TOWN OF BARNSTABLE

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TO: Mary Barry, Chair, Barnstable Planning Board

FROM: Ruth J. Weil, Town Attorney
T. David Houghton, 1st Assistant Town Attorney
Charles S. McLaughlin, Assistant Town Attorney

RE: Request for an opinion on whether the petition to amend the zoning ordinance to prohibit group homes in residential zoning districts in its present or modified form is consistent with MGL Chapter 40A (the Dover Amendment) and other federal law.

DATED: November 9, 2017

Legal Ref. 2017-0004

REQUEST FOR AN OPINION

By letter dated November 9, 2017, the Planning Board asked for an opinion from the Town Attorney's office on whether or not the request to amend the zoning ordinance to prohibit group homes in residential zoning districts is, in its present or modified form, consistent with MGL Chapter 40A (the Dover Amendment) and other federal law.

BACKGROUND

On May 18, 2017 a proposal to amend the zoning ordinance was submitted to the Town Council by 12 registered votes in the Town. The three-page proposal sought to "adopt an amendment to zoning

by-laws prohibiting the establishment of Group Homes in a Single Family (hereinafter SF) Residential Districts". The reasons appended to the Petition included the following definition of Group Home: "A GH is defined "A home where a number of unrelated people in need of care, support or supervision can live together." Pursuant to G.L. c. 40A §5, the petitioned proposal was referred to the Planning Board for the scheduling of a public hearing.

By e-mail dated November 8th, 2017, John Julius and Laura Wentzel, the two spokespeople for the Petition that had been submitted to the Town Council, requested a modification of the Petition to reflect the following proposed amendments to the Barnstable Zoning Ordinance.

Section 240-10E:

Except as otherwise specified here under: The following are prohibited;

E: Group Homes in Residential Districts.

240-128 - To add the following definition:

Group Home is defined as a home where a small number, of at least three, unrelated people in need of care, support, or supervision can live together.

DISCUSSION

A. The State Zoning Act and the Americans with Disabilities Act (42 U.S.C §§ 12132 et seq.) (ADA), the Rehabilitation Act (26 U.S.C § 794(a) (RA), and Fair Housing Act (42 U.S.C § 3604 (f)(i) et seq.) (FHA) Impose Limits on the Home Rule Power of Municipalities.

1. The Home Rule Amendment.

Limitations on the powers bestowed by the Home Rule Amendment on municipalities fall into two groups: the specific, enumerated exclusions of Mass. Const. amend. art. II. § 7 of the amendment itself; and the more generic limitations that the legislative enactment cannot be "inconsistent" with state law. Inconsistency has been found "…when either the legislative intent to preclude local action is clear, or, absent

plain expression of such intent, the purpose of the statute cannot be achieved in the face of the local by-law." Grace *v.* Brookline, 379 Mass. 43, 54 (1979). See also, Boston Gas Co. v. City of Newton, 425 Mass. 697, 701-02 (1997); CHR General, Inc. v. Newton, 387 Mass. 351, 356-357 (1982); Rogers v. Provincetown, 384 Mass. 179, 180-181 (1981).

2. State and Federal Laws Affecting Municipal Enactments Relating to "Group Homes."

i. The Dover Amendment.

The so-called "Dover Amendment" under G. L. c. 40A §3 provides in relevant part "[N]o zoning ordinance…shall…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 structure 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."

In order to withstand challenges to implementation, the proposed ordinance would therefore have to be considered not to restrict or regulate the *use* of land or structures for educational purposes by a nonprofit educational corporation.

What constitutes educational purposes by a nonprofit educational corporation has been laid out by the Supreme Judicial Court in Regis College v. Town of Weston, 462 Mass. 280 (2012) as uses serving primarily educational purposes, "primarily" meaning the dominant purpose of the use has a goal that could reasonably be described as educationally significant.[1] The education being provided is not limited to "traditional or

[1]/ For other examples of how "education" has been defined under the Dover Amendment, *see,* Worcester County Christian Communications, Inc. v. Bd. of Appeals of Spencer, 22 Mass. App. Ct. 83, 87 (1986) (a radio station may be an educational use); Comm'r of Code Inspection of Worcester v. Worcester Dynamy, Inc., 11 Mass. App. Ct. 97 (1980) (dormitory use); Harbor Schs., Inc. v. Bd. of Appeals of Haverhill, 5 Mass. App. Ct. 600 (1977) (residential facility for the education of emotionally disturbed children).

correctional education regimes" but extends to "nontraditional communities of learners in a manner tailored to their individual needs and capabilities" that "differed markedly from that offered by 'traditional' academic institutions." Id at 285.

Under this definition of primary educational purposes "residential facilities in which adults with histories of mental difficulties will live while being trained in skills for independent living" are "amendment protected" id at 286 citing Fitchburg Housing Authority v. Zoning Board of Appeals of Fitchburg, 380 Mass. 869 (1980). Similarly, the use of a barn by a mental health association to provide shelter and education to mentally challenged adults in need of care and supervision was deemed a protected use under the Dover Amendment. Watros v. Greater Lynn Mental Health & Retardation Ass'n, Inc., 421 Mass. 106 (1995). ("It is clear that the over-all intent of the Legislature [in passing the Dover Amendment] was to prevent local interference with the use of real property for educational purposes.") See S. Middlesex Opportunity Council, Inc. v. Town of Framingham, 752 F. Supp. 2d 85 (D. Mass) (2010).

In light of the case law defining what constitutes a predominant "nonprofit educational uses" and in view of the clear language of the Dover Amendment that "[N]o zoning ordinance…shall…regulate or restrict the use of land or structures…for…educational purposes on land owned or leased…by a nonprofit educational corporation…", it is our analysis that a zoning ordinance that imposes an outright prohibition in all residential zoning districts of group homes defined as "as a home where a small number, of at least three, unrelated people in need of care, support, or supervision can live together" would be deemed to be inconsistent with and violative of the Dover Amendment. The limitations to local regulations imposed by the Dover Amendment are underscored by the fact that there are several bills pending in the great and

general Court to study and/or amend the Dover Amendment. See HB 3593 (limiting the applicability of Dover Amendment in certain communities) and SB 194 (establishing a Commission to review the Dover Amendment). In this regard, the city of Cambridge has previously obtained a Special Act to exempt Cambridge from the provisions of the Dover Amendment relating to religious and nonprofit educational facilities. Barnstable currently has special legislation pending to allow Barnstable to regulate nonprofit educational uses in residential zoning districts.

ii. Provisions of G.L. c. 40A §3 Prohibiting the Imposition of Local Regulations for Congregate Living Arrangements for Non-Related Persons with Disabilities that are not Imposed on Families or Groups of Similar Size or Unrelated Individuals.

G.L. c. 40A §3 also includes a provision which limits the imposition of local regulations on congregate living arrangements among non-related persons with disabilities that are not imposed upon families and groups of similar size or unrelated persons. Specifically, the provision states:

> Notwithstanding any general or special law to the contrary, local land use and health and safety laws, regulations, practices, ordinances, by-laws and decisions of a city or town shall not discriminate against a disabled person. Imposition of health and safety laws or land-use requirements on congregate living arrangements among non-related persons with disabilities that are not imposed on families and groups of similar size or other unrelated persons shall constitute discrimination. The provisions of this paragraph shall apply to every city or town, including, but not limited to the city of Boston and the city of Cambridge.

Since the Massachusetts Zoning Act nowhere defines the phrases "disabled person" or "persons with disabilities", the Legislature ordinarily construes the Massachusetts statute in accordance with the construction given the cognate Federal statute that Massachusetts would look under federal law, including the FHA, in

interpreting the phrases "disabled person" and "persons with disabilities," Granada House v. City of Boston, 6 Mass. L. Rep. 466 (1997).

According to 42 U.S.C. §3602(h), the Act defines "handicap" as "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment." The Act broadly defines "handicapped" individuals and those who need support, care and supervision because of impairments which substantially limit at least major life activities. See Oxford House, Inc. v. Town of Babylon, 819 F. Supp. 1179, 1185 (E.D.N.Y. 1993), and cases cited therein

The proposed zoning amendment would prohibit group homes in residential zoning districts "where a small number, of at least three, unrelated people in need of care, support, or supervision can live together" by its terms imposes "...land-use requirements on congregate living arrangements among non-related persons with disabilities that are not imposed on families and groups of similar size or other unrelated persons" and would therefore run afoul of the above provision under G.L. c. 40A §3.

b. Federal Law.

i. The Federal Fair Housing Act.

The Fair Housing Act, 42 U.S.C. § 3601 (FHA), generally makes it unlawful to refuse to sell or rent or otherwise make unavailable a dwelling to an individual on account of race, color, religion, sex, familial status, handicap, or national origin. In addition, the FHA establishes protections for persons with disabilities and families with children with which local zoning requirements must be consistent.

An individual or organization may attempt to prove housing discrimination under one or more of three causes of action: (1) disparate treatment; (2) disparate impact; and (3) evidence that a municipality failed to make "reasonable accommodations" to its rules, policies or procedures, "when such accommodations may be necessary to afford the [physically disabled] equal opportunity to use and enjoy a dwelling." See, 42 U.S.C. §3604(f)(3)(B).

Congress explicitly intended for the FHA to apply to zoning ordinances and other laws that would restrict the placement of group homes. H.R. Rep. No. 100-711, at 24 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2185 (stating that the amendments "would also apply to state or local land use and health and safety laws, regulations, practices or decisions which discriminate against individuals with handicaps"); *see also* Hemisphere Bldg. Co. v. Village of Richton Park, 171 F.3d 437, 438 (7th Cir. 1999) ("the cases hold or assume …that the [FHA] applies to municipalities, and specifically to their zoning decisions"); Larkin v. Michigan Dep't of Soc. Servs., 89 F.3d 285, 289 (6th Cir. 1996) (noting that Congress intended for the FHA to apply to zoning ordinances that restrict the placement of group homes) which either apply to group homes for the disabled or have a disparate impact on such uses have been disfavored as being violative of the FAA). United States v. See, City of Chicago Heights, 161 F. Supp. 2d 819 (2001); Children's Alliance; Horizon House v. Township of Upper Southampton, 804 F. Supp. 683 (E. D. PA 1992).

When dispersal requirements for group homes under local ordinances have been upheld, it has been where an existing state statute required dispersal to promote the integration of group homes for the disabled throughout the community and where the

spacing requirement was limited. See Harding v. City of Toledo, 433 F. Supp. 2d 867, 871-872, N.D. Ohio , 2006)(preliminary injunction denied in a challenge to a 500 foot setback between group homes which mirrored state law); Family Style v. City of St. Paul, 923 F. 2d 91 (8th Cir. 1991)(where there were already 21 group homes in a one and half block area and state law authorized the ordinance, denial of 3 additional group homes was upheld). As noted above, G.L. 40A s.3 does not permit disparate treatment for the siting of congregate living facilities for the disabled which are not imposed upon single family residences.

ii. The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12132

The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12132, provides in part that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." Although the First Circuit has yet to hold that the ADA applies to zoning regulations or decisions, the Second, Third, Sixth, and Ninth Circuit Courts of Appeal have concluded that municipal zoning that discriminates against drug and alcohol rehabilitation programs offered to qualified individuals with a disability violates the ADA

Consistent with the rulings in other jurisdictions, in Habit Mgmt., Inc. v. City of Lynn, 235 F. Supp. 2d, 28 (D. Mass 2002), the Court ruled that a zoning ordinance of the City of Lynn banning methadone clinics within two miles of a school (and thus everywhere within the City of Lynn) violated the ADA. The city made "no showing that the placement of methadone clinics in industrial [zones in which other clinics were allowed by special permit] or business [zones in which other clinics were allowed as of

right] poses any significant risk to the health and safety of the community even when within two miles of a school." Habit Mgmt., Inc. v. City of Lynn, 235 F. Supp. 2d at 29.

As the Massachusetts Attorney General's letter disapproving the Millbury exclusion zone for methadone clinics points out "[T]he Àmericans with Disabilities Act (42 U.S.C §§ 12132 et seq.) ('ADA'), the Rehabilitation Act (26 U.S.C § 794(a) ('RA'), and Fair Housing Act (42 U.S.C § 3604 (f)(i) et seq.) ('FHA') all prohibit municipal by-laws from discriminating against disabled persons.

CONCLUSION

Since the passage of the Home Rule Amendment (HRA), the Town of Barnstable has embraced the opportunity for legislative creativity in addressing local issues that the HRA provided. In so doing, the Town has been mindful of those areas where federal and state constitutional and statutory constraints preclude local legislative action. Our analysis leads us to the conclusion that for the reasons outlined in detail above, an ordinance which prohibits group homes defined as "a home where a small number, of at least three, unrelated people in need of care, support, or supervision can live together" in all residential zoning districts is inconsistent with state law and preempted by it. The same inconsistency and preemption would occur with any other zoning amendment having a similar application. Further, such a local ordinance would be subject to challenge under both the FHA and the ADA.

We are happy to address any additional questions which you might have.

November 8th 2017

Elizabeth Jenkins/Members of the Planning Board,

As per the recommendation of Planning and Development on August 23rd 2017, we the petitioners have revised our request/proposal to amend the zoning ordinance to restrict group homes in Residential Districts.

Please submit the follow revisions to the Planning Board for our hearing scheduled Monday November 13th at 7:00 pm EST.

Section 240-10E:

Except as otherwise specified here under: The following are prohibited;

E. Group Homes in Residential Districts

240-128 - To add the following definition:

Group Home - is defined as a home where a small number, of at least three, unrelated people in need of care, support, or supervision can live together.

Thank you,

Laura Wentzel/John Julius

November 8, 2017

Gary Lopez

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BARNSTABLE PLANNING BOARD

BARNSTABLE TOWN COUNCIL

BARNSTABLE TOWN ATTORNEY

365 Main Street

Hyannis, MA

This a letter in support of an amendment to Section 240-116 (Exemptions) of the Barnstable Code by adding (F) to require Dover Amendment proponents to validate their "educational use" claims based on the 2012 Supreme Judicial Court (SJC) decision in Regis College v. Town of Weston.

Regis College, located in Weston, Massachusetts, proposed "Regis East," an eight-building, 766,000 square-foot residential facility for senior citizens, to be built on a parcel of wooded land across the street from its main campus. In addition to apartment units and associated dining, fitness and healthcare facilities, Regis East would include classrooms, and residents would be required to enroll in at least two courses per semester.

Weston's Zoning Board of Appeals denied Regis's request for relief from local zoning, expressing the view that the educational aspects of the project were mere "window dressing" for what was in truth a luxury housing development. Regis appealed to the Land Court. In a summary judgment ruling, the Land Court affirmed the zoning board's decision, agreeing with the board that Regis East appeared to be more of a money-making housing development than an educational institution, and that the project's educational features were too vaguely described. Regis filed a further appeal, and the SJC took the case on direct appellate review.

In its decision, the SJC first reviewed some of its own key precedents in considerable detail. Doing so led the court to confirm that, while Dover Amendment protection isn't limited to "traditional or conventional educational regimes," to qualify for the exemption a project proponent must show two

things: (1) a "bona fide goal" that can reasonably be described as "educationally significant," and (2) that this educationally significant goal is the "primary or dominant" purpose of the project.

On both elements, the SJC concluded that Regis's evidence – while vague – was sufficient to raise disputed issues of material fact that could not properly be resolved on summary judgment. As a result, the SJC remanded the case to the Land Court for further proceedings – most likely a trial.

I propose the Barnstable Code be amended to reflect the SJC's Regis decision by requiring future Dover Amendment proponents in all single family-zone districts to validate their claims to the ZBA by submitting evidence of a bona fide goal that can reasonably be construed as "educationally significant."

I feel it is imperative both elected and appointed town leaders to act to protect the most important purpose of zoning; to protect and maintain property values by assuring that incompatible uses have a fair hearing that enables abutters to present their views. The SJC, in its Regis decision, amended MGL Ch. 40A Section 3, the Dover Amendment, to require proponents to prove their assertions.

Sincerely,

Gary Lopez