



CITY of MALDEN PLANNING BOARD
NOTICE of DECISION

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CITY OF MALDEN
MALDEN, MASS.

CASE NUMBER 18-12

LOCATION of SUBJECT PROPERTY 52 Fairview Avenue, Malden, MA

NAME of PETITIONER and OWNER Gustavo Lopes

DATES of PUBLIC HEARING June 13, 2018, August 8, 2018 and November 14, 2018

DATE of DECISION November 14, 2018

DATE of FILING DECISION with CITY CLERK November 28, 2018

DATE of NOTIFICATION to BUILDING INSPECTOR November 28, 2018

FINAL DATE for FILING APPEAL of DECISION with SUPERIOR COURT December 18, 2018

[Any appeal must be made pursuant to M.G.L. c. 40A, §17 and filed within 20 days after date this Notice is filed with City Clerk.]

PROCEDURAL HISTORY (Case #18-12):

1. Petitioner is the property owner, Gustavo Lopes, 531 Great Road, Acton, MA 01720.
2. Petitioner was represented by his engineers, Anthony A. Esposito, P.E., Carver, MA and Kanayo H. Lala, P.E., Acton, MA at the public hearing on August 8, 2018, and by his engineers, Anthony A. Esposito, P.E., Carver, MA and Paul B. Aldinger, Ph.D, P.E., East Providence, RI at the public hearing on November 14, 2018.
3. The petition seeks a special permit under §700.13, Chapter 12, Revised Ordinances of 1991, as Amended, of the City of Malden (the "Ordinance") to allow removal of ledge and alteration of grade to install a driveway.
4. In March/April 2018, petitioner began to remove ledge without the required permits to create a driveway; upon receipt of a complaint, the Building Department ordered the work to be stopped; and this petition was filed.
5. At the time the petition was filed, the following plans and information were submitted: Site plan, "Plot Plan 52-54 Fairview Avenue, Malden, MA Middlesex County," dated (signed) April 2, 2018, prepared by Richard J. Mede, P.L.S, Medford Engineering & Survey, Medford, MA; "Parking Plan," dated April 4, 2018, prepared by Kanayo H. Lala, P.E., Acton, MA for Project/Owner: Bridgeline Construction LLC, Charlestown, MA; and correspondence dated April 4, 2018, from Kanayo Lala, P.E., Acton, MA, that describes the site and excavation.
6. All documentation required by §700.13.3 of the Ordinance was not submitted when the petition was filed, as stated in the email from Nelson Miller, Building Commissioner, dated June 13, 2018.
7. On June 13, 2018, that the Planning Board opened the public hearing, received no public testimony and tabled the public hearing to allow petitioner the opportunity to provide the following required plans, documentation and requested information: pre-ledge removal survey of property prepared by geotechnical professional engineer that describes type of ledge to be removed, location of fault lines; erosion prevention plan; drainage calculations; stormwater management plan; amount of ledge removed to date (cubic yards); expected duration (days) of ledge removal; number of truckloads; all methods proposed to remove ledge; and number of bedrooms in the dwelling.
8. Prior to the public hearing reopening on August 8, 2018, the following plans and information were submitted: correspondence dated July 20, 2018 from Anthony A. Esposito, P.E., Carver, MA, that describes the project, stormwater management and drainage calculations; "Topographic Plan of Land 52-54 Fairview Avenue Malden, MA (Middlesex County)," dated July 20, 2018 (stamped/signed July 23, 2018), prepared by Anthony A. Esposito, P.E., Medford Engineering & Survey, Medford, MA; two correspondences dated June 28, 2018, from Kanayo Lala, P.E., Acton, MA, that describe the site and ledge excavation; and an email dated August 7, 2018 from Kanayo Lala, P.E., that clarifies the amount of ledge removed to date and remaining to be removed.
9. On August 8, 2018, the Planning Board reopened and conducted the public hearing, and tabled the public hearing and its decision to allow: 1) petitioner to update/revise the plans so that grades and heights of retaining walls and ledge cuts comply with the Ordinance, or to seek a variance; 2) petitioner to provide more specific information about the amount of ledge removed to date and still to be removed from the site; 3) Building Department to advise whether the living room, bathroom and residential living areas in the basement were constructed pursuant to a building permit; 4) Building Department to provide the number of bedrooms at the property; and 5) petitioner to provide means, methods and equipment to be used to remove ledge and submit to the City Engineer and Fire Department for review and approval.
10. Prior to the public hearing reopening on November 14, 2018, the following plans and information were submitted: correspondence dated October 23, 2018 from Anthony A. Esposito, P.E., Carver, MA, that describes the revised proposal, erosion control plan, drainage calculations, stormwater management plan and method, means and equipment to be used to remove the ledge; correspondence dated October 23, 2018 from Paul B. Aldinger, Ph.D, P.E., East Providence, RI, regarding Geotechnical Engineering Services Rock Excavation for the project; "Topographic Plan of Land 52-54 Fairview Avenue Malden, MA (Middlesex County)," dated July

- 20, 2018, revised October 23, 2018, prepared by Anthony A. Esposito, P.E., Medford Engineering & Survey, Medford, MA; and "Construction Details 52-54 Fairview Avenue Malden, MA (Middlesex County)," dated October 23, 2018, prepared by Anthony A. Esposito, P.E., Medford Engineering & Survey, Medford, MA.
11. On November 14, 2018, the Planning Board reopened and conducted the public hearing and rendered a final decision.
 12. The City posted the notice of the public hearing and the notice of each tabled public hearing with the City Clerk and mailed all notices to abutters.
 13. The public hearings complied with the notice requirements of Massachusetts General Laws, Chapter 40A, §11.

FINDINGS of FACT (Case #18-12):

The City of Malden Planning Board finds the following facts:

1. The subject property is the site of a 2 ½ story, two-family dwelling that contains a total of five bedrooms and is currently used as two rental apartments.
2. The subject property also contains a portion of an accessory residential two-car garage, located at the rear of the dwelling; the majority of the garage is located on the abutting parcel, 13 Division Street (Assessor's parcel ID # 115 722 202), which historically has been held in common ownership with the subject property.
3. Petitioner purchased the subject property and the abutting property at 13 Division Street in August 2017.
4. Petitioner renovated the dwelling at the subject property, including finishing the basement and attic for residential living space, per a building permit (Permit # RES-023561-2017); however, the plans approved with the building permit, "Two-family Home 52-54 Fairview Avenue Malden, MA," dated October 3, 2017, prepared by Kanayo Lala, P.E., do not depict changes made during construction or existing rooms as constructed and/or as currently used, as described by Nelson Miller, Building Commissioner in his email correspondence dated November 14, 2018 and as explained in his verbal testimony during the public hearing on November 14, 2018.
5. Exposed ledge outcroppings extend along the front (southern) and western sides of the subject property and throughout abutting properties and the surrounding neighborhood.
6. Petitioner excavated and removed approximately 68 cubic yards of ledge from the front (southern) and western side yards of the subject property without the required permits, to prepare the site to construct a driveway.
7. The currently excavated area onsite may accommodate two or more parking spaces.
8. The proposal is to remove additional ledge from the same area to provide a driveway with four parking spaces.
9. The amount of ledge still to be excavated and removed from the site is 53 cubic yards.
10. The proposed method and means to remove ledge are by hydraulic chisel hammer breaker, model 1000B mounted on a Bobcat 337 Midi Excavator, or an equivalent vehicle/equipment.
11. Under the revised proposal, a tiered or terraced retaining wall system will be installed, and the height of each tier will comply with the Ordinance.
12. The two-family dwelling on the property predates and is exempt from the current Ordinance, including parking requirements, and the property is considered preexisting nonconforming, per §700.1 of the Ordinance.
13. There is no offstreet parking on the subject property; however, the abutting property at 13 Division Street historically has been used for parking by the subject property, with access via Division Street and parking for four to five vehicles in the garage and paved driveway; and this use predates the Ordinance and may be considered preexisting nonconforming, per §700.1 of the Ordinance.
14. Petitioner does not intend to allow tenants of the subject property to use 13 Division Street for parking, and petitioner eliminated the staircase in the rear yard of the dwelling that provided access between the properties.
15. Petitioner is currently using 13 Division Street to store his personal property and construction and landscaping materials for the subject property, however, petitioner recently was using the property for storage of materials and debris from his contractor's business, which is a prohibited industrial use in the Residence A zoning district, where the property and subject property are located.
16. All abutting dwellings are single-family dwellings, and the neighborhood is thickly settled.
17. Petitioner's prior excavation work at the site without permits may have caused damage to abutting homes.
18. Petitioner's prior excavation work at the site without permits created the ledge cuts currently existing on the property with heights that are in violation of §400.7.8 of the Ordinance.
19. The Fire Department's recommendations regarding the proposal, including the method of ledge removal, number of seismographs, hours of operation and fire watch, are described in email correspondence dated November 13, 2018 from Kevin Halpin, Fire Lieutenant.
20. The City Engineer's recommendations regarding the proposal, including survey of nearby properties, seismographic data, curb-cut, restoration of sidewalks, proposed rain garden, and construction schedule and site meeting, are described in a memorandum dated November 14, 2018 from Yem Lip, City Engineer.

21. The area that has already been excavated may be graded and finished for use as parking, without additional ledge removal; however, the heights of ledge cuts and retaining walls and the grades of parking areas and driveway must comply with the Ordinance.
22. The Ward City Councilor opposes the proposal due to public safety concerns and detrimental impacts to the neighborhood and overuse of the property.
23. Several residential abutters are in opposition to the proposal due to its adverse impacts on their homes.
24. The proposal is detrimental to the neighborhood.
25. The proposal will adversely affect the general welfare and public safety.

DECISIONS (Case #18-12):

On June 13, 2018, the Planning Board tabled the public hearing until receipt of the plans and documentation required by §700.13 of the Ordinance.

On August 8, 2018, the Planning Board tabled the public hearing and its decision until receipt of the revised plans and information requested by the Board.

On November 14, 2018, pursuant to the foregoing Findings of Fact, the Planning Board denied a special permit subject to nineteen conditions.

On November 14, 2018, pursuant to the foregoing Findings of Fact, the Planning Board denied a special permit subject to thirteen conditions.

RECORD of VOTES (Case #18-12):

On June 13, 2018, the vote on the motion to table the public hearing was nine in favor, none opposed, and the motion passed:

Antonucci, yes; Chuha, yes; Fitzgerald, yes; Gebreselassie, yes; Hayes, yes; Henry, yes; MacCuish, yes; Soucy, yes; Ioven, yes.

Motion by Antonucci, seconded by Henry.

On August 8, 2018, the vote on the motion to deny the special permit was four in favor, five opposed, and the motion failed:

Antonucci, yes; Chuha, no; Ferguson, yes; Fitzgerald, no; Gebreselassie, no; Hayes, no; Henry, no; Soucy, yes; Ioven, yes.

Motion by Antonucci, seconded by Soucy. [Absent: MacCuish. Present but not voting: Chiavelli.]

On August 8, 2018, the vote on the motion to table the public hearing and decision was nine in favor, none opposed, and the motion passed:

Antonucci, yes; Chuha, yes; Ferguson, yes; Fitzgerald, yes; Gebreselassie, yes; Hayes, yes; Henry, yes; Soucy, yes; Ioven, yes.

Motion by Fitzgerald, seconded by Henry. [Absent: MacCuish. Present but not voting: Chiavelli.]

On November 14, 2018, the vote on the motion to grant a special permit to remove ledge, subject to the following nineteen conditions, was five in favor, four opposed, and the motion failed:

- 1) All development shall be as per site plan, "Topographic Plan of Land 52-52 Fairview Avenue Malden, MA (Middlesex County)," dated July 20, 2018, revised October 23, 2018, and "Construction Details 52-54 Fairview Avenue Malden, MA (Middlesex County)," dated October 23, 2018, prepared by Anthony A. Esposito, Medford Engineering & Survey, unless and except as modified by these conditions; 2) All ledge/rock removal may be done only by hydraulic chisel hammer breaker model 1000B mounted on a Bobcat 337 Midi Excavator or an equivalent vehicle/equipment; and any ledge/rock removal by blasting or any other mechanical or other means is prohibited; 3) During site development, implement erosion controls as per plan; 4) Offer and conduct pre-ledge removal video and photographic survey of all buildings within 300-feet of the property lines of the subject property, who consent, and provide survey to property owner; before ledge removal begins, provide City

with list of all properties surveyed and contacted; 5) During any ledge removal activity, place seismograph on site and at the following properties or property line with: 44 Fairview Avenue, 56 Fairview Avenue and 13 Division Street; submit seismograph tapes to Fire Chief for review daily; 6) Maintain liability insurance of a minimum of \$100,000.00/\$300,000.00 with City of Malden named as a loss-payee; 7) During site development, hire fire details and provide a fire watch at any time as the Fire Chief deems appropriate and necessary in his reasonable discretion; 8) During site development, hire local police details as the Police Chief deems appropriate in his reasonable discretion; 9) Deliver written notice to all premises within 300 feet of the property lines of subject property, indicating the date(s) of ledge removal activity will be conducted and the hours of beginning and ending daily for the same; submit copy of notice(s) to City; 10) All retaining walls must comply with Sections 400.7.8 and 700.10 of this Ordinance; 11) The hours of operation for any ledge removal and/or any construction equipment operated for ledge removal or site grading/preparation, are 9 am to 4 pm Monday-Friday; 12) Install rain garden for stormwater management, as per plan; existing water service below garden shall be at minimum depth of 4 feet to prevent frozen water line during winter months; 13) The maximum number of bedrooms is five (5); the maximum number of kitchens is two (2); no bedrooms are allowed in the basement; submit current "as-built" floor plans; 14) Replace plywood coverings on all doors on garage at 13 Division Street (Assessor's PID 115 722 202) with standard doors; 15) Curb-cut requires and is subject to DPW approval; 16) Submit as-built site plan showing parking areas, stairs, walkways, retaining walls and ledge cuts; 17) Restore concrete sidewalk, apron, granite curb and pavement to match existing condition; 18) Provide construction schedule and owner, site engineer, geotechnical engineer and contractor shall attend a site meeting with City Engineering Department and City Planner prior to the start of work; and 19) Ledge removal may not commence before January 1, 2019 and last no more than fifteen consecutive business days.

Antonucci, no; Chuha, yes; Ferguson, no; Fitzgerald, yes; Gebreselassie, yes; Hayes, yes; Henry, yes; Soucy, no; Ioven, no.

Motion by Fitzgerald, seconded by Henry.

[Present but not voting: Chiavelli, MacCuish.]

On November 14, 2018, the vote on the motion to grant a special permit with no additional ledge removal, subject to the following thirteen conditions, was three in favor, six opposed, and the motion failed:

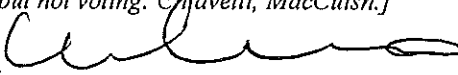
1) Provide maximum number of parking spaces and all development shall be as per site plan, "Topographic Plan of Land 52-52 Fairview Avenue Malden, MA (Middlesex County)," dated July 20, 2018, revised October 23, 2018, and "Construction Details 52-54 Fairview Avenue Malden, MA (Middlesex County)," dated October 23, 2018, prepared by Anthony A. Esposito, Medford Engineering & Survey, unless and except as modified by these conditions; 2) During site development, implement erosion controls as per plan; 3) Maintain liability insurance of a minimum of \$100,000.00/\$300,000.00 with City of Malden named as a loss-payee; 4) During site development, hire fire details and provide a fire watch at any time as the Fire Chief deems appropriate and necessary in his reasonable discretion; 5) During site development, hire local police details as the Police Chief deems appropriate in his reasonable discretion; 6) All retaining walls must comply with Sections 400.7.8 and 700.10 of this Ordinance; 7) Install rain garden for stormwater management, as per plan, with existing water service below garden shall be at minimum depth of 4 feet to prevent frozen water line during winter months; 8) The maximum number of bedrooms is five (5); the maximum number of kitchens is two (2); no bedrooms are allowed in the basement; submit current "as-built" floor plans; 9) Replace plywood coverings on all doors on garage at 13 Division Street (Assessor's PID 115 722 202) with standard doors; 10) Curb-cut requires and is subject to DPW approval; 11) Submit as-built site plan showing parking areas, stairs, walkways, retaining walls and ledge cuts; 12) Restore concrete sidewalk, apron, granite curb and pavement to match existing condition; and 13) Provide construction schedule and owner, site engineer, geotechnical engineer and contractor shall attend a site meeting with City Engineering Department and City Planner prior to start of work.

Antonucci, yes; Chuha, no; Ferguson, yes; Fitzgerald, no; Gebreselassie, no; Hayes, no; Henry, no; Soucy, no; Ioven, yes.

Motion by Antonucci, seconded by Ferguson.

[Present but not voting: Chiavelli, MacCuish.]

I hereby certify that the above is a true copy of the decision of the Malden Planning Board. By:


Michelle A. Romero, City Planner