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July 8, 2020

T.E. Hopkins, Chair
Oak Bluffs Planning Board
P.O. Box 1327
Oak Bluffs, MA 02557

Re: Martha's Vineyard School District's Application for
For Site Plan Review – Field project

Dear Mr. Hopkins:

You have requested that I address the impact of the so-called "Dover Amendment" on the Planning Board's authority under Section 10.4 of the Oak Bluffs Zoning By-laws governing site plan review as it pertains to the Martha's Vineyard Regional High School's ("MVRHS") application for "the renovation and construction of athletic fields at [MVRHS](the "Project")". My conclusions are as follows.

Paragraph 2 of § 3 of c. 40A (the so-called "Dover Amendment") provides, in part, as follows:

> "No zoning ordinance or by-law shall . . . prohibit, regulate or restrict the use of land or structures . . . for educational purposes . . . .; 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."

MVRHS submitted a letter to the Board dated February 10, 2020 ("[t]he Opinion Letter"), which states that: "The Planning Board may consider the[ ] criteria [set forth in Section 10.4.8 of the ZBL] for purposes of its Site Plan Review, but may not expand its review beyond these criteria. It must be noted that nowhere in these criteria or the [ZBL] in general is the Planning Board authorized to determine the type of playing field installed in the school athletics facilities . . . . However, the Planning Board may impose reasonable conditions at the expense of the applicant, including performance guarantees, to promote the . . . objectives, provided such conditions comply with [the] Dover Amendment, M. G. L. c. 40A, § 3 . . . ." (Opinion Letter at 2). The Opinion Letter continues to state that the Project is "protected under the [Dover Amendment] (id. at 5) and that the Board "cannot impose conditions and/or other limitations on [MVRHS's] use of its school athletic facilities, and/or design . . . [which] would include, without limitation, those related to aesthetics, lighting, noise, hours of operation and/or functionality or design choices which actually impede or otherwise negatively impact the [MVRHS's] use of its school athletic facilities . . . ." (Id. at 4-5.)

The Dover Amendment aims to strike a balance between legitimate municipal goals advanced by reasonable zoning regulations and protected uses -- such as educational ones. Trustees of Tufts College. v. City of Medford, 415 Mass. 753, 757 (1993); see also Campbell v. City Council of Lynn, 415 Mass. 772, 778 (1993). Under this framework, zoning regulations containing use restrictions that "facially discriminate against the use of land for educational purposes" are obvious violations of the Dover Amendment and will not be applied to protected uses. Trustees of Tufts College v. City of Medford, 33 Mass. App. Ct. 580, 581 (1992). Reasonable dimensional requirements, or other areas expressly mentioned in the Dover Amendment (e.g., parking), still apply to Dover protected uses so long as the zoning restrictions do not "have the practical effect of nullifying the use exemption" contained in the Dover Amendment. Id. at 582. When an institution considers a dimensional requirement unreasonable as applied to its project, it bears the burden of "demonstrating that compliance [with the zoning regulation] would substantially diminish or detract from the usefulness of a proposed structure ... without appreciably advancing the municipality's legitimate concerns." *Tufts*, 415 Mass. at 759. This demonstration is heavily fact-specific, depending on the context of each case. Id.

Under existing law, the Board's authority is limited to those subject matter

areas identified in Section 10.4.8 that are reasonably related to dimensional regulations and/or parking. In The Bible Speaks v. Board of Appeals of Lenox, 8 Mass. App. Ct. 19, 34 (1979), the Appeals Court ruled that that "those portions . . . 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". The Appeals Court's rationale was grounded on two factors: 1.) "there [was] nothing in the language of G.L. c. 40A, § 3, which contemplates the requirement of site plans and informational statements as monitoring devices for educational uses" (id. at 32); and 2.) site plan requirements "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 regulations for such institutions which is antithetical to the limitations on municipal zoning power in this area prescribed by G.L. c. 40A, § 3." Id. at 33. See also Trustees of Tufts College v. Medford, 415 Mass. 753, 765, 616 N.E.2d 433 (1993) (citing The Bible Speaks, *supra,* in holding that the Land Court judge properly declared invalid the site plan and special permit requirements of the ordinance as applied to any future, unspecified projects on Tufts campus).

I have not located a case in which an appellate court solely reviewed a site plan requirement "that did not exist in connection with a special permit requirement" (Bay Farm Montessori Academy, Inc. v. Town of Duxbury, 75 Mass. App. Ct. 1103, at * 2 (Mass. App. Ct. 2010) (Rule 1:28 opinion)(emphasis added)); however, there is no case holding that broad site plan review authority – similar to the type of discretionary control vested in a traditional special permit granting authority - passes muster in the face of a Dover Amendment challenge. Id. ("the judge here properly noted that the defendants failed to point to any precedent that suggests that a site plan provision on its own might be valid"). Accordingly, I am constrained to advise you that you it is more likely than not that the Board is precluded from exercising its power to review the Project beyond an examination of any dimensional limitations and an analysis of the proposed parking plan, consistent with the limits imposed by the Dover Amendment. MVRHS' submission to the Board, through its counsel, appears to concur with my assessment.

In the following paragraph, I will provide guidance on your authority, as modified by G. L. c. 40A, § 3, with respect to each of areas that Section 10.4.8 directs the Board to consider when addressing a site plan review application:

1. *Minimize the volume of cut and fill, the number of removed trees 6" caliper or larger, the length of removed stone walls, the area of wetland vegetation displaced, the extent of storm water flow increase from the site, soil erosion, and threat of air and water pollution;*

   This subsection is outside of your scope of review.

2. *Maximize pedestrian and vehicular safety both on the site and egress from it;*

The Dover Amendment expressly grants local zoning officials the power to impose reasonable regulations regarding "parking". In Trustees of Boston College v. Board of Alderman of Newton, 58 Mass. App. Ct. 794, 809-810, review denied, 440 Mass. 1108 (2003), for example, the Appeals Court summarized the inquiry as it applied to analyzing a local board's power to review parking plans under a site plan review provision, as follows:

> "To the degree reasonably possible, the Dover Amendment seeks to accommodate protected uses with critical municipal concerns, which include provision of adequate parking. Further, there is no requirement that, to be enforceable, zoning regulations (including the parking regulations here) must be tailored specifically for educational uses. Although we agree that the judge correctly held invalid under the Dover Amendment the parking regulations as they were strictly applied to the MCP to require up to 357 additional spaces . . . we cannot at the same time say that reasonable accommodation on parking cannot be had under those regulations. We should attempt to give a local zoning requirement validity if that can be done without straining the common meaning of the terms employed."

(Citations and internal quotations omitted.) Thus, while the Court held invalid a requirement that the applicant had to provide a large number of additional spaces, it also suggested that a measure of parking regulation fell within the scope of the board's site plan review authority. Accordingly, it is reasonable for the Board to set reasonable limitations on parking – or require additional parking, depending on the proposed volume of use of the proposed facility. It is reasonable for the Board to assess the issue of safe egress and access to the parking sites as related to its power to set reasonable regulations on parking; however, I am again constrained again to note that the case law has not defined the contours of this authority and the

Board's consideration should not take on the rigor of what would be involved in either a special permit or subdivision control application. In other words, to the extent that examination of egress and access are reasonably related to "reasonable regulation" of parking, they can be considered.

3. *Minimize obstruction of scenic views from publicly accessible locations;*

Outside of the Board's scope of review.

4. *Minimize visual intrusion by controlling the visibility of parking, storage, or other outdoor service areas viewed from public ways or premises residentially used or zoned;*

See number 2 as it pertains to parking.

5. *Minimize glare from headlights and lighting intrusion;*

Outside of the Board's scope of review.

6. *Minimize unreasonable departure from the character, materials, and scale of buildings in the vicinity, as viewed from public ways and places;*

Outside of the Board's scope of review.

7. *Minimize contamination of groundwater from on-site waste-water disposal systems or operations on the premises involving the use, storage, handling, or containment of hazardous substances; and*

Outside of the Board's scope of review.

8. *Ensure compliance with the provisions of this Zoning By-Law, including parking, signage, landscaping and environmental performance standards.*

See number 2 as it pertains to parking.

Note that Section 10.4.3(2) provides that applicants for site plan review "shall also submit a copy of the site plan review to the Sewer Commission,

applicable water district, Board of Health . . . and the Conservation Commission for their advisory review and comments." The Dover Amendment only places limitations on a municipality's authority under zoning; it does not extend to municipal boards that may have jurisdiction over various aspects of the Project. It is within the Board's authority to seek comment and review from the other local boards or commissions in order to facilitate their independent assessments of the Project, and those boards or commissions retain their statutory authority and jurisdiction, to the extent applicable.

You have also asked me whether the Dover Amendment applies here because the applicant's materials suggest that the facilities may be used, at times, for non-educational/school related functions, such as non-school athletic events where admission fees are charged. Protection under the Dover Amendment is not forfeited simply because an educational institution allows other, non-educational entities to use a facility. The Supreme Judicial Court has held that "we have required not only that a proposed use of land have educational purposes, but also that these purposes be 'primary or dominant'. . . . Thus, [an applicant claiming Dover Amendment protection] must show not that [its facility] will serve educational purposes, but that such purposes predominate over [the facility's] . . . [non-educational- recreational components." Regis College v. Town of Weston, 462 Mass. 280, 287-88 (2012). The question is, therefore, whether the MVRHS' use of the facility predominates over other non-educational uses.

The Courts have not established a clear test for determining this issue, and the law is limited on the question. It would be appear that the facility will be used by students daily for practices, games, and meets, as well as classes. The evidence strongly suggests that the facility will be used for a predominantly educational purpose. The Board is within its rights to inquire during the public hearings on this topic to ensure that the applicant is properly invoking the Dover Amendment. The question whether the educational use predominates can be revisited when the Board is in possession of the fully range of facts and information.

Finally, as I noted in my correspondence of February 21, 2020, the Dover Amendment does not limit the Martha's Vineyard Commission's (MVC) scope of review, as its authority is grounded in special legislation (MVC Act), not c. 40A. See, e.g., Town of Tisbury v. Martha's Vineyard Commission, 27 Mass. App. Ct. 1204 (1989)(MVC reviewed a development proposal for a 47 acre farm and greenhouse as a development of regional impact (DRI) even though the use

constituted a protected agricultural use under G. L. c. 40A, § 3). The MVC has greater powers to review projects within its jurisdiction than exist under the Town's Zoning By-laws, particularly where (as here) local zoning is limited by the Dover Amendment. The MVC Act gives that body purview over conservation, health, traffic, water quality, and a host of other police powers issues when reviewing DRI's – powers that the courts have consistently upheld.

Please do not hesitate to call with further questions.

Very truly yours,

/s/ Michael A. Goldsmith

Michael A. Goldsmith

MAG/ad