MURPHY, LAMERE & MURPHY, P.C.

Attorneys at Law

Michelle Allaire McNulty
Matthew R. Tobin
Paige L. Tobin
Caitlin Leach Mulrooney
Joshua R. Coleman

Nancy J. Campany
Peter C. Sumners
Elizabeth F. Toner
Marianne M. Peters
Julie Muse-Fisher, *Of Counsel*

Via Electronic and First-Class Mail

February 10, 2020

Matthew D'Andrea, LP.D.
Superintendent of Schools
Martha's Vineyard Public Schools
4 Pine Street
Vineyard Haven, MA 02568

Re: Martha's Vineyard Public Schools Athletics Facilities Permit Application Standards of Local Review

Dear Dr. D'Andrea:

This letter is in response to your inquiry regarding the procedures for review of a permit application for renovated school athletics facilities (the "Project") at the Martha's Vineyard Public Schools (the "District"). Specifically, you have asked for an outline of the authority and procedures for site plan review by the Oak Bluffs Planning Board (the "Planning Board") and regional review by the Martha's Vineyard Commission (the "Commission"). This letter provides an overview of those review processes and the parameters of the respective bodies' authority, based on our understanding of the scope of work involved in the Project and our analysis of the Planning Board's and Commission's respective enabling acts, local regulations and by-laws, and applicable statutes, including without limitation the Dover Amendment, M.G.L. c.40A, §3, which limits the authority of local zoning bodies to prohibit, regulate or restrict the development of property for educational use, among other things.

Town of Oak Bluffs Planning Board Site Plan Review

The Town of Oak Bluffs Recodified Zoning By-Laws (amended May 2019) (the "Zoning By-Laws") set forth site plan review procedures for large developments such as the District's Project. Massachusetts law does not specifically govern site plan review by a local planning board; instead, the Planning Board's site plan review is primarily governed by its own Zoning By-Laws, and the criteria and standards set forth in the Zoning By-Laws act as both an authorization for and a limitation on the Planning Board's review. As such, the Planning Board is constrained by the limits of its local Zoning By-Laws, specifically Section 10.4, with regard to the matters it may consider during site plan review.

Pursuant to Section 10.4 of the Zoning By-Laws, the Project is subject to site plan review as a "Use, Structure, or Activity Available As of Right". *See Section 10.4.3.* Section 10.4.5 sets forth requirements for the contents of the site plan submitted to the Board, and it is my understanding that the District has already submitted its site plan application. As such, at this stage, the Planning Board will progress with review the application in accordance with the approval criteria set forth

50 Braintree Hill Office Park, Suite 202
Braintree, MA 02184-8807
Telephone (781) 848-1850 Fax (781) 849-0749
www.mlmlawfirm.com

in Section 10.4.8. This Section provides, "Site Plan approval shall be granted upon determination by the Planning Board that the plan meets" the objectives set forth in the Zoning By-Law, including "adequate access to each structure for fire and service equipment and adequate provision for utilities and storm water drainage consistent with the functional requirements of the Planning Board's Subdivision Rules and Regulations", as well as, "after considering the qualities of the specific location, the proposed land use, the design of building form, grading, egress points, and other aspects of the development," being designed so as to:

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;

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

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

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;

5. Minimize glare from headlights and lighting intrusion;

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

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

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

In our opinion, and subject to the statutory limitations discussed herein, the Planning Board may consider these criteria 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 Zoning By-Laws generally is the Planning Board authorized to determine the type of playing fields installed in the school athletics facilities, *i.e.*, grass or artificial. However, the Planning Board may impose reasonable conditions at the expense of the applicant, including performance guarantees, to promote the above objectives, provided such conditions comply with Dover Amendment, M.G.L. c.40A, §3, and applicable laws. *Id., § 10.4.8.*

Martha's Vineyard Commission Development of Regional Impact Review

It is our understanding that based on the size, location, and scope of the Project, it is likely to be referred to the Martha's Vineyard Commission for review as a Development of Regional Impact

("DRI"). *See The Martha's Vineyard Commission Act, Mass. Acts of 1977, c.831, §13.* For any DRI, the Commission's approval is required prior to the issuance of a permit by relevant local boards. *See id., §16.* The Commission's DRI Review process includes publication of a notice in local newspapers, a public hearing, review by the Commission's Land Use Planning Committee, and an assessment, vote, and issuance of a written determination by the full Commission, which may include specific conditions for the issuance of a local permit (subject to the limitations of Dover Amendment, M.G.L. c.40A, §3, discussed herein). *See id., §§13-16; Martha's Vineyard Commission DRI Regulations, §§6-8 (October 2014).* For additional details regarding the procedural timelines of the DRI review, please see Section 14 of the Martha's Vineyard Commission Act and the Martha's Vineyard Commission DRI Regulations, and/or contact our office for further information.

The scope of the Commission's review is governed by Section 14 of the Martha's Vineyard Commission Act, which provides in pertinent part that "The commission shall permit the referring agency to grant a development permit for such development only if it finds after such public hearing that":

> (a) the probable benefit from the proposed development will exceed the probable detriment as evaluated pursuant to section fifteen;
>
> (b) the proposed development will not substantially or unreasonably interfere with the achievement of the objectives of the general plan of any municipality or the general plan of the county of Dukes County;
>
> (c) the proposed development is consistent with municipal development ordinances and by-laws, or, if it is inconsistent, the inconsistency is necessary to enable a substantial segment of the population of a larger community of which the municipality is a part to secure adequate opportunities for housing, education or recreation; and
>
> (d) if the proposed development is located in whole or in part within a designated district of critical planning concern, it is consistent with the regulations approved or adopted by the commission pursuant to section ten . . . .

Id. For purposes of analyzing the DRI benefits and detriments under Section 14(a), "shall consider, together with other relevant factors, whether":

> (a) development at the proposed location is or is not essential or especially appropriate in view of the available alternatives on the island of Martha's Vineyard;
>
> (b) development in the manner proposed will have a more favorable or adverse impact on the environment in comparison to alternative manners of development;
>
> (c) the proposed development will favorably or adversely affect other persons and property, and if so, whether, because of circumstances peculiar to the location, the

effect is likely to be greater than is ordinarily associated with the development of the types proposed;

(d) the proposed development will favorably or adversely affect the supply of needed low and moderate income housing for island residents;

(e) the proposed development will favorably or adversely affect the provision of municipal services and the burden on taxpayers in making provision there for;

(f) the proposed development will use efficiently or burden unduly existing public facilities or those which are to be developed within the succeeding five years;

(g) the proposed development will aid or interfere with the ability of the municipality to achieve the objectives set forth in the municipal general plan; and

(h) the proposed development will further contravene land development objectives and policies developed by regional or state agencies.

Id. As with the site plan review, there is no general law specifically governing DRI Review, and the procedures and criteria set forth in the Commission's enabling act and local regulations act as both a grant of and limitation on the authority of the Commission.

Statutory Limitations

In addition to the authority and limitations set forth above, there are also general statutory limitations on these bodies' authority to regulate the District's renovation and use of its property. Specifically, for a public school such as the District which is renovating its school athletics facilities, the "Dover Amendment", M.G.L. c.40A, §3, provides, in pertinent part, "No zoning ordinance or by-law shall . . . prohibit, regulate or restrict the use of land or structures . . . for educational purposes on land owned" by a public entity, "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." *See also Town of Tisbury v. Martha's Vineyard Comm'n*, 27 Mass. App. Ct. 1204 (1989) (applying M.G.L. c.40A, §3 to the Commission). It is well-established that school athletics and other school extracurricular activities are protected educational uses under M.G.L. c.40A, §3. *See Forster v. Bd. of Appeals of Belmont*, 60 Mass. App. Ct. 1118, 2004 WL 323545, at *2 (2004) (unpublished disposition); *Bible Speaks v. Board of Appeals of Lenox*, 8 Mass. App. Ct. 19, 34 (1979). It is our understanding that the District's school athletics facilities will be used primarily for the educational purposes of the public school district and the District's member communities, and may also be available for use by members of the public, by application, and subject to the District's facilities use policies. As such, in our opinion, the District's school athletics facilities are protected under M.G.L. c.40A, §3.

As a result of this protection, the Planning Board and Commission cannot impose conditions and/or other limitations on the District's use of its school athletics facilities, and/or on the design and

construction of the property which affect that use, which prohibit, regulate or restrict their use. In our opinion, a non-exhaustive list of impermissible conditions and/or limitations 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 District's use of its school athletics facilities. Given the District's interest in maximizing the use of its athletics fields throughout the entire calendar year, and its determination that synthetic fields are the only suitable, affordable, and safe material for such use, in our opinion limiting the design of the athletics fields to exclude synthetic surfaces would constitute an impermissible condition and/or limitation. Further, dimensional and parking controls imposed on the District's use of its property must be reasonable and not have the effect of making use of the school athletics facilities infeasible. Impermissible and/or unreasonable conditions would include those which make the educational use excessively costly. *See Trustees of Tufts College v. City of Medford*, 415 Mass. 753, 759 (1993); *Petrucci v. Bd. of Appeals of Westwood*, 45 Mass. App. Ct. 818, 827 (1998). It is axiomatic that where a municipality does not have authority to adopt zoning ordinances or by-laws prohibiting, regulating, or restricting the educational use of District property, the local or regional zoning body cannot accomplish the same effect by administrative regulation. *See Bible Speaks v. Bd. of Appeals of Lenox*, 8 Mass. App. Ct. 19, 33 (1979) (board cannot subordinate the educational use of property to the board's planning goals). As a result, the Planning Board's and Commission's authority to impose restrictions with regard to the District's school athletics facilities is substantially limited under M.G.L. c.40A, §3.

Summary and Conclusion

Based on the foregoing, the Planning Board's review of the Project application must be limited to considering those issues over which the Planning Board has jurisdiction and authority to impose conditions under the relevant local by-laws, regulations and enabling acts, as well as M.G.L. c.40A, §3. In our opinion, there is no legitimate planning purpose served by either the Planning Board or the Commission in including in its respective review of the District's application a consideration of factors over which the respective body has no legal authority to impose conditions or other limitations. As such, it would be inappropriate and would impose unreasonable burdens and excessive costs on the District for the Planning Board to engage in a scope of review which includes matters beyond the scope of its authority.

I trust this letter sufficiently responds to your inquiry. Please do not hesitate to contact our office with any further questions.

Very truly yours,

Peter C. Sumners

Nancy J. Campany