

To: Town of Dennis Zoning Board of Appeals
RE: Appeal of Dover Amendment Determination - 1 Love Lane, South Dennis

Town of Dennis Planning Board Case Law Memorandum

Throughout this process, there has been regular reference to the opinion of Town Counsel that this project is “likely exempt” under the Dover Amendment and any thought to the contrary was out of bounds. However, when a project is seeking exemption from the Town’s Zoning Bylaws, laws that bind every other resident, business, and developer, it is imperative that there be proper scrutiny at every level. The final sentence of Town Counsel’s memorandum states: “it is my opinion that the Building Commissioner **may** determine that the proposed use **could be** classified as exempt under G.L. c. 40A Section 3.” This is hardly a conclusion that speaks with any command or authority. The Town of Dennis Planning Board has given this project the legal scrutiny it deserved from the beginning and determined that the requirements under the Dover Amendment were not met.

“The Dover Amendment strikes a balance between preventing local discrimination against educational uses and honoring legitimate municipal concerns that are expressed through local zoning laws.” Sullivan v. Heritage Plantation of Sandwich, Inc., 35 Mass. L. Rep. 281 (2018), citing Trustees of Tufts Coll. v. Medford, 415 Mass. 753, 757 (1993). The use of the land must 1. have as a “bona fide goal something that can reasonably described as educationally significant” and 2. “the educationally significant goal must be the ‘primary or dominant’ purpose for which the land or structures must be used.” Regis College v. Town of Weston, 462 Mass. 280 (2012), citing Whitinsville Retirement Soc’y, Inc. v. Northbridge, 394 Mass. 757, 759 (1985).

The majority of Town Counsel’s memorandum was consumed by an analysis of the “type” of education provided by Housing Assistance Corporation (hereinafter “HAC”) under relevant case law and whether that would be considered “educationally significant” while being

completely devoid of any legal discussion as to whether or not the proposed education was the “primary purpose” *of the site/project itself*. The cases cited by Town Counsel certainly highlight the documented history of the court’s expansion of the definition of education to include “non-traditional forms of education.” It appears once that hurdle was met for Town Counsel, the analysis stopped there and little thought was given to the “primary purpose” requirement of the test. This is the failure that was so patently obvious to the Planning Board from HAC’s initial presentation to the Planning Board on April 1, 2024.

The Planning Board agrees that a curriculum focused on developing life skills *can be* viewed as “educationally significant” by the courts when presented in a certain manner. The curriculum proposed by HAC simply did little to persuade the Planning Board that it is significant enough to establish that the primary purpose of the shelter at 1 Love Lane is educational. Town Counsel failed to articulate or explain in any way how one satisfies the “primary purpose” part of the test and then conversely how HAC *actually* meets the standard based on the materials presented. Town Counsel seemed to simply rely on a quote from a letter of advocacy peddled by HAC’s attorney, Peter Freeman, as to what the “primary purpose” of the shelter was. Town Counsel clearly failed to properly assess the materials provided by HAC, as one thorough review of these materials (Exhibits A-G) exposes the “educational plan” for the Trojan Horse that it is. Attorney Freeman’s letter hits enough buzzwords and the titles of the materials seemingly provide support. But, the devil is always in the details and the details of this project do not point to a primary purpose of education. The details support a conclusion that the primary purpose of the 1 Love Lane shelter is housing with an ancillary element of education. This is not the required standard.

Incidentally, several of the cases cited by Town Counsel herself paint a picture of the actual programming behind these non-traditional educational homes, which is necessary to consider when assessing the primary purpose of the 1 Love Lane shelter. The Planning Board is willing to take the time to explain it below in this memorandum.

The programs cited in the case law are generally highly structured for residents and almost always include a vocational component and/or an academic component in addition to the teaching of “life skills.” In Gardner-Athol Area Mental Health Ass’n. Inc. v. Zoning Bd. of Appeals of Gardner, the plaintiff leased a single family dwelling for use as a residential care facility for four adults with mental disabilities where the residents would be taught daily living, *as well as* vocational skills, with the goal of preparing them for more independent living. 401 Mass. 12 (1987). In Congregation of the Sisters of St. Joseph of Boston v. Town of Framingham, residents fell into one of three categories and were provided a curriculum according to that categorization. 2 LCR 125 (1994). One curriculum option, for example, was training for single mothers and their children in basic living skills including housekeeping, nutrition, childcare, budgeting, healthcare, job search and employment. Id. at 126. These mothers were *also* trained in English as a second language, graduate equivalent degrees, and tutoring in basic skills such as English and Math with adjunct counseling services as needed to support these educational programs. Id.

While cited by Town Counsel, the Court in Harbor Schools, Inc. v. Board of Appeals of Haverhill specifically did not determine whether or not the facility met the standards of M.G.L. ch. 40A §3. 5 Mass. App. Ct. 600 (1977). For the purposes of this discussion, the details regarding the programming are relevant as the facility housed girls from 13-18 years old with behavioral issues. Id. at 602. The teachers were specialized and focused on emotional,

psychiatric adjustment *as well as* daily educational indoctrination in the basic studies such as English, mathematics, science, etc. Id. at 603-604. The program also included house counsellors and house matrons who resided at the facility. Id. All the children were given periodic diagnostic reading tests and various achievement tests. Id.

In the most recent case analyzed by the Massachusetts Supreme Judicial Court, McLean Hospital Corporation v. Town of Lincoln, the proposed facility housed 6-12 students at a time who participated in the immersive residential program generally lasting for 60-120 days and residents who complete the program receive a graduation certificate. 483 Mass. 215, 216 (2019). Residents received approximately eleven (11) hours per day of instruction, including classroom time from 9am-4pm, *as well as* practice in social and emotional skills. Id. at 218-19. The program included a “full-time, highly structured, mandatory curriculum taught by formally and specially trained staff, upon graduation from which the students ideally will return to their respective high schools, colleges, and communities.” Id. at 224.

Brockton Coalition for Homeless v. Tonis was a case *provided* by HAC as part of their educational materials in addition to being flagged by Town Counsel. 17 Mass. L. Rep. 554 (March 5, 2004). In Brockton Coalition, the shelter under consideration was going to be home to seventeen (17) homeless families where educational programs take place a minimum of five (5) days a week. Id. The shelter included a classroom and a computer training area. Id. The residents were to have classes, individual coaching and guidance on keeping long-term housing, and job training, including computer skills for job applications and interviews. Id. Notably, “life for the temporary residents will be highly structured and regulated. The Coalition imposes a lot of rules. There are daily schedules. A primary purpose of the rules and schedules is to ensure that the residents, both mothers and children, obtain the maximum participation in the Coalition

educational programs.” Id. All residents are to be in the shelter and in bed by certain times every day. Id. Visits by non-residents are regulated in timing and duration. Id. Adult residents are required to consistently attend and participate in the educational programs. Id. Non-attendance is not an option and residents who will not participate in the educational programs are discharged. Id. All adult residents who have not graduated from high school or obtained an equivalency diploma are required to attend high school equivalency classes and to work steadily towards obtaining a diploma. Id. Shelter staff provide scheduled child activities so that the mothers can attend classes and other educational programs. Id. Residents are required to report any income and to establish a regular savings program. Id.

While notable for its clear establishment of the two part test for assessing projects requesting exemption under the Dover Amendment noted above, the Court in Regis College v. Town of Weston, 462 Mass. 280 (2012) provides extremely relevant analysis for the shelter at 1 Love Lane. In Regis College, the Court was confronted with a senior housing project by which residential units would take up sixty percent (60%) of the square footage of the project and the remaining spaces included a variety of purposes: dining, meetings and events, fitness activities, healthcare, recreation, a children’s center, and an adult day care center. Id. at 282. Residents were assigned “academic advisors” and required to enroll in a minimum of two courses per semester. Id. The lower Land Court judge was concerned that the educational purpose “seems subordinate to the plaintiff’s desire to provide elderly housing and/or a source of revenue.” Id. at 284. “The record was ‘unclear’ whether the plaintiff would in practice insist on the residents participating in the educational programs, and specifically whether the plaintiff would in fact evict residents who failed to complete the minimum course requirement.” Id. Further, the Court noted “here the concern expressed by the judge and the defendant is that the project may not in

fact operate as the plaintiffs claim it will. In the Zoning Board's view, the educational aspects of the Regis East development are so "amorphous, flexible and vague" as to suggest that they are mere "window dressing" for what is essentially a "luxury residential" complex." Id. at 287. The plaintiff was required to make a showing that the educational purposes "predominate over Regis East's residential and recreational components." Id. at 288.

Further, the Court stated: "as a practical matter, the protection afforded by the Dover Amendment can be financially advantageous to the landowner. Because the statutory purpose of preventing local discrimination against educational uses is only furthered if the intended use of the land is in fact educational, the term 'educational purposes' should be construed so as to minimize the risk that Dover Amendment protection will improperly be extended to situations where form has been elevated over substance." Id. at 288-89. "The primary or dominant purpose requirement helps ensure that a party invoking the Dover Amendment protection does so without engrafting an educational component onto a project in order to obtain favorable treatment under the statute." Id. at 290.

In analyzing the information provided by HAC as to the educational component of this shelter, it is necessary to keep in mind the following: the shelter will house at least 158-237 adults and children; at least 79 adults will need to receive education on-site; residents stay on average of 9-12 months and up to 3 years; staffing includes 3 educational *case managers* and 1 *housing search educator*; there are no designated classrooms; no information regarding actual instruction happening on site; no information provided regarding how many days "education" will be offered or for how long the "education" will take place; there is no information provided about the computer training room (i.e. the number of computers, how/when there is access; when/how training will occur); the library is the size of a closet; no daily schedules; no

information regarding childcare opportunities while parents are occupied; no offerings of any academic-type education; no vocational training opportunities.

Turning to the educational materials provided by HAC, only three (3) Exhibits actually provide tangible support for the purported curriculum being offered at the shelter. The Ending Homelessness Course (Exhibit C) and its corresponding handouts (Exhibit D) make up the course that is “designed to be self-paced and reflect your needs and wants.” *See* Exhibit C, Chapter 2. It is anticipated that residents will bring these materials to meetings with the case managers and complete tasks in-between meetings. There is no classroom instruction that is identified. The Money Matters workshop (Exhibit E) appears to be a lengthy workshop if you go by page count alone, but a review of these materials clearly indicate that the materials are covered over two workshop sessions. It is imperative to consider how much education needs to exist over a 9-12 month period of time to be deemed the “primary purpose” of this site. It would be generous to say that what has been provided covers a couple of weeks. What happens when these courses are completed?

A review of the Participation and License Agreement (Exhibit F) provided by HAC, which was purported to include an educational requirement, does not mention education one time. Residents are “required” to “follow shelter rules.” Much like in Regis College, there is legitimate concern over what is being said by HAC to receive the Dover Amendment exemption and what is going on in actuality. If HAC asks you to look at the Emergency Assistance Shelter rehousing plan (Exhibit G), a resident is “expected” to participate in 30 hours of education a week—expected is not the same as required. Repeatedly, statements have been made and written to indicate that education is required at 1 Love Lane and non-participation will result in expulsion from the shelter. The paperwork does not reflect that in any way.

While this not a “luxury residential complex”, the Planning Board does suggest that this is housing with an educational “window dressing” that exempts HAC from needing to comply with any town laws that may impact the number of residents able to be served by this shelter. The economic stakes for HAC are high—a Dover approved project that calls for less renovations while maximizing the number of residents is much more advantageous than a non-Dover approved project that needs to go through a full review by the necessary Town boards, which would likely impact the current proposed layout. Once the project was given its Dover exemption by the Building Commissioner with such limited educational components, the running of the shelter was no longer part of the conversation and actual compliance with the intent of the Dover Amendment at the site will not matter in the future or be enforceable in any way. If HAC was truly focused on the educational component, you would see things such as teachers on staff, classrooms, schedules, academic opportunities, vocational opportunities, childcare for non-school-aged children, strict compliance requirements. etc. These things are not present simply because educating the residents is not the true, primary purpose of the site.