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MEMORANDUM

To: Belmont Planning Board

From: George A. Hall, Jr.
Anderson & Kreiger LLP

Re: Belmont Hill School Application for Design and Site Plan Approval/Planning Board Case No. 22-16/ "Dover Amendment" Issues

Date: December 16, 2022

The purpose of this memorandum is to address the arguments presented to the Planning Board in three legal memoranda, one from the applicant and two submitted by or on behalf of neighborhood residents, concerning the proper application of G.L. c. 40A, § 3, paragraph 2 (familiarly known as the "Dover Amendment") to the above project.[1]

The Dover Amendment states that local zoning bylaws may not

> prohibit, regulate or restrict the use of land or structures … for educational purposes on land owned or leased 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 appears indisputable (and not disputed) that the Belmont Hill School (BHS) is "is a nonprofit educational institution providing a formal middle school and high school education in the 7th through 12th grade," and that, as such, the uses carried out by BHS on its campus are allowed by right under the Dover Amendment. Under the Schedule of Use Regulations in the Belmont Zoning Bylaw (§ 3.3), any such use is allowed by right.

It is also not disputed that the Dover Amendment applies not only to the land and structures directly used for the education of students, but also the ancillary and accessory uses that are "directly related to the function" of BHS on its campus, such as parking, residential buildings for students, faculty and staff, athletic facilities, administrative offices, and facilities buildings of the

[1] More specifically, I am addressing the December 5, 2022 Memorandum submitted to the Board by Robert H. Fitzgerald on behalf of the Belmont Hill School, the November 30, 2022 letter filed by Jamy B. Madeja on behalf of "Belmont Concerned Citizenry," and the December 13, 2022 letter to the Board filed by Tanya Austin on behalf of "a group of concerned citizens of Belmont."

sort proposed by BHS in this application. The Bible Speaks vs. Board of Appeals of Lenox, 8 Mass. App. Ct. 19, 31 (1979).[2]

The arguments raised on behalf of the concerned citizens fall into three categories: (1) that a town's right to enforce "reasonable regulations concerning the bulk and height of structures [etc.]" gives the Board the authority to impose conditions limiting or reducing the scale of the project, (2) that an accessory use like a parking lot may lose the protection of the Dover Amendment if it is excessive in scale to the needs of the school, and (3) that the Board can and should use certain discretionary provisions in the Zoning Bylaw to compel further study of the project. I will address these separately below.

Reasonable Regulations Concerning the Bulk and Height of Structures [etc.]

While the Dover Amendment does not allow municipalities to prohibit or require special permits for educational uses, the exemption does not allow an educational institution to disregard the dimensional regulations that uniformly apply in the underlying district, including minimum parking requirements, unless they are "unreasonable" as applied to the school's campus. When an educational institution seeks to avoid a dimensional or parking regulation on the ground that it cannot reasonably be applied to the proposed improvement to its campus, the school has the burden of "demonstrating that compliance would substantially diminish or detract from the usefulness of a proposed structure, or impair the character of the institution's campus, without appreciably advancing the municipality's legitimate concerns." Tufts College v. City of Medford, 415 Mass. 753, 759 (1993).

It is my understanding that the project proposed by BHS will comply with all of the applicable dimensional and parking regulations in the Belmont Zoning Bylaw except for § 5.1.3(g)(1), which requires a 150' separation between access/egress driveways.[3] BHS has requested a waiver from this requirement. I think it clear that BHS has the burden of showing that the regulation is

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[2] As noted by BHS's counsel, this proposition is also supported by several other appellate cases, including Radcliffe College v. Cambridge, 350 Mass. 613, 618 (1966) (parking), Trustees of Tufts College v. City of Medford, 415 Mass. 753 (1993) (parking), and Newbury Junior College v. Town of Brookline, 19 Mass. App. Ct. 197 (1985) (dormitories).

[3] I think it is important to point out that dimensional thresholds that trigger Design and Site Plan Review, such as the number of parking spaces or the size of the accessory structure, are not dimensional limitations with which BHS can be deemed "noncompliant," triggering an obligation to satisfy the Tufts test. A threshold for a form of administrative review is exactly that; it does not imply any kind of presumption that the proposed number of parking spaces should not be allowed. In some cases, the Bylaw *requires* enough parking to trigger DSPR approval.

unreasonable as applied, as described in Tufts, before the Board approves the waiver BHS seeks from that section.[4]

Ms. Austin's letter suggests, however, that BHS would have a similar burden with regard to conditions that the Planning Board might impose that would go above and beyond the dimensional limitations contained in the bylaw for this district, such as greater setbacks for the proposed facilities building, wider buffers between the parking areas and abutting properties, or even a reduction in the total number of parking spaces. The Board should not be misled by those arguments. Each of the cases discussed by Ms. Austin on pages 4-8 of her letter address a school's claim to be exempt from dimensional regulations adopted by the city or town *in its zoning ordinance or bylaw*, not the power of planning boards to impose additional requirements through site plan approval. The fact that municipalities may require Dover-exempt uses to obtain site plan approval rests on the premise that site plan review contemplates "regulation of a use rather than its prohibition," Prudential Ins. Co. of America v. Board of Appeals of Westwood, 23 Mass. App. Ct. 278, 282 (1986). One of the main purposes of Design and Site Plan Review in Belmont is to ensure that the sometimes complex dimensional rules in the Bylaw have been correctly applied in the design of the project (see § 7.3.5(b), which directs the Board to consider whether the underlying dimensional requirements, parking minima, and landscaping requirements contained in the Bylaw have been met). Beyond such compliance, the Board's powers are limited to imposing conditions that are "reasonable" (as § 7.3.3(d) of the Zoning Bylaw explicitly requires).

Any court is going to begin with the presumption that compliance with the dimensional requirements applicable in the underlying district will be sufficient to protect the neighborhood in the way the Zoning Bylaw intended. This is not to say that a Board cannot require the applicant to explore alternative designs or layouts that accomplish more or less the same project purpose, for similar costs, while improving traffic circulation or providing greater protection for abutting uses. Some such alternatives might allow for greater setbacks, better screening, reduced (or enhanced) lighting, improved stormwater management, and the like. But the burden is not on BHS to show that such conditions are unreasonable under the Tufts test; I expect a court would require the Town to show that requiring a landowner to design to stricter standards than those applicable to other landowners is justified by an important zoning interest, taking the project's purpose and cost into account.

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[4] It does not appear to me that the Board has the inherent power to waive compliance with § 5.1.3(g)(1) for non-Dover-exempt uses under the Design and Site Plan Review bylaw, so a waiver would have to meet the Dover standard articulated in Tufts. It should be noted that this is not a particularly high bar. To "substantially diminish or detract from the usefulness" of a structure means to do so to more than a trivial or insubstantial degree. To "appreciably" advance the Town's interests means to do so measurably and concretely, not merely hypothetically.

The other sections of the bylaw cited on pages 3-4 of Ms. Austin's letter are not the kinds of uniform dimensional regulations to which the Tufts test would be applicable, for the various reasons explained below:

- Ms. Austin contends that the proposed building will violate the height requirement by reaching to 38 feet. That contention appears to be based on calculating the distance between the "lowest grade" to the peak of the roof, which is not how the Bylaw determines building height. The Bylaw requires a measurement from "grade" (defined in § 1.4 as "[t]he average of the ground level adjoining the building at all exterior walls based upon the existing contour lines"). Sheet A3.1 of the submitted site plan shows the building height, measured to the peak of the roof, to be 29'6" above "average grade. The Board may wish to seek confirmation from the Office of Community Development that the grade has been calculated correctly, but it appears that the building height is well under the 36' limit and that there is no height violation proposed here.

- Section 5.1.3 prohibits parking facilities that are accessory to an allowed principal use if they are not on the same lot as the principal use. I think it is clear that Section 5.1.3. is a use restriction – a prohibition against the use of land or structures that in this instance are to be used for educational purposes – and therefore cannot be applied here. The fact that there is an exception to this prohibition for parking facilities "located within 400 feet of the building entrance to be served" does not transform this section into a regulation "concerning the bulk and height of structures, and determining yard sizes, lot area, setbacks, open space, parking or building coverage requirements."[5]

- Section 5.3 is a discretionary standard pertaining to landscaping requirements, directing that existing plants should be retained "wherever possible" and that trees of 6 inches caliper or greater within 25 feet of a street should not be removed "unless dictated by plant health, access safety, or identification of the premises." The "wherever possible" standard suggests that, even for projects that do not have the benefit of the Dover

[5] The Tufts case includes a discussion about the City of Medford's requirement that parking be provided on the same "lot" as the principal use, but the situation the Court was addressing there was quite different. The City was trying to enforce a parking minimum against the University: a requirement that the square footage associated with a proposed library addition required the addition of a certain number of parking spaces on the same lot. The lower court had decided the "same lot" requirement was unreasonable as applied to the campus; the Appeals Court vacated that holding (and the SJC agreed) based on the City's stipulation that the location of the proposed garage *met* that requirement, not because they found it to be reasonable. Nothing in Tufts suggests that the City could have prohibited the use of land on another lot to provide *additional* student parking not required by the Zoning Ordinance.

> amendment, this limitation is not intended to allow the Planning Board to effectively deny the proponent the intended use of the property. BHS is contending that it has met the "wherever possible [for the intended use]" standard; I leave it to the Board to evaluate that claim on its merits.

- Section 7.4.3 imposes standards for the granting of special permits. Again, this is a use limitation not applicable to Dover-exempt uses. The Town may not require a special permit for the project, nor may it impose special permit standards as a condition of granting Design and Site Plan approval.

The Scale Argument

Ms. Austin urges the Board to make its own determination as to BHS's parking needs in order to decide whether the parking area is, in fact, Dover-exempt. She argues:

> where construction of a single parking space or a dozen parking spaces might be an educational use, this cannot be the case *ad infinitum* – for example, it is self-evident that a thousand parking spaces would not be an educational use for a school of BHS's size and makeup. Where, then, does one draw the line between educational and non-educational uses? In the absence of any Massachusetts case addressing this issue, we submit that the boundary between such uses should be set by considering the actual needs of the educational institution, as determined by an independent study.

Ms. Austin essentially admits that there is no case law supporting this proposition, and there is ample reason to doubt that Massachusetts courts would allow zoning and planning boards to second-guess an educational institution's reasonable estimation of its own needs.[6] The SJC's decision in Martin v. The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter–Day Saints, 434 Mass. 141 (2001) (upholding Belmont's approval of the Mormon Temple building notwithstanding the steeple's noncompliance with the height limitation), while not exactly on point, is illustrative of the SJC's skepticism that local boards should be making decisions about what is or isn't necessary to serve the institution's purposes.

Even if such a hypothetical case might arise at some point, Ms. Austin's suggestion that the Board should determine that the BHS project exceeds that threshold because the proposed lot will accommodate visitors for larger campus events, but is more than is necessary for the school's daily needs, would not be a defensible position if adopted by the Board. Many facilities

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[6] One can always posit some *reduction at absurdum* example of a proposal that would exceed any reasonable estimate of the school's requirements, as Ms. Austin has done, but there is a reason there are no cases addressing such proposals: schools don't propose them for obvious practical, prudential and economic reasons.

– shopping malls, sports venues, function facilities, etc. – construct enough parking to accommodate unusually large events. I am not aware of any case that would suggest that a planning board, through site plan review, could require the downsizing of such a facility when it meets setback, screening, maximum lot coverage, minimum open space, and other applicable dimensional limits.

Ms. Medeja's letter makes a similar argument regarding the scale of the project, suggesting that the Board's power to enforce reasonable regulations means that it can require BHS to consider alternatives, implicitly suggesting that this should include alternatives to using the proposed East Campus for parking, or in the campus layout more broadly. For all the reasons stated above, I do not believe the Planning Board's powers here include the ability to deny BHS the use of this particular parcel for its intended purpose, in a manner that complies with the underlying dimensional requirements, in favor of an alternative location for the parking area.

Development Impact Report

Both Ms. Austin and Ms. Medeja urge the Board to require BHS to fund a Developmental Impact Report. My understanding is that, in lieu of such a report, the Board has engaged peer review consultants, at BHS's expense, to look into specific issues where impacts to abutting property owners are most likely, and that this is consistent with recent past practice. I think that is a prudent approach. Given that the limits on local boards' site plan review powers with regard to Dover-exempt uses have not been fully fleshed out by case law, I think it is wise to take that more targeted approach.