious or educational use from all dimensional requirements. However, RLUIPA provides that “no government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution” and “no government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.” 42 U.S.C.A. § 2000cc. For example, a zoning ordinance that treated religious schools on equal terms with public schools did not violate RLUIPA. Marianist Province of United States v. City of Kirkwood, 944 F.3d 996 (8th Cir. 2019). However, a zoning ordinance that allowed a variety of uses in a downtown area, including an assembly hall, but prohibited churches, violated the equal terms provision of RLUIPA because it was treating religious assemblies different than non-religious assemblies. Lighthouse Institute for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253 (3rd Cir. 2007).

Additionally, land use boards and commissions, and city officials, must apply the provisions of RLUIPA to religious land uses. Failure to apply those provisions may impose significant liability on a city, including monetary damages and payment of attorneys’ fees. Therefore, it is possible to limit the risk of violating RLUIPA and subjecting the City to liability by including zoning measures that apply the least restrictive means of furthering a compelling government interest to religious uses.

D. **Application of RLUIPA and the Dover Amendment to the Zoning Ordinance Generally, and the Marasao et al. Zoning Petition Specifically**

There are several important things to keep in mind concerning the application of RLUIPA and the Dover Amendment to the Zoning Ordinance generally, and specifically to the pending Marasao, et al. Zoning Petition:

- **The Dover Amendment applies to religious and nonprofit educational uses, and RLUIPA applies only to religious uses.** Section 4.50 of the Zoning Ordinance, the Institutional Use Regulations, regulate additional types of institutional uses, such as health care facilities, and those uses are not subject to either the Dover Amendment or RLUIPA.
- **As a result of changes that were part of the Multifamily Zoning, religious and nonprofit educational uses are allowed citywide, pursuant to the Dover Amendment.** The Zoning Ordinance needs to be amended to reflect that and staff will be preparing proposed amendments to present to the Council.
- **Religious and nonprofit educational uses are not immune from all dimensional regulations,** but the dimensional regulations imposed on them must be reasonable, and specifically for religious uses, if the dimensional regulation imposes a substantial burden on religious exercise, it is only permissible if the City has shown it has a compelling governmental interest and it is the least restrictive means of furthering that interest.
- Whether the regulation is reasonable, whether it is imposing a substantial burden on religious exercise, and whether it is the least restrictive means of furthering a compelling government interest are all **fact dependent questions that must be looked at on a case-by-case basis.** It would be difficult to adopt zoning regulations that consider all of the possible scenarios that could arise, and instead, **the Planning Board, Board of Zoning Appeal and Inspectional Services Department need to look at applications for nonprofit educational uses and religious uses differently than other uses when they seek zoning relief.**
- **Therefore, the Zoning Ordinance does not have to include different dimensional requirements for religious and educational uses than it does for other types of uses,** but when a project applies for permits, a fact specific analysis has to be done to see if provisions in the Zoning Ordinance can or cannot be applied to specific projects.
- **Additionally, the Zoning Ordinance cannot discriminate against religious uses or treat religious uses on less than equal terms than similar types of secular uses or structures.**
- The Multifamily Zoning changes to the Zoning Ordinance have allowed residential building up to 6 stories, with certain conditions, citywide. As a result, the City may have a harder time arguing that there is a compelling government interest in imposing a more restrictive height limit on religious uses, and a harder time defending a more restrictive

height limit as reasonable for religious and nonprofit educational uses. **It will be harder to prove there is a compelling government interest in more restrictive dimensional requirements for religious uses when the City has allowed expansive dimensional requirements on residential uses.** However, even without the Multifamily Zoning changes, it is possible a religious use would meet the standard for additional height.

- If the City Council passes the Marasao, et al. Zoning Petition, it would decrease the risk that the City's Board of Zoning Appeal, Planning Board, or Commissioner of Inspectional Services Department apply the Zoning Ordinance in a way that could be found to substantially burden a religious use and that is not the least restrictive means of furthering a compelling government purpose. **Therefore, passing the the Marasao, et al. Zoning Petition may reduce the risk of liability for the City.**
- **Even if the Council does not pass the Marasao, et al. Zoning Petition, the BZA, Planning Board and Commissioner of ISD will have to continue to analyze proposed religious uses under RLUIPA, and religious and nonprofit educational uses under the Dover Amendment,** and dimensional requirements that are currently allowed for residential uses will be compared to what religious and nonprofit educational uses are seeking.

This addresses the questions raised by the Ordinance Committee and Planning Board. I will be available to discuss further at the continued hearings.

Very truly yours,


Megan B. Bayer
City Solicitor

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