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RE: P&A CLIENT ADVISORY (2012:02)
Regis College v. Town of Weston, SJC-10919
No Dover Amendment Protection Unless Education Is the Primary Use

We are writing to advise our public sector clients of Regis College v. Town of Weston, a decision issued by the Supreme Judicial Court (SJC) on May 22, 2012 that has important consequences on the application of the Dover Amendment set forth in G.L. c. 40A, §3.

This case involved an appeal filed by a private educational institution from a decision of the Weston Zoning Board of Appeals denying a proposed project exemption pursuant to the Dover Amendment. Regis College's proposed project, known as Regis East, involved eight buildings to be constructed, four for educational purposes and the remaining four to be used for 362 units of senior housing. Seniors would be required to pay a \$700,000 - \$1,000,000 one-time entrance fee, 90% refundable, and also would be required to pay a monthly maintenance fee of approximately \$4,000 per month. Seniors residing at Regis East would be required to take at least four college courses per year, but such courses would not be for matriculation purposes, would not require the issuance of grades, and would allow "pass-excel" grades (with no failing grade). Moreover, liberal waiver of the academic curriculum requirement was permitted under the applicable project documents. The Town moved for summary judgment, arguing that Regis College's proposed senior housing development was not a primary or predominant educational use entitling Regis College to exemption under the Dover Amendment from the regular application of Weston's Zoning By-laws. The Land Court granted the Town's motion for summary judgment, and the college appealed. The SJC transferred the case from the Appeals Court on its own motion.

On appeal Regis College argued that it is entitled to Dover Amendment protection, that the primary or predominant educational use requirement is not contained in the Dover Amendment, was not added to the statute in an earlier proposed amendment to the Dover Amendment, and is a judicial construction that should not be enforced by the courts. Alternatively, Regis College further argued that the primary focus of Regis East is educational, with education broadly defined as required by the case law. Petrini & Associates, along with

Marlborough City Solicitor Donald Rider, filed an Amicus Brief on behalf of the City Solicitors and Town Counsel Association and the Massachusetts Municipal Association in support of the Town of Weston.

In its decision, the SJC reversed the award of summary judgment because the SJC could not conclude that Regis College has no reasonable expectation of proving that Regis East will primarily operate in furtherance of educational purposes. Although the award of summary judgment to the Town of Weston was overturned, the basis for the SJC's ruling was purely procedural and the holding is in fact favorable to municipalities on the substantive issue of what an educational institution must demonstrate in order to obtain Dover Amendment protection. The case has been remanded to the Land Court for resolution of factual issues, subject to the SJC's legal holding that Regis College will have the burden of demonstrating on remand that the dominant purpose of the project will be educational.

In reaching its decision, the SJC clarified and restated important principles that will be helpful to cities and towns to follow in evaluating Dover Amendment applications, including the following:

1. The SJC held that there were "two commonsense and interrelated limits on the statute's application," namely that "the Dover Amendment protects only those uses of land and those structures that have as their bona fide goal something that can reasonably be described as educationally significant. The second is that the educationally significant goal must be the 'primary or dominant' purpose for which the land or structure will be used." Decision pp. 5-6.
2. Over the objection of Regis College, the SJC explicitly reaffirmed that it is the applicant's burden to demonstrate that the dominant purpose or goal of the project under consideration is primarily educational in nature. Decision, pp. 8, 10. The SJC acknowledged that this requirement is intended to prevent a party seeking Dover Amendment protection from engrafting an educational component onto an otherwise non-exempt project in order to take advantage of the statute's favorable treatment.

For these reasons, the Regis College decision is on balance more favorable to local permit granting authorities in cities and towns than it is to non-profit developers, insofar as the SJC affirmed that the Dover Amendment is not a carte blanche to non-profit development free from the restrictions of local zoning but rather the applicant must demonstrate that the dominant purpose or goal of the development is primarily educational in nature. Thus, local review of entitlement to a Dover Amendment exemption is not a rubber stamp test, as the applicant must meet specific requirements that can be reviewed and measured.

Please contact Christopher Petrini or any of the other attorneys at P&A should you have any questions regarding the Regis College decision, or how to implement the SJC's guidance in reviewing applications for projects claiming Dover Amendment protection.