



TOWN OF SWAMPSCOTT

OFFICE OF THE PLANNING BOARD

ELIHU THOMSON ADMINISTRATION BUILDING
22 MONUMENT AVENUE, SWAMPSCOTT, MA 01907

FILE SPR22-1
DATE Received by Town
Clerk 02/28/22 at
10:54am

APPLICATION FOR SITE PLAN REVIEW

The undersigned Applicant herewith submits the accompanying site plan for approval under the provisions of the Zoning By-law of the Town of Swampscott and certifies that the information and plans provided are correct and truly indicate the intentions of the proposed project.

APPLICANT NAME Sean R. Fitzgerald
Print or Type Name Signature Sean Fitzgerald 3/2/22
ADDRESS 22 Monument Avenue, Swampscott, MA 01907
PHONE NUM. 781-596-8850 EMAIL sfitzgerald@swampscottma.gov

OWNER NAME Town of Swampscott PHONE NUM. 781-596-8850
ADDRESS 22 Monument Avenue, Swampscott, MA 01907

ARCHITECT / ENGINEER NAME Lavallee Brensinger Architects PHONE NUM. 603-935-4211
ADDRESS 155 Dow Street, Suite 400, Manchester, NH 03101

10 Whitman Road New Elementary School A2
PROJECT LOCATION (Address) TITLE OF THE PLAN ZONING DISTRICT(S)

Deed of the Property recorded in Southern Essex Town of Swampscott
District Registry of Deeds, Book _____, Page _____. Assessors Map(s) 22, Lot(s) E1-0

Please provide a brief narrative description of your proposed project:

Site development and building construction for the New Elementary School serving Grades K-4.



APPLICATION DATE

Received by Town Clerk
02/28/2022 at 10:54AM

DECISION DATE

Town Clerk Stamp Use Only

TOWN OF SWAMPSCOTT APPLICATION FOR ZONING RELIEF AND INSPECTOR OF BUILDING APPEALS

Date: March 1, 2022

Fee: \$ Waived

Petition #: SPR 22-1

TYPE OF RELIEF SOUGHT

- ☐ Use Special Permit (Section 2.2.0.0.)
- ☐ Dimensional Special Permit (Section 2.3.6.0.)
- ☐ Special Permit (Section 2.2.7.0. – Nonconforming Uses and/or Structures)
- ☐ Special Permit (Section 3.1.1.3. – Parking and Loading Requirement Reduction)
- ☐ Special Permit (Section 3.2.0.0. – Signs)
- ☐ Special Permit (Section 3.3.4.0. – General Landscaping and Screening Requirement Waiver)
- ☐ Special Permit (Section 3.6.3.0. – Assisted and Independent Living Facilities)
- ☐ Special Permit (Section 4.1.7.0. – Uses in Flood Plain/Wetland Protection Overlay District)
- ☐ Special Permit (Section 4.2.8.0. – Variation of Flood Plain/Wetland Protection Overlay District Reqs)
- ☐ Special Permit (Section 4.3.4.0. – Wireless Communication Facility)
- ☐ Special Permit (Section 4.7.3.0. – Humphrey St Site Plan Special Permit – HS SI-P)
- ☐ Special Permit (Section 4.7.3.0. – Humphrey St Special Permit - HSSP)
- ☒ Special Permit (Section 5.4.0.0. – Site Plan)
- ☐ Dimensional Variance (Section 5.5.0.0.)
- ☐ Appeal of Determination of Inspector of Buildings

BOARD

- ☒ Planning Board (in cases of an HS SI-P or when only a Site Plan Special Permit is required)
- ☐ Zoning Board of Appeals (in all other cases)

LOCATION OF PROPERTY

10 Whitman Road

Street No. and Name

22

Map

E1-0

Lot

1930 and 1950

Year Built

Zoning District: A2
Present Use: Stanley Elementary School
Petitioner: Sean R. Fitzgerald
Address: 22 Monument Avenue, Swampscott, MA 01907
Telephone: 781-596-8850
Email: sfitzgerald@swampscottma.gov

Overlay District: None
Proposed Use: New Elementary School
Owner: Town of Swampscott
Address: 22 Monument Avenue, Swampscott, MA 01907
Telephone: 781-596-8850
Email: _____

Description of project and relief being sought (use additional sheets as needed):

Site development and building construction for the New Elementary School serving Grades K-4.
Project located at the existing Stanley School site.

<u>Dimensional Requirements</u>	<u>Required</u>	<u>Existing</u>	<u>Proposed</u>
Max. Lot Coverage:	<u>25%</u>	<u>5%</u>	<u>22.4%</u>
Min. Open Space:	<u>25%</u>	<u>79%</u>	<u>29%</u>
Lot Area:	<u>20,000 SF</u>	<u>265,111 SF</u>	<u>265,111 SF</u>
Frontage:	<u>100 FT</u>	<u>35 FT</u>	<u>37 FT</u>
Front Yd. Setback:	<u>25</u>	<u>25</u>	<u>25</u>
Side Yd. Setback:	<u>10</u>	<u>10</u>	<u>10</u>
Rear Yd. Setback:	<u>25</u>	<u>25</u>	<u>25</u>
Gross Floor Area:	<u>153,855 SF</u>	<u>38,400 SF</u>	<u>153,855 SF</u>
Building Height/# of Stories	<u>35 FT / 2.5 Stories</u>	<u>37 FT / 2 Stories</u>	<u>59 FT / 3 Stories</u>

The undersigned hereby requests a hearing before the Special Permit Granting Authority, with this application and supporting documentation and certifies that this submittal is authorized by the owner of record and truly indicates the owner's intentions regarding the proposed project.


Authorized Agent

Owner of Record

Inspector of Buildings

Date

NEW ELEMENTARY SCHOOL

SWAMPSCOTT, MA

Received by Town Clerk
02/28/2022 10:54AM

REPORT CONTENTS
PLANNING BOARD SITE PLAN SUBMISSION
01 MARCH 2022



LAVALLEE | BRENSINGER ARCHITECTS
155 Dow Street, Suite 400
Manchester, NH 03101
603-622-5450
www.lbpa.com

TABLE OF CONTENTS

1. Town Counsel Letter – Site Plan Special Permit Application
2. Locus Plan
3. Open Area Calculations
4. Demolition Narrative
5. Time and Cost Statement
6. Development Impact Statement
7. Site Circulation Diagram
8. Drainage Calculations (bound separately)
9. Traffic Impact Report (bound separately)

1. Town Counsel Letter – Site Plan Special Permit Application

February 22, 2022

Robin Stein
rstein@k-plaw.com

Ms. Angela Ippolito, Chair
Swampscott Planning Board
Swampscott Town Hall
22 Monument Avenue
Swampscott, MA 01907

Re: New Elementary School Project – Site Plan Review

Dear Ms. Ippolito:

The Town has asked us to provide the Planning Board with guidance regarding the Town's application for a Site Plan Special Permit pursuant to Section 5.4.0.0 of the Town's Zoning By-laws (the "By-laws") relative to its new elementary school project (the "School Project") to be located at 10 Whitman Road, Swampscott, MA.

It is my understanding, that the Planning Board ordinarily reviews applications for Site Plan Special Permits under a traditional discretionary special permit standard whereby the Planning Board may, but is not required to, issue an approval. In my opinion, while the Planning Board may undertake a Site Plan Special Permit review of the School Project, that review is limited pursuant to G.L. c.40A, §3.

G.L. c.40A, §3 protects certain uses from application of local zoning bylaws:

No zoning ordinance or by-law shall . . . 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.

It is my understanding, that the Building Commissioner has already determined that the use is an educational use protected by G.L. c.40A, §3 and that pursuant thereto the project complies with all applicable dimensional controls. The property also located on Town-owned land in the A-2 zoning district where this use is allowed by right.

In my opinion, while the Town may, pursuant to G.L. c.40A, §3, subject the School Project to "reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements" of the By-laws, it may not require a special permit for the educational use proposed by the Town. "The Legislature did not

Ms. Angela Ippolito, Chair
Planning Board
February 22, 2022
Page 2

intend to impose special permit requirements, designed under c.40A, §9, to accommodate uses not permitted as of right in a particular zoning district, on legitimate educational uses which have been expressly authorized to exist as of right in any zone.” The Bible Speaks v. Board of Appeals of Lenox, 8 Mass. App. Ct. 19, 33 (1979). A copy of The Bible Speaks decision is enclosed herein for your review and information.

Although site plan review is not identified in G.L. c.40A, §3 as a permissible type of regulation, the Courts have upheld its application to uses protected thereby. In The Bible Speaks, the Court held that application of reasonable and specific regulations of the type spelled out in the statute (bulk and height of structures, etc.) may be reviewed through a site plan process provided that such regulations are applied in a reasonable, non-discretionary manner and without reference to other, more general site plan review criteria outside the scope of review authorized by G.L. c.40A, §3.

A requirement may not be applied, and in my opinion, would not be considered reasonable under G.L. c.40A, §3, if application of that requirement would substantially diminish or detract from the usefulness of the proposed use without appreciably advancing legitimate municipal concerns, or if the cost of compliance would be disproportionate to advancement of municipal concerns. See Trustees of Tufts College v. City of Medford, 415 Mass. 753, 757 (1993).

Accordingly, it is my opinion, that the Planning Board’s review of the Town’s application is limited to a non-discretionary application of “reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements” of the By-laws. Moreover, in my further opinion, the Planning Board cannot apply these requirements in a manner that would substantially diminish or detract from the usefulness of the proposed use without appreciably advancing legitimate municipal concerns, or if the cost of compliance would be disproportionate to advancement of municipal concerns, as doing so would not be considered reasonable under the statute as set forth above.


Please feel free to contact me if you have any questions

Very truly yours,



Robin Stein

RS/smm
Enc.
cc: Town Administrator

 KeyCite Yellow Flag - Negative Treatment
Distinguished by [Jewish Cemetery Ass'n of Massachusetts, Inc. v. Board of Appeals of Town of Wayland, Mass.Land Ct., August 13, 2010](#)
8 Mass.App.Ct. 19
Appeals Court of Massachusetts, Berkshire.

The BIBLE SPEAKS
v.
BOARD OF APPEALS OF LENOX (and
four companion cases.¹)

Argued April 25, 1979.

Decided July 3, 1979.

Synopsis

Appeals were taken from a judgment of the Superior Court, Berkshire County, George, D. J., in consolidated cases involving a municipality's attempts to enforce zoning restrictions on a private nonsectarian educational institution. The Appeals Court, Greaney, J., held that provisions of municipality bylaw were invalid as going beyond scope of bulk, dimensional, and parking regulations permitted to be imposed on educational uses under statute and placed board of zoning appeals in position to act impermissibly to impede reasonable use of institution's land for educational purposes.

Order accordingly.

West Headnotes (3)

[1] **Zoning and Planning** Continuance or change of use in general

Exclusively church-like properties may continue projects under construction without encumbrance by local zoning bylaws until June 30, 1978, irrespective of a town's earlier acceptance of statute authorizing town to impose regulations on sectarian educational uses or other religious uses which were not intrinsically accessory to a church. [M.G.L.A. c. 40A § 1 et seq.](#)

[9 Cases that cite this headnote](#)

[2] **Zoning and Planning** Schools and education

Nonsectarian educational institution was not exempt by reason of statute from town's application of restrictions adopted under statute which permits educational land or structures to be subject to reasonable regulations concerning bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements. [M.G.L.A. c. 40A § 1 et seq.](#)

[26 Cases that cite this headnote](#)

[3] **Zoning and Planning** Conformity to enabling statute

Provisions of municipality bylaw were invalid as going beyond scope of bulk, dimensional, and parking regulations permitted to be imposed on educational uses under statute and placed board of zoning appeals in position to act impermissibly to impede reasonable use of institution's land for educational purposes. [M.G.L.A. c. 40A § 1 et seq.](#)

[28 Cases that cite this headnote](#)

Attorneys and Law Firms

****279 *20** Hugh C. Cowhig, Town Counsel, Lee (David O. Burbank, Pittsfield, with him), for defendants.

Andrew T. Campoli, Pittsfield, for plaintiff, submitted a brief.

Before ***19** ARMSTRONG, GREANEY and KASS, JJ.

Opinion

GREANEY, Justice.

These appeals raise the question whether a town may require an application for a special permit for all new religious and educational uses, or changes in such uses, in residential districts consistent with the provisions of *G.L. c. 40A, s 3*, as appearing in *St.1975, c. 808, s 3*.² Specifically, we must decide whether the plaintiff, a sectarian educational institution, should have been granted building permits for certain uses attendant to its softball field, which is utilized by its elementary, high school, and college students, without the necessity of first applying under the local by-law for a ****280** special permit. We must also determine whether the Lenox board of appeals (board) could properly have conditioned the grant of permission to change the use of three of the plaintiff's existing buildings into classroom and dormitory space, either upon restrictions that affect the entire educational campus or upon restrictions that concern buildings which are not the subject of the special permit applications. All of these questions require examination of the extent to which a municipality by way of its zoning by-law may regulate sectarian and nonsectarian educational uses, a question that has remained relatively dormant since the decision in *Radcliffe College v. Cambridge*, 350 Mass. 613, 215 N.E.2d 892 (1966).

21** We first summarize the facts and procedural history necessary to an understanding of these issues. The Bible Speaks is a nonprofit religious and educational corporation organized under the laws of the State of Maine which has filed a certificate as a foreign corporation doing business in the Commonwealth under the provisions of *G.L. c. 181, s 4*.³ On its campus in Lenox (formerly the property of a private nonsectarian educational institution) it conducts a school for grades kindergarten through twelve (approved by the Lenox School Committee pursuant to the provisions of *G.L. c. 76, s 1*) and a three-year college to prepare students for the ministry.⁴ On May 7, 1976, the town of Lenox (town) at its annual town meeting accepted the provisions of the new zoning enabling act, *St.1975, c. 808* (hereinafter *c. 808*). At the same meeting the town amended its zoning by-law to include a section covering "Educational/Religious Use"⁵ which imposed a limitation ***22** *281** that all educational and religious purposes "may be permitted as a special exception only if the (board) so determines."⁶ On July 23, 1976, the plaintiff applied to the board for a special permit to change the use of one of its buildings from a gymnasium to two classrooms for its college; on August 3, 1976, it further sought to change the use of two other buildings from classrooms and a chapel to small dormitories. On October 15, 1976, the board granted all three special permits, subject to the conditions ***23** set out in full in the margin.⁷ The board went on to state in its decisions that "(t)he petitioner has complied with the first two paragraphs of

section 9.18 by filing" plans and information concerning the total operation of its campus as part of the applications for special permits for changes in use of the three existing buildings. The plaintiff filed a timely action in the Superior Court seeking review of the decisions and specifically objecting to the four general conditions (conditions 4A, B, C & D in the board's decision, note 7, *Supra*) upon which the special ***24** permits were granted in all three change-of-use cases.

On May 25, 1977, the plaintiff applied to the building inspector for a building permit to erect hooded lights thirty-five feet high⁸ on a softball field which is part of its campus. ****282** The building inspector refused to grant the permit. On the same date, the plaintiff requested a building permit to convert an existing shed near its ballfield into a snack bar primarily for the benefit of its students and others using the field. This request was also denied. The plaintiff appealed from both actions of the building inspector to the board. On August 29, 1977, the board issued separate decisions on the two appeals which are reproduced, insofar as material, in the margin,⁹ upholding the ***25** building inspector's denial of building permits on the bases that a change in a religious or educational use required application for a special permit and that the operation of the softball field at night was not "reasonably necessary for the functioning of the religious or educational uses." The plaintiff brought separate complaints against the building inspector and the board in both the snack bar and lights cases testing the validity of these actions.

Those actions were consolidated for trial along with the pending complaints involving the three change-of-use cases. A district court judge sitting in the Superior Court under statutory authority ruled: (1) that the board had no authority to grant or deny the permit for the snack bar (as a consequence he ordered the board to refrain from interfering with the operation of the plaintiff's snack bar); (2) that the denial of a permit to erect the lights was ***26** within the power of the board (as a result he affirmed the decision of the board); and (3) that the specific conditions imposed on the special permits for change of use of the three existing buildings were valid, as restatements of the substance of the plaintiff's applications, but that the remaining four general restrictions were attempts to impose limitations on the plaintiff's general educational activities and, as such, exceeded the authority of the board (as a result he ordered these conditions annulled). Judgments were entered accordingly. The board and the building inspector took appeals from the judgments in the snack bar cases; the board also appeals from the judgment in the change-of-use cases, and the plaintiff appeals from the judgment in the lights cases.

In substance, we are content with the judge's rulings that the plaintiff may utilize its existing shed as a snack bar and that the board exceeded its authority in imposing general restrictions upon the plaintiff as preconditions to a change of use of its **283 buildings. We disagree with the judge's conclusion that the board's decision as to the softball field lights was proper. Our disposition of the issues follows a different route from that taken by the judge below and is based on the conclusion that the local by-law exceeds tolerably permissible limits in its regulation of educational uses.

1. Applicability of G.L. c. 40A. At the outset we consider the plaintiff's contention that it is entirely exempt from the effect of the zoning enabling act, G.L. c. 40A, as formulated through c. 808, and as a result, that it is also exempt from any local zoning requirements enacted pursuant to c. 40A. It bases this contention in part upon the language which appears in c. 808, s 6, which provides, insofar as material, that "(t)he provisions of (G.L. c. 40A), as amended . . . shall not be deemed to affect any church or other facilities used for religious purposes in existence or under construction prior to (June 30, 1978)." It claims that the provisions of s 6 are designed to continue in effect the prior versions of G.L. c. 40A, which exempted *27 religious and educational uses from zoning control under local by-laws.¹⁰ In further support of this argument the plaintiff directs our attention to cases elsewhere which it cites as persuasive authority for the proposition that uses analogous to those present on its campus are primarily religious uses, exempt from any form of local zoning control. These decisions are four in number: *28 *Bishop v. Ashton*, 92 Idaho 571, 574-575, 448 P.2d 185 (1968), which held that a recreational complex built by a religious organization on the same grounds as its church building was within the scope of the term "church" in an ordinance permitting church use in a residential zone; *Slevin v. Long Island Jewish Medical Center*, 66 Misc.2d 312, 317-319, 319 N.Y.S.2d 937 (Sup.Ct.1971), which determined that a drug rehabilitation center located in a church parish house was a religious use; *Diocese of Rochester v. Planning Bd. of Brighton*, 1 N.Y.2d 508, 522-526, 154 N.Y.S.2d 849, 136 N.E.2d 827 (1956), which concluded that the decision of a local zoning board denying a permit to erect a church and a parochial school in a residential zone was arbitrary and unreasonable, because a church could not be unreasonably excluded from a residential zone, and a parochial **284 school was to be permitted wherever public schools were allowed; and *State ex rel. Covenant Harbor Bible Camp v. Steinke*, 7 Wis.2d 275, 281, 96 N.W.2d 356, 361 (1959), which held that a bible camp constituted a permissible use under an ordinance which authorized "churches . . . 'boarding-and-lodging parochial schools' (and) 'organized quasi-public recreational * * * buildings and

grounds'," and became a nonconforming use upon passage of an amendment deleting these provisions.

The plaintiff's argument, reduced to basics, appears to draw on three premises: (1) that it is primarily a religious enterprise because its principal function is to educate and train people for the ministry; (2) that c. 808, s 6, is the legislative restatement of the Dover Amendment and exempts projects under construction by religious organizations if started prior to June 30, 1978, irrespective of the town's earlier acceptance of c. 808; and (3) that because its oar was in the water on all the proposed activities in issue prior to June 30, 1978, the town could not impose any restrictions on their completion. We are not persuaded by this argument.

The cases relied upon by the plaintiff, read in connection with the provisions of c. 808, s 6, to establish the proposition that religious uses are generally exempted *29 from any zoning regulation, are all inapposite. The Bishop and Slevin decisions concerned themselves with proposed accessory uses to existing church facilities and did not involve sectarian educational facilities such as are in issue here. The Rochester decision is based on the peculiarities of the local by-law involved in that dispute, while the result in the Harbor Bible Camp case turns on the law relating to nonconforming uses.

Moreover, the plaintiff's argument also completely overlooks the presence of *G.L. c. 40A, s 3*, appearing in c. 808, s 3. This section provides, in pertinent part, that "(n)o zoning ordinance or by-law shall . . . prohibit, regulate or 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 . . . 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." It is this section, not c. 808, s 6, that is intended to synthesize the Dover Amendment and case law construing it (see note 10, Supra). *Section 6* must be viewed as a special nonconforming use provision of limited life to accommodate religious uses which were in the planning stage when c. 808 was enacted and which were likely to be built or under way by June 30, 1978.

^{[1] [2]} Reading ss 3 and 6 together, in the light of case law, and harmonizing the two sections in view of the purposes they seek to accomplish, we conclude that s 6 was designed to permit exclusively church-like properties to continue projects under construction without encumbrance by local zoning by-laws until June 30, 1978, irrespective of a town's earlier acceptance of c. 808, while s 3 was intended to authorize a town such as Lenox, upon its acceptance of c. 808, to impose the type of regulations

described in that section on sectarian educational uses or other religious uses which were not intrinsically accessory *30 to a church.¹¹ Considering the uses contemplated by the plaintiff against the broad definition of the term “education” fashioned by our case law (see e. g., *Radcliffe College v. Cambridge*, 350 Mass. at 618, 215 N.E.2d 892, 895, holding that parking, and the feeding and housing of college personnel is “within the broad scope of the educational powers,” and **285 *Harbor Schs. Inc. v. Board of Appeals of Haverhill*, 5 Mass.App. --, --^a, 366 N.E.2d 764 (1977), quoting from *Mount Hermon Boys’ Sch. v. Gill*, 145 Mass. 139, 146, 13 N.E. 354, 357 (1887), stating that “(e)ducation may be particularly directed to either the mental, moral, or physical powers and faculties, but in its broadest and best sense it relates to them all”), it is plain to us that all the plaintiff’s proposed uses are educational in nature, as purposes directly related to the functioning of the sectarian educational institution maintained on its Lenox campus. It follows, as a consequence, that the plaintiff is not exempt by reason of c. 808, s 6, from the town’s application of restrictions adopted under G.L. c. 40A, s 3, which permits educational “land or structures (to 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.”

2. Validity of the Lenox by-law. By employing the language just quoted, the Legislature set out the scope of permissible regulation of religious and educational land and structures. In the context of this case, Lenox may, through the mechanism of its zoning by-law, consistent with G.L. c. 40A, s 3, regulate the bulk of buildings on the plaintiff’s campus and impose dimensional and parking *31 requirements; and the building inspector may properly deny the plaintiff permits for any structure which does not comply with such “reasonable regulations.” But the town may not, through the guise of regulating bulk and dimensional requirements under the enabling statute, proceed to “nullify” the use exemption permitted to an educational institution. *Sisters of the Holy Cross of Massachusetts v. Brookline*, 347 Mass. 486, 494, 198 N.E.2d 624 (1964).

We turn then to the question whether ss 6 and 9.18 of the town’s zoning by-law, when taken together, impose the type of permissible bulk, dimensional, and parking limitations specified in G.L. c. 40A, s 3, as the defendants claim, or whether they impermissibly regulate the use of a sectarian educational institution, as the plaintiff claims.

The board points out that s 9.18 of the by-law sets out, under a heading of “Regulations,” specific limitations of

the sort expressly permitted under G.L. c. 40A, s 3 (see note 5, Supra). There would be no difficulty if these constituted the only limitations which the town applied to educational institutions such as the plaintiff’s campus. However, the by-law imposes several other requirements which apply to the plaintiff’s educational uses within s 9.18 and s 6. Section 9.18 also requires every nonmunicipal educational institution planning any change in its buildings and structures to file with the board a site plan and an informational statement designed “to minimize the probable impact of such uses upon the town in general and upon the character of the specific neighborhood.” The site plan calls for a delineation of existing buildings, parking areas, sewer and water lines, trees over twelve inches in diameter, “and any other significant existing man-made or natural features”; the informational statement must include “the probable effects of the use on (such factors as) . . . changes in the number of legal residents, . . . increases in municipal service costs, . . . changes in tax revenue, . . . land erosion or loss of tree cover, . . . character of surrounding neighborhood, *32 . . . master plan of the town, . . . (or) any pertinent regional plans.”¹² The requirement of a site plan and the type of development prospectus required by the informational statement would be perfectly appropriate for consideration of proposed subdivisions under the Subdivision Control Law, G.L. c. 41, s 81K et seq., or for the evaluation **286 of cluster and planned unit developments under the zoning law, G.L. c. 40A, s 9, as appearing in c. 808, s 3. But there is nothing in the language of G.L. c. 40A, s 3, which contemplates the requirement of site plans and informational statements as monitoring devices for educational uses, and it is quite obvious that an educational campus of the type under consideration in this case is neither a subdivision nor a project in the category of a cluster or planned unit development. Section 9.18 in its entirety goes beyond a collation of all of the reasonable bulk and dimensional requirements which a by-law can legitimately impose on educational buildings and districts.

The full impact of the requirements of s 9.18 must also be appraised in light of the provisions of s 6 of the by-law, which makes educational uses, such as the plaintiff’s, special exceptions dependent on the discretionary grant of a special permit by the board.¹³ By reliance on the criteria spelled out in the informational statement, the board is essentially attempting to exercise planning board functions and pursuing its own notions of land use planning, and to the extent that those notions become inconsistent with the presence or expansion of educational *33 institutions within the town, the board will be able to fashion restrictions that subordinate the educational use to the board’s planning goals. Any such restrictions imposed under the authority of the by-law may well have the effect

of nullifying, or seriously diminishing, the educational institution's entitlement to reasonable growth. It also, as a practical matter, enables the town to exercise its preferences as to what kind of educational or religious denominations it will welcome, the very kind of restrictive attitude which the Dover Amendment was intended to foreclose. The board's decisions in these cases bear out these observations by indicating that the board applied the by-law to make its own determination of what constituted an educational use, and once that determination was made, to impose conditions in areas outside of those specified in the enabling statute.

In our opinion, the provisions of the by-law taken together invest the board with a considerable measure of discretionary authority over an educational institution's use of its facilities and create a scheme of land use regulation for such institutions which is antithetical to the limitations on municipal zoning power in this area prescribed by G.L. c. 40A, s 3. The Legislature did not intend to impose special permit requirements, designed under c. 40A, s 9, to accommodate uses not permitted as of right in a particular zoning district, on legitimate educational uses which have been expressly authorized to exist as of right in any zone.¹⁴

¹⁴ We conclude, therefore, that the provisions of the Lenox by-law go well beyond the scope of bulk, dimensional, and parking regulations permitted to be imposed on educational uses by G.L. c. 40A, s 3, and place the board in a position to act, as it did in this case, impermissibly *34 to "impede the reasonable use of the (institution's) land for its educational purposes." *Radcliffe College v. Cambridge*, 350 Mass. at 618, 215 N.E.2d at 896.

3. Relief. The question of a proper disposition of the cases remains. The plaintiff's multiple actions are susceptible to consideration as requests for declaratory relief (*Woods v. Newton*, 349 Mass. 373, 375, 208 N.E.2d 508 (1965)) and, in reaching a disposition, we consider it appropriate to treat them in that posture. Despite the presumption of validity accorded to municipal zoning ordinances (*Crall v.*

Leominster, 362 Mass. 95, 102, 284 N.E.2d 610 (1972)), we are satisfied that portions of the Lenox by-law are in conflict with the zoning enabling act. It is also clear to us that those portions of s 9.18 of the by-law which impose bulk, **287 dimensional, and parking restrictions on educational uses would be valid as the type of reasonable regulations authorized by G.L. c. 40A, s 3, if they stood apart from the embroidery contained in the provisions of the by-law requiring site plans, information statements, and special permits for educational uses. We determine, however, that the bulk, dimensional, and parking regulations are severable from the balance of s 9.18, and from the provisions in s 6, and are capable of enforcement as if they were limitations applicable to all structures of a particular class, including educational buildings and structures.

The judgments are reversed, and new judgments are to be entered, declaring that s 6 and those portions of s 9.18 of the Lenox zoning by-law which impose the requirements of a site plan, informational statement, and special permit before religious and educational institutions can expand their uses are invalid; that the provisions of s 9.18, imposing bulk, dimensional, and parking requirements are valid; that the plaintiff is not required to apply for a special permit as a condition precedent to obtaining a building permit for the construction of its softball field lights; that the plaintiff is not required to obtain either a special permit or a building permit in order to use its shed as a snack bar; and that the conditions annexed to *35 the three change-of-use cases (denominated in the decisions dated October 15, 1976 as 4A, 4B, 4C and 4D) are annulled, with the notation that occupancy of the buildings can be conditioned on compliance with the applicable parking requirements in s 9.18.¹⁵

So ordered.

All Citations

8 Mass.App.Ct. 19, 391 N.E.2d 279

Footnotes

- 1 Two of the companion cases are also against the board of appeals, and two are against the building inspector of Lenox.
- 2 That section provides in relevant part that "(n)o zoning ordinance or by-law shall . . . regulate or 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; 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."
- 3 The parties stipulated that The Bible Speaks was organized on February 21, 1973, under Me.Rev.Stat.Ann. tit. 13, s 71 (1965); that it was certified as a foreign corporation by the Secretary of the Commonwealth on March 8, 1976; and that

in 1976 it received a certificate of exemption under [G.L. c. 64H, s 6\(D\)](#) and (E), from the Sales and Use Tax Bureau.

4 There appears to be no dispute that it conducts on its campus a bona fide educational enterprise.

5 Section 9.18 of the zoning by-law ("Educational/Religious Use") provides as follows:

"Any non-municipal educational use or any religious use is subject to the following regulations: recognizing that educational and religious uses may exist in residential areas, the following regulations are drawn to minimize the probable impact of such uses upon the town in general and upon the character of the specific neighborhood. In order to assess the probable impact, a site plan and informational statement must be presented to the permit-granting authority at the time of the initial filing. The site plan at a scale of 1 = 40', prepared by a registered architect, landscape architect, or civil engineer, must show existing buildings, roads, parking areas, sewer and water lines, drainage systems, water courses, trees over 12 in diameter at breast height, and any other significant existing man-made or natural features.

"The informational statement shall detail the probable effects of the use on the following: (1) attendance at public schools; (2) increase in vehicular traffic; (3) changes in the number of legal residents; (4) increases in municipal service costs; (5) load on public utilities or future demand for them; (6) public safety, police, and fire protection; (7) changes in tax revenue; (8) changes in surface drainage; (9) increased consumption of water; (10) increased refuse disposal; (11) land erosion or loss of tree cover; (12) character of surrounding neighborhood; (13) master plan of the town; (14) any pertinent regional plans."

"Any non-municipal educational use or any religious use is subject to the following regulations:

REGULATIONS

1. Maximum building height 2 stories or 35 feet.

2. Maximum building coverage 4%.

3. Setback two hundred (200) feet buffer surrounding the property to be kept undeveloped except for entrance and exit roadways.

4. Major access roads and major parking areas subject to frequent use day or night shall be paved. Major roads are to be eighteen (18) feet wide and shall not exceed a 7 1/2% Grade.

5. Parking areas shall be screened as provided in [Section 2](#) definitions screening (a) and (c).

6. Parking areas shall be within three hundred (300) feet of the building to be served.

7. Parking requirements:

A. Places of assembly 1 space for every three (3) seats.

B. Classrooms and/or dormitories

Grades 1-10 1 space for each staff member;

Grades 10-12 1 space for each staff member plus 1 space for every two students.

College 1 space for each staff member plus two (2) spaces for every three (3) students."

6 [Section 6](#) of the zoning by-law of the town of Lenox (as amended 1976). This limitation was accomplished by amending the table of uses in [s 6](#) of the by-law to indicate that educational or religious purposes in residential districts are "xa" uses, permitted only by special exception, as contrasted with "x" uses, which are permitted as of right.

7 "Oct. 15, 1976

"Decision of the Board of Appeals on the appeal and petitions of the Bible Speaks for

1. A change in use of Building No. I, The Old Gymnasium, to two classrooms and a lecture hall.

2. A change in use of Building No. 15, formerly Bassett Hall, from classrooms to dormitory rooms.

3. A change in use of Building No. 12, formerly Thayer Hall, from chapel and storage space to five dormitory rooms."

"Special permits are granted for each of these three petitions, subject to the following restrictions:

I. Building No. I, The Old Gymnasium

A. The use and occupancy of this building is limited to 300 persons.

2. Building No. 15, formerly Bassett Hall

A. The occupancy of this building is limited to 13 couples and their children.

B. There shall be no kitchen facilities provided and meals shall not be served on the premises except in an emergency.

3. Building No. 12, formerly Thayer Hall

A. The occupancy of this building is limited to 3 couples and 10 single students.

B. There shall be no kitchen facilities provided and meals shall not be served on the premises except in an emergency.

4. The following restrictions apply to all three special permits:

A. Sufficient parking spaces are to be provided and screened to meet the requirements of the Zoning By-Laws, Section 9.18, Regulations 4, 5, 6, and 7. Reference is made to the parking site plan filed with the board.

B. The total number of students and staff living at the 40 Kemble Street facilities is limited to 325.

C. Any major differences in enrollment, residents, buildings, campus, or plans from those outlined in the master plan, drawings or informational statement presented to the Planning Board, dated June 16, 1976, shall be brought to the

attention of the Planning Board and Zoning Board of Appeals immediately.

D. A sewer holding tank is to be constructed to collect the flow from Buildings No. 4 (St. Martin's Hall), No. 19 (Monks Hall) and No. 20 (Field House) during periods of high sewage flow and to release the sewage into the Town mains during periods of low volume flow. The capacity of this tank is to be determined by a licensed and certified engineer or the Tri-Town Sanitary Engineer."

Other portions of the decision express the board's opinion that the proposed use of Building No. 1 as a dormitory for thirteen married couples is "marginal from the standpoint of the zoning by-laws, as it makes the use of the building very close to apartments," but that the uses are "not deemed to be detrimental to the area or the community, subject to the restrictions and qualifications in this decision."

- 8 Section 7.6.2 of the zoning by-law states that "(i)n all zoning districts, any private outdoor lighting fixture, whether temporary or permanent, shall be so placed or hooded that the light shall not be noxious or offensive to the neighborhood," while s 8.4.5 provides that the maximum building or structure height in all districts is thirty-five feet.

- 9 "Decision

"The appeal of the Bible Speaks, 40 Kemble Street, from the refusal of the Building Inspector to issue them a permit for the erection of hooded lights at 35 ft. in height around their softball field, located in an area near Stockbridge Road, is Denied.

"The Zoning Bylaws, as amended May 7, 1976 stipulate that changes in religious and educational uses require a specific permit in all zoning districts. It is the Board's opinion that the change from an unlighted softball field to one that is lighted, specifically for the purpose of extending the playing hours into the night, would constitute a significant change in use and therefore would require a special permit.

"The petitioner's point that the lighting of this softball field is an adjunct to the operation of its school was not proven. The lights are clearly meant for nighttime use and the petitioner has stated that they will be used to extend the hours of play for the regional softball league (of which the Bible Speaks is a member). The operation of such lights is not considered to be reasonably necessary for the functioning of the religious or educational uses."

"Decision

"The appeal of the Bible Speaks, 40 Kemble Street, from the refusal of the Building Inspector to issue to them a permit to open a snack bar near their softball field is Denied.

"The Zoning Bylaws, as amended May 7, 1976 stipulate that changes in religious and educational uses require a special permit in all districts, (See Bylaw Sections 6.3 and 6.6B). It is the Board's opinion that the change from a storage shed (as indicated in their master plan) to a vending operation would constitute a change in use significant enough to require a special permit.

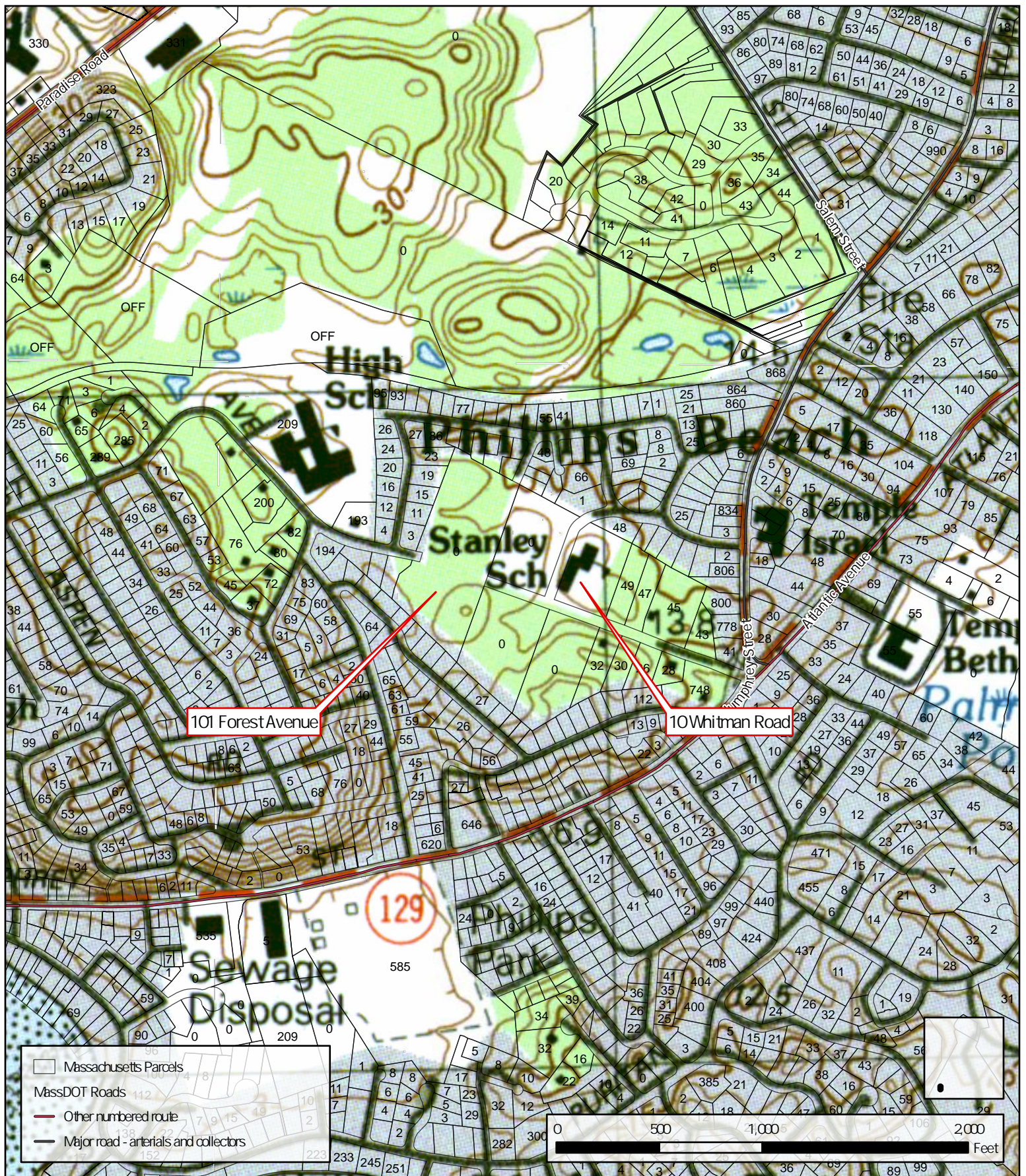
"Zoning Bylaw Section 9.18 on religious & Educational Uses requires that such an organization file a site plan and an informational statement with the Zoning Board of Appeals when it initially files a petition. The Bible Speaks filed such a site plan and informational statement on or about June 16, 1976. In these papers the old use of the building in question (Identified as No. 22 Boat House) was for storage"

- 10 The history of the special zoning status for religious and educational uses is familiar lore to those conversant with the topic of land use regulation and may be summarized as follows. In 1933, the town of Dover adopted a zoning by-law prohibiting the erection, alteration, or use of any building or premises in a residential district for any purpose except enumerated purposes which, in addition to "1. detached one-family dwellings," included "3. church," and "4. educational use." On March 4, 1946, this by-law was amended in subdivision 4, so that the subdivision read, "4. educational use; if non-sectarian and if not organized or operated for private profit." In 1950, St.1950, c. 325, inserted the following language in [G.L. c. 40, s 25](#), a predecessor of the present [c. 40A, s 3](#): "No by-law or ordinance which prohibits or limits the use of land for any church or other religious purpose or which prohibits or limits the use of land for any religious, sectarian or denominational educational purpose shall be valid." In [Attorney General v. Dover](#), 327 Mass. 601, 100 N.E.2d 1 (1951), the Supreme Judicial Court was called upon to consider the impact of this amendment (which is widely referred to as the Dover Amendment) on the Dover by-law. The court stated that the effect of the by-law, if valid, "would be to prohibit any use of land or buildings in a residential district for sectarian educational purposes" and agreed with the Attorney General's contention that "if the amended (by-law) was ever valid, it became invalid immediately upon the taking effect of the statute of 1950." *Id.* at 603-604, 100 N.E.2d at 3. In [Sisters of the Holy Cross of Massachusetts v. Brookline](#), 347 Mass. 486, 198 N.E.2d 624 (1964), the court struck down the application of single family residence dimensional requirements to a sectarian educational institution as having the effect of virtually nullifying the Dover Amendment, though stating in dicta that there might be instances in which a municipality might permissibly impose dimensional requirements upon buildings that serve educational or religious purposes. In [Radcliffe College v. Cambridge](#), 350 Mass. 613, 215 N.E.2d 892 (1966), the court refused to construe the Dover Amendment as precluding the application of offstreet parking requirements contained in the Cambridge zoning ordinance to the plaintiff, ruling that the ordinance did not impede the reasonable use of the college's land for its educational purposes. Two other cases deal with peripheral aspects of the topic. See [Worcester v. New England Institute and New England School of Accounting, Inc.](#), 335 Mass. 486, 140 N.E.2d 470 (1957), [Chicopee v. Jakubowski](#), 348 Mass. 230, 202 N.E.2d 913

(1964).

- 11 A simple example will elucidate the distinctions further. Lenox accepted c. 808 on May 7, 1976. From that date until June 30, 1978, a church if it desired could, by virtue of [s 6](#), construct a fifty-foot steeple despite the imposition of height restrictions in the by-law. However, if it conducted a college, the church might not be able to construct a high rise dormitory on its campus by reason of the restrictions imposed under the authority of [s 3](#). The two sections serve to denominate religious and sectarian educational uses as two separate categories.
- a Mass.App.Ct.Adv.Sh. (1977) 1012, 1018.
- 12 In addition, the “informational statement” also requires the educational institution to include an assessment of the probable impact of its project on attendance in the public schools, increase in vehicular traffic, increases in municipal service costs, load on public utilities or the future demand for them, public safety, police and fire protection, changes in surface drainage, increased consumption of water and increase in refuse disposal.
- 13 The special exception provisions of the by-law are set forth in note 6, Supra.
- 14 The board’s argument that [G.L. c. 40A, s 9](#), authorizes a special permit mechanism to afford the town leeway in regulating uses not otherwise permitted as of right in a zone simply overlooks the limitations on the town’s zoning power as to religious and educational uses contained in [c. 40A, s 3](#).
- 15 Of course, all the proposed uses contemplated by the plaintiff in this case, and in particular the uses intended for the buildings, are subject to the requirements of any other applicable State or local codes such as (without limitation) health and sanitary codes, fire codes and regulations, and the State Building Code.

2. Locus Plan



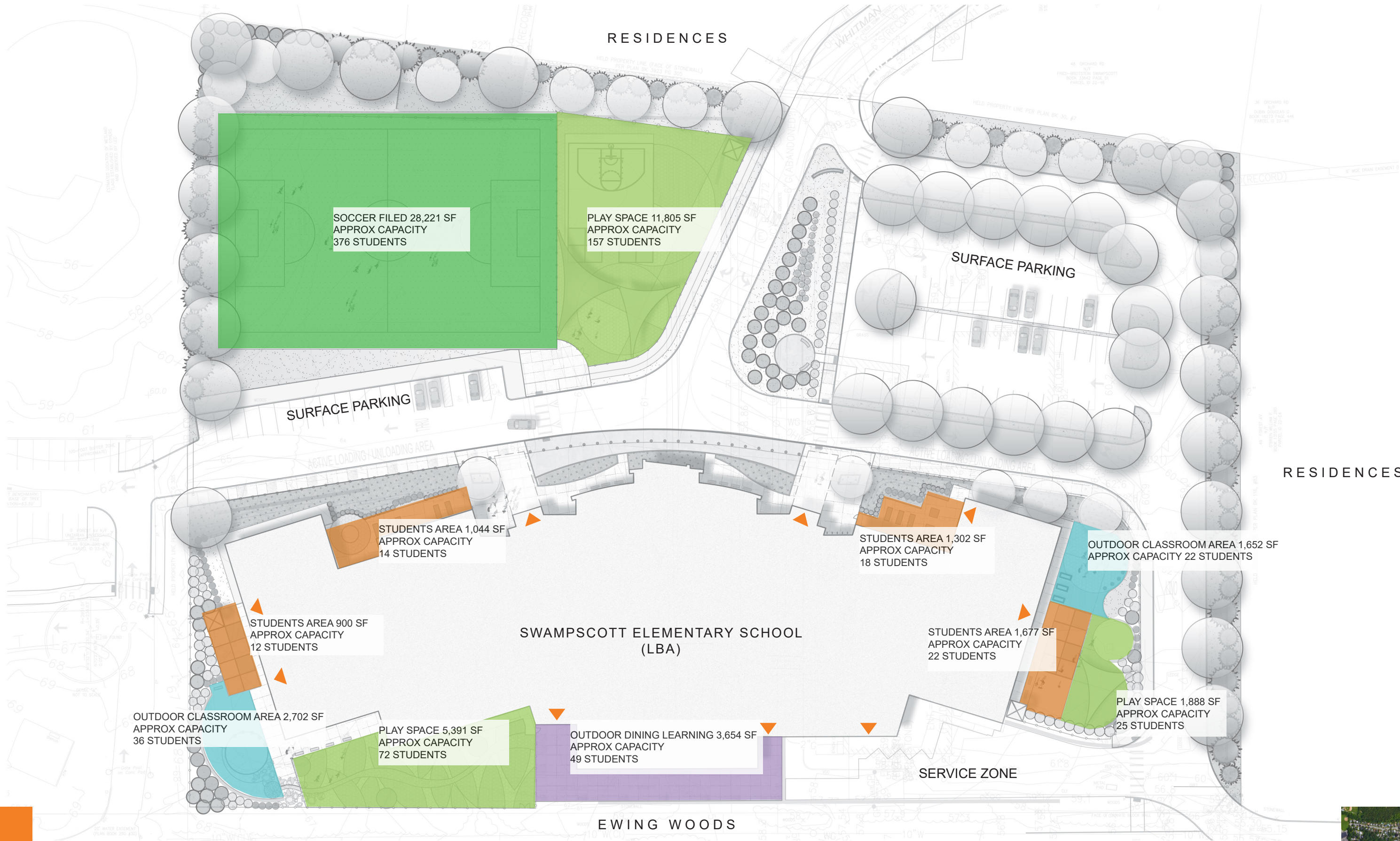
USGS Locus Map New Elementary School 10 Whitman Rd and 101 Forest Ave, Swampscott, MA

2/17/2022

3. Open Area Calculations

Refer to Drawing C-003 Open Space Calculations.

The following diagram provides additional information on site program area sizes and capacities.



4. Demolition Narrative

The proposed scope of demolition for the New Elementary School project includes:

- Demolition of the existing Stanley School in its entirety. The Swampscott School District will identify any items they wish salvaged.
- Demolition of all existing site improvements on the Stanley School site, including vehicular paving, pedestrian paving, playground equipment, stairs, benches, fencing, bleachers, select utilities, etc. Refer to Civil Drawing C-100 Site Demolition, Erosion Control and Sedimentation Plan for more information.
- Removal of existing trees and shrubs include those near the existing school building and only as needed at the site perimeter to make vehicular and pedestrian connections to the neighborhood. Remaining existing vegetation at the site perimeter will be maintained.

5. Time and Cost Statement

- Projected Schedule and Phasing
 - Early Site Construction Phase – July 2022 through September 2022
Scope will include demolition of the existing Stanley School, site clearing, ledge removal and earthwork to prepare the building pad area for the main building contract.
 - Main Building Contract – October 2022 through June 2024
Construction of the New Elementary School and all associated sitework.
- Project Budget
 - The approved construction budget is \$77,937,159.00 (Seventy-Seven Million, Nine-Hundred Thirty-Seven Thousand, One-Hundred Fifty-Nine dollars.)

6. Development Impact Statement

- Physical Environment
 - Vegetation – refer to the existing conditions surveys for areas of vegetation.
 - Topography – the school site is generally flat. The site is divided by Whitman Road, with the area to the west of Whitman approximately 4-5' higher than the east area. The high point of the site is at the southwest corner.
 - Unusual or Historic Features – there are no unusual or historic features. A Project Notification Form for the project, including the demolition of the existing Stanley School, was submitted to the Massachusetts Historical Commission, who had no comment on the project.
 - Viewpoints – views from the school site are generally contained to the site itself as most of the perimeter is defined by mature trees and vegetation.
 - Trails and Open Space – the western side of the site consists of an open field area with two (2) Little League baseball fields. At the eastern side of the site around the school are the school playground areas. The Ewing Woods public conservation land is adjacent to the site at the south.
 - Indigenous Wildlife – per review of the MassDEP Priority Resources Map, no Priority Habitat of Rare Species or Estimated Habitat of Rare Wetlands Wildlife are located on the site. Refer to the Notice-of-Intent submittal for more information.
- Surface Water and Subsurface Conditions
 - Existing Waterbodies and Wetlands – refer to the drainage calculations / stormwater report for information.
 - Alterations to Shorelines or Wetlands – not applicable.
 - Soil and Water Conditions – refer to the Geotech subsurface investigations information that is included within the drainage calculations / stormwater report. GeoEnvironmental investigations noted existing fill areas that will be addressed during construction.
 - Ground and Surface Water Impacts – refer to the drainage calculations / stormwater report for information.
 - Long-Term Sea Level Rise and Storm Surge Effects – not applicable
- Circulation Systems – refer to the Traffic Impact Report for detailed information.
- Support Systems
 - Water Distribution – A new 8-inch diameter water main will be constructed through the site, connecting to both the existing main in Whitman Road and to the existing main in the unimproved portion of Forest Avenue. The new main will maintain the existing loop already in existence and will provide the school with a more resilient water supply. New site hydrants, connected to the new site main, will be installed in locations as approved by the Fire Department. The

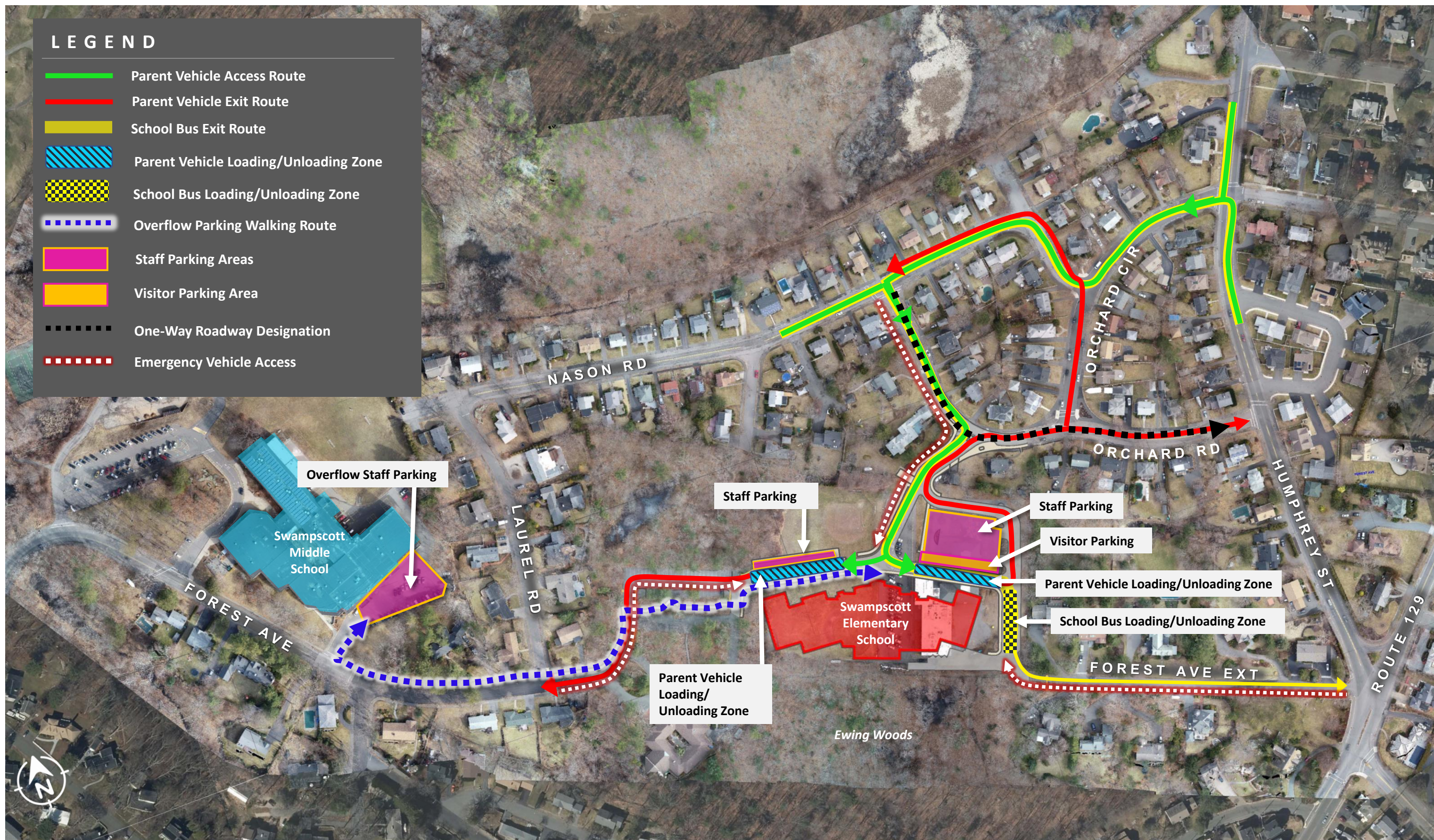
school will be supplied with new separate domestic and fire services from site main.

- Sewage Disposal – A new sanitary sewer system will be constructed as part of the site improvements. The sewer system will consist of PVC gravity lines connected to the town sewer main in Whitman Road. A precast concrete grease-trap will be installed in the service area of the building to address flows from the kitchen and cafeteria.
- Refuse Disposal – the building service and loading dock area will provide space for three (3) containers for trash, compost and recyclable materials. Pickup services will be provided by the School District collection vendors.
- Fire Protection – the new building and site development will provide hydrants, Fire Dept. connections and a complete building sprinkler system. Access to the site, building perimeter access and specific details for the sprinkler and communications systems have been reviewed and coordinated with the Swampscott Fire Department. On-site fuel storage of approximately 2000 gallons is limited to the integrated diesel fuel tank for the backup electrical generator.
- Recreation – proposed recreational resources on the school site include a U10 Soccer Field and a Community Playground.
- Schools – no increase to the student population from this project. The New Elementary School has a design enrollment of 900 K-4 students.

- Phasing

- Erosion and Sedimentation Control – refer to Civil Drawing C-100 Site Demolition, Erosion Control and Sedimentation Plan and Civil Drawing C-600 Site Erosion Control and Sedimentation Details for more information.
- Construction Phase Site Safety – the Owner's Project Manager is developing a comprehensive Construction Management Plan that will be incorporated into the construction contract documents for both the early site and main building contracts. This plan will include requirements for general site safety, demolition, blasting, Community communication protocols, logistic plan requirements, etc. To secure the construction site, construction fencing will be installed at the entire school site perimeter with lockable construction entrance gates.
- Required Public Improvements – refer to the Traffic Impact Report and recommendations for Off-Site Roadway Improvements for more information. Off-Site improvements will be performed through separate construction contracts as coordinated by the Town.

7. Site Circulation Diagram



8. Drainage Calculations (bound separately)

9. Traffic Impact Report (bound separately)