

Bar split over need for Dover Amendment fix

By: Pat Murphy October 23, 2014



Land use attorneys are sharply divided over whether the so-called "Dover Amendment" should be revised to prevent developers from bypassing zoning restrictions by simply adding on purported educational programs as window dressing for their projects.

First enacted in 1950, the Dover Amendment was intended to bar towns and municipalities from discriminating against religious and educational institutions by excluding them from residentially zoned neighborhoods. In its current form, the law exempts schools,

religious organizations and other institutions from zoning requirements if it is determined that a proposal is for "educational purposes."

In a landmark 2012 case, *Regis College v. Town of Weston*, the Supreme Judicial Court held that to qualify for protection under G.L.c. 40A, §3, the burden of proof is on an applicant to show the primary and dominant purpose of a project is educational in nature.

George X. Pucci represented the town of Weston in successfully opposing the Dover Amendment project in Regis. Pucci said he sees no need for the Legislature to step in and make changes to the law, despite complaints by some that developers use the measure to obtain approval for projects in which the educational component is limited at best.

"[T]he language of the Dover Amendment is sufficiently clear in light of the SJC's most recent pronouncement in the Regis case, which reaffirmed the 'primary or dominant purpose' test established in earlier appellate case law," said Pucci, a lawyer at Kopelman & Paige in Boston.

But Framingham attorney Christopher J. Petrini thinks otherwise.

"Some in the municipal field have felt that developers sometimes use the Dover Amendment as a hammer to compel approvals. That was not the intended purpose of the law," said Petrini, who filed amicus briefs in Regis on behalf of the Massachusetts City Solicitors and Town Counsel Association and the Massachusetts Municipal Association.

'Textbook case?'

Framingham attorney Robert G. Cohen recently was involved in a case that he claims is a textbook example of how developers misuse the Dover Amendment.

Earlier this year, Framingham's building commissioner concluded that an 80-bed inpatient treatment center for patients with eating disorders qualified as an educational use under the measure.

The project had first been proposed in 2013 by Walden Behavioral Care of Waltham, a psychiatric hospital, but a request for a special permit was denied. Walden subsequently repackaged the project by proposing to add a research and education center. The hospital reapplied for a special permit under a nonprofit affiliate, seeking approval under the Dover Amendment's exception for educational institutions.

Cohen said that Walden's argument that the project was an educational use was "nonsensical."

"People go to a hospital to be cured of the problems, not to be educated about them," Cohen said.

The building commissioner nonetheless approved the project.

Cohen represented approximately 500 people in the residential neighborhood in which the development was planned. Cohen's clients appealed to the Framingham Zoning Board of Appeals, but failed to get the unanimous vote needed to overturn the commissioner's decision.

The group went on to file an appeal at Land Court, before recently learning that Walden abandoned the project.

"It's a victory for the neighborhood," Cohen said. "The primary and dominant use being proposed by the applicant was to provide medical care — psychiatric treatment to sick people. Had the matter continued through the courts, we

probably would have prevailed on that issue, but who knows?"

Marisa L. Pizzi of Bowditch & Dewey in Framingham represented Walden in the case. Pizzi said the project was halted simply because the original property owner decided to let the purchase agreement with Walden expire.

Had the suit proceeded in Land Court, Pizzi said, she is confident her client would have prevailed under the Regis "primary and dominant purpose" standard.

"While parts of the proposed program might function as a hospital, it was very much education-based. The program itself was based on changing people's behavior through education," Pizzi said.

She noted that lawmakers left the term "education" within the meaning of the Dover Amendment undefined.

"The Legislature has wisely left it open to the courts to interpret. What is 'educational' necessarily has to be determined on a case-by-case basis, and that's exactly what the courts have done," she said.

Pizzi said judges in Massachusetts have defined "education" very broadly under the Dover Amendment to include uses such as rehabilitation, counseling and treatment for people with mental and physical disabilities as well as those with substance abuse problems.

"Unfortunately, there is still a segment of society that subscribes to the 'not in my backyard' philosophy," Pizzi said. "In my opinion, efforts to revise or limit the Dover Amendment are in large part a reaction to that."

Vague statute?

In arguing for revisions to the statute, Cohen said the Dover Amendment is vague "and leaves it up to the whims of people who are interpreting it."

"You can't have lawyers twisting the words of the statute to try to shoehorn a project that just doesn't belong in a particular area by making a claim that something is educational when it plainly isn't," Cohen said.

Petrini, who represented the town of Framingham in the zoning dispute over the Walden project, declined to comment on the case. But he said the Dover Amendment comes up a fair amount in his municipal practice and that he has seen examples where it appeared that a developer presented a project as falling under the amendment in order to bypass local approval or restrictions.

"Given the number of occasions this Dover Amendment has come up, if clarification could be written directly into the statute, it may be helpful and avoid disputes," Petrini said.

Pucci, meanwhile, said he is satisfied that the statutory language of the Dover Amendment combined with the Regis ruling provides a more than adequate framework for resolving zoning disputes.

"In most cases, this [Regis] test can be easily applied in a pragmatic manner so that bona fide religious or educational uses cannot be unfairly discriminated against, which was the original purpose of the Dover Amendment," Pucci said. "Right now, we have a pretty clear mandate as to what the scope of the statute really is."

Claims that there are fundamental problems with the Dover Amendment are overblown, according to Pucci. Noting that his firm represents a third of the cities and towns in Massachusetts, Pucci said he rarely sees the law being used by a developer in an abusive way.

Catherine J. Savoie who represented the developer in Regis, said Dover strikes a "great balance" between local zoning authority and protecting society's interests in promoting educational and religious institutions.

"The idea is that these [educational] uses are so valuable to society that you can't allow a local zoning authority to regulate in such a way as to wipe out the use or prevent the use," said Savoie, who practices at Posternak, Blankstein & Lund in Boston. "However, the local zoning authority may regulate in a way that is reasonable as long as it allows the use."

Unintended consequences?

As a first step for revising the statute, Cohen supports the suggestion that the Legislature could make the holding in Regis an explicit part of the law.

But Newton attorney Kenneth N. Margolin argues that that would be redundant.

"The Supreme Judicial Court has already said that education has to be the dominant purpose," Margolin said. "What do we accomplish by writing into the statute that 'education has to be the dominant purpose?'"

Margolin has been litigating Dover Amendment cases on behalf of human services organizations since 1978. He noted that there have been periodic efforts to weaken the Dover Amendment over the years and questioned new

calls to revise the law.

"The kinds of abuses [the critics claim occur] are actually few and far between," Margolin said. "I don't see this as a widespread problem."

Margolin said he instead fears the law of unintended consequences could come into play as the result of legislative action.

"For example, the Legislature could presumptively exclude psychiatric facilities, but the unintended consequence might be making it more difficult for projects for people with mental illness that are really educational to be located and opened," Margolin said. "Unless we see a specific category of a problem, I think judicial evolution is preferable to revision."

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