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MEMORANDUM

To: Board of Selectmen

From: Christopher J. Petrini
Town Counsel

cc: Zoning Board of Appeals
Planning Board
Standing Committee on Planning and Zoning
Government Study Committee
Edward Noonan, Town Moderator
George P. King, Jr., Town Manager
Mark J. Purple, Assistant Town Manager
Joe Mikielian, Building Commissioner
Eugene Kennedy, Senior Planner

Date: July 22, 2005

Re: SMOC's Proposed Use for 517 Winter Street; Possible Changes or Modifications to Framingham Zoning By-Law and Possible PILOT Program for Framingham

INTRODUCTION

This memorandum will address several questions that have arisen due to the recent purchase of 517 Winter Street by South Middlesex Opportunity Council, Inc. ("SMOC"). Local residents have expressed concerns that SMOC may decide to use the existing building at this site for some type of use that is incompatible with the residential zoning of this area. Members of the Board of Selectmen have expressed similar concerns. In view of these concerns, I have undertaken an analysis to determine what form of reasonable compliance with local zoning may be imposed on the use of this property, while being mindful of the protections that likely will be afforded it pursuant to G.L. c. 40A, § 3 (hereinafter referred to as "Section 3" or "Dover

Amendment”). I also have addressed whether some form of payment in lieu of taxes program (“PILOT Program”) may be applied to SMOC to recoup some of the costs incurred in providing SMOC or its service clients with municipal services. If the Board wishes to meet with me at an upcoming meeting to discuss this memorandum, I would be pleased to do so.

FACTS

SMOC is a Massachusetts nonprofit corporation and also is qualified as a charitable organization pursuant to G.L. c. 59, § 5, as exempt from taxation. SMOC provides service to low-income, homeless and special need populations in the greater Metrowest area. SMOC’s stated goal is to improve the quality of life for low income people by offering programs that include day care and preschool education, employment training and placement, housing, addiction, mental health, women’s protective services, nutrition, energy and weatherization, legal services, services for the elderly, emergency shelter, as well as community organizing around health care, housing, rising energy cost and banking services.

A review of the Town’s property listing for 517 Winter Street, indicates that the land and existing structure have been held in continuous ownership since January 1, 1900, by the Nicholas Thisse Trust. Because the two-story building on this property has been used as a nursing home since it was built in 1900, it has continued as a preexisting nonconforming use pursuant to G.L. c. 40A, §6, due to the fact that the use predates the change to an R-1 zoning district.

On July 13, 2005, the Department of Building Inspection (“Department”) received a building permit application from SMOC for a change of use, with no additional construction, for a “family shelter, providing temporary housing for families, supported by a program designed to assist formerly homeless families in finding and maintaining permanent housing” for the former nursing home at 517 Winter Street. Along with their application, SMOC provided details of the proposed educational use and its non-profit status. Under G.L. c. 40A, the Building Commissioner has 30 days from receipt to either approve the building permit application or deny the application in writing for cause.

ISSUES PRESENTED

I have addressed several questions concerning the acquisition of this property by SMOC. These questions include: (1) what zoning requirements would SMOC be required to comply with if the proposed use is not a Dover Amendment use; (2) if the Town is to adopt a change to the Zoning By-Law that could require Dover Amendment uses to be subject to site plan review, what kinds of review and regulation can the Town impose on these uses; (3) could those changes to the By-Law be applied to SMOC; and (4) even though SMOC is a charitable, non-profit organization, can the Town require that it make payments-in-lieu-of-taxes for the cost incurred by the Town in providing municipal services?

ANALYSIS

1. What would be required if the use proposed by SMOC is not a Dover Amendment protected use?

The prior use of the property for a nursing facility was a pre-existing, non-conforming use that was in existence prior to the zoning of this area for R-1 residential use. The new use is as a family shelter. Therefore, if the proposed use was found to not be a use protected by Section 3, SMOC would need to obtain a variance by the Zoning Board of Appeals that the change in use will not be substantially more detrimental than the existing nonconforming use to the neighborhood pursuant to G.L. c. 40A, § 6. However, even if SMOC could meet the requirements for a use variance, it would not be available in this instance as Section V.F.1. of the By-Law states “[a] variance authorizing a use or activity not otherwise permitted in the district in which the land is located shall be prohibited in . . . single residence and general residence districts.” SMOC would also be subject to any other relevant regulations required by the By-Law for the type of use being proposed, including parking requirements and site plan review if those provisions were triggered by the proposed use.

It is possible, however, that SMOC will be able to support its claim that this is a legally supportable Dover Amendment use. “The Dover Amendment bars the adoption of a zoning ordinance or bylaw that seeks to prohibit or restrict the use of land for educational [or religious] purposes.” Trustees of Tufts College, 415 Mass. 753, 757 (1993). However, the statute authorizes municipalities to adopt and apply reasonable regulations regarding bulk, dimensions, open space and parking, to land and structures for which such uses are proposed. See id. According to the Supreme Judicial Court, the Dover Amendment seeks to strike a balance between preventing local discrimination while “honoring legitimate municipal concerns” that are expressed in local zoning laws. See id.

The Superior Court recently decided a Dover Amendment case with facts similar to SMOC’s present application for a change of use. In Brockton Coalition for Homeless v. Tonis, 2004 WL 810296 (Mass. Super. Ct. March 5, 2004) (Hely, J.). In that case, the Brockton Coalition for the Homeless (“Coalition”) purchased the land and building of a nursing home in Stoughton. See id. at 1. The Coalition then obtained a building permit to renovate the nursing home in order to operate the facility as a temporary shelter for seventeen homeless families. See id. An abutter to the property appealed the issuance of the building permit to the Stoughton Zoning Board of Appeals and the zoning board overturned the issuance of the building permit, which in turn precluded the building commissioner from issuing a certificate of occupancy. See id. at 2.

The Coalition appealed the decision to the Superior Court pursuant to G.L. c. 40A, § 17. See id. The Superior Court found that “the term shelter is somewhat misleading. Temporary housing is only one part of the assistance that the Coalition will be providing to homeless families at the Stoughton facility. . . . [the purpose of the] shelter is to assist homeless families in obtaining permanent housing and in becoming economically and socially independent. The Coalition seeks to achieve this by providing temporary shelter with education.” Id. at 3. The

court then went on, at length, to address all of the programs offered by the Coalition which supported its conclusion that the dominant purpose of the proposed facility was educational. See generally id. This in turn required the court to apply the limitations on the board's authority as contained in § 3 for a Dover Amendment use and resulted in the court looking closely at the zoning board's basis for denying the permit, which was predominately based on inadequate parking and access for fire and emergency vehicles. See id. at 5-6. According to the Court, all of the issues could be adequately addressed through reasonable accommodations and therefore strict compliance with zoning was not required. The Court therefore overturned the decision of the zoning board and ordered issuance of the certificate of occupancy while permitting the zoning board to regulate the location and marking of parking spaces to ensure adequate and appropriate emergency vehicle access.

2. What changes to the Zoning By-Law would allow Review and Regulation of Dover Amendment Uses and what would be the Limits to Regulation under State Law?

There is currently a great deal of interest in Town in changing the Zoning By-law to expressly permit reasonable regulation, and in some cases, site plan review of Dover Amendment uses. A Zoning By-Law change has been proposed for consideration by a Special Town Meeting on August 3, 2005. The Zoning By-Law changes as currently drafted propose to treat Dover Amendment uses the same as other projects, subject to whatever Dover protections such projects are entitled to receive. These changes are likely to be found permissible by the Attorney General and the courts, so long as they are applied in a neutral, non-discriminatory fashion to Dover uses.

Some communities have implemented site plan review provisions solely tailored for regulation and review of Dover Amendment uses. These bylaws generally have been approved by the Attorney General. The possible risk of such by-laws in their application is that the Appeals Court has determined "there is nothing in the language of G.L. c. 40A, § 3, which contemplates the requirement of site plans and informational statements as monitoring devices for educational [and religious] uses . . ." The Bible Speaks v. Board of Appeals of Lenox, 8 Mass. App. Ct. 19, 32 (1979). According to the Appeals Court, allowing site plan review for these uses might enable planning boards to:

fashion restrictions that subordinate the [] use to the board's planning goals. Any such restriction imposed under the authority of the by-law may well have the effect of nullifying, or seriously diminishing, the educational institution's entitlement to reasonable growth. It also, as a practical matter, enables the town to exercise its preferences as to what kind of educational or religious denominations it will welcome, the very kind of restrictive attitude which the Dover Amendment was intended to foreclose.

See id. at 32-33. A copy of the Bible Speaks decision is attached as Exhibit A.

Notwithstanding the broad prohibitory language in the Bible Speaks decision, recent case law at the trial court level indicates that site plan review may be applied to Dover-protected uses

if it is a neutral application of local zoning.¹ For example, in a recent decision issued by the Superior Court, the use of site plan review by the Town of Sturbridge was found to be reasonably applied to new construction involving an expansion project proposed by a non-profit organization which included an educational component. See Rehabilitative Resources, Inc. v. Peabody (Zoning Board of Sturbridge), 2004 WL 2341387 (Mass. Super. Ct. Oct. 7, 2004) (Billings, J.) (“Rehab III”). (A copy of Rehab III is attached as Exhibit B.) In this case, a planning board denied approval of the project’s site plan, “acknowledging that § 3 applied to [the project], but finding the project not in conformity with the bylaw’s requirements regarding a variety of (vehicular and pedestrian) traffic-related issues.” Rehabilitative Resources, Inc. v. Planning Board of Sturbridge, 61 Mass. App. Ct. 1122 (2004) (unpublished 1:28 decision which cannot be relied upon as precedent) (Rehab II). (A copy of Rehab II is attached as Exhibit C.) Specifically, the planning board found “that while the proposed project is an exempt educational use, it does not satisfy the safety requirements of the site plan review process. The application is silent on the surrounding safety concerns and offers no mitigation measures. The proposed use[s] . . . exceed the stated ‘office building’ parameters for the traffic study and site design.” See Rehab II at 1122.

In response to the planning board’s decision, Rehabilitative Resources, Inc. (“RRI”), appealed to the Superior Court and subsequently to the Appeals Court, asserting that as the project involved a nonprofit educational use, it was subject to protection of G.L. c. 40A, § 3 and therefore not required to comply with the town’s site plan review process. See Rehab II at 1122; Rehabilitative Resources, Inc. v. Gibson, 2002 WL 31973244 (Mass. Super. Ct. Dec. 13, 2002) (Donohue, J.) (Rehab I). (A copy of Rehab I is attached as Exhibit D.) The case went to the Appeals Court on a procedural issue to answer the question of whether a town’s by-law could allow an applicant the right of appeal directly to court for review of a denial of a site plan. The Appeals Court held that a town by-law could establish the right to immediate court review, but did not reach RRI’s claim that site plan review did not apply to the use based due to G.L. c. 40A, § 3. Instead the Appeals Court remanded it back to the Superior Court to be combined with that courts consideration of the denial of the building permit.

On remand from the Appeals Court, the Superior Court in Rehab III found in favor of the planning board and held that local zoning can be enforced “against an educational use . . . so long as the provision is shown to be related to a legitimate municipal concern, and its application bears a rational relationship to the perceived concern.” The Superior Court concluded that in relation to the site under consideration, which was already nonconforming as to setback and lot width, enforcement of the zoning requirements were reasonably related to addressing important issues of access, density, light and air. See Rehab III, Exh. B., at 5. The Superior Court found that RRI had failed to carry its burden in showing that it would be excessively burdened by substantial compliance with the zoning by-law. See Rehab III, Exh. B, at 6. What is most significant is that the court also took into consideration that the educational use was not the main

¹ As one example of an attempt to fashion an acceptable means by which to apply site plan review to Dover Amendment uses, the City of Newton requires a “non-binding” administrative site plan review for these types of uses. As compliance with the outcome of the review would be voluntary, it arguably does not violate the ruling of the Appeals Court in The Bible Speaks. However, it also does not contain a means by which to insure compliance with local concerns and recommendations.

purpose for the structure, stating that “[i]t is neither a campus, nor a single-purpose structure, nor the last developable site in town. That RRI may have outgrown it, and may wish to consolidate its operations . . . is not sufficient to carry its burden of showing that otherwise legitimate land use regulations would unreasonably interfere with its educational mission.” Id.

It does not appear that RRI sought to appeal the decision of the Superior Court on the fundamental question of whether it is permissible to apply site plan review to Dover projects. Although this case does not set any form of precedent, it still provides guidance in defining what local regulations may be considered reasonable by the courts in their attempt to balance local concerns with the need to protect Dover Amendment uses. We may be able to use RRI III for persuasive value should the Building Commissioner determine that the use was not primarily educational in nature and thus does not grant the permit allowing the change of use under the Dover Amendment.


The requirements for site plan review as defined in Framingham’s By-Law (presuming the By-law is amended at the August 3rd Town Meeting to remove the current exception for Dover Amendment uses), are quite different from the requirements used by the Town of Sturbridge.² However, they are similar in that both are neutral as to their application in that they do not require that G.L. c. 40A, § 3 uses be subjected to any greater regulation than other uses. It is this neutral treatment that appears to be the key element to the successful application of site plan review to Dover Amendment uses.

The principle of treating Dover and non-Dover uses alike also is in keeping with an opinion of the Attorney General’s Office (“AGO”) issued to the Town of Danvers in 2003, which stated in pertinent part:

It is our view that the requirement for site plan review is not facially inconsistent with state law to ascertain whether a protected use complies with reasonable regulations concerning yard size, lot area, setbacks, open space, parking, and building coverage requirements. However, we caution the town not to implement site plan review in a manner that infringes on the rights given under G.L. c. 40A, Section 3.

See Danvers #2366 (Attorney General’s Office, The Municipal Law Unit, March 19, 2003). Stated in another way, reasonable regulation and site plan review of Dover Amendment Projects likely will be deemed permissible by a court if it is applied to many uses and not just § 3 uses, and the analysis or review performed stays within the parameters of what can be regulated under the Dover Amendment.

² The Town of Sturbridge required site plan review for most uses based on the language “No person shall undertake a use, construction, or alteration of any structure which is subject to the provisions of the Site Plan Review, unless . . . [a]pproved by the [planning board], [whereupon] the [planning board] shall issue a permit therefore No building or use permit shall be issued by the Director of Inspections . . . until a decision of the [planning board] providing the final site plan has been filed with the Town Clerk” See Rehab II, Exh. C. at 1122.

 Therefore, it is advised that the Town not attempt to fashion any type of “use specific” site plan review for Dover Amendment uses. Instead, Section IV.I.2 of the By-Law which currently states:

The Planning Board shall conduct site plan review and approval. Notwithstanding any provision of this By-Law to the contrary, any structure, use, alteration or improvement which meets any of the following criteria (excluding subdivisions for detached single-family dwellings, planned unit developments, and all uses exempt from such zoning regulation as set forth under MGL Chapter 40A, Section 3) shall require site plan review and approval as set forth in this section (emphasis added).

should be amended to remove the underscored “and all uses exempt from such zoning regulation as set forth under MGL Chapter 40A, Section 3.” In addition, Section III.A.1.i. which states:

i. Facilities, including structures and site improvements, owned and operated by a non-profit organization recognized by the Commonwealth of Massachusetts as such, Chapter 180, as amended, Massachusetts General Laws, operated for religious, charitable, educational, scientific, or literary purposes, or to prevent cruelty to animals or children and not of a correctional nature, which are used for the non-profit work of the organization, including the administration of such organization's affairs, provided that: (1) The contiguous area of the site, including the area of any ponds or lakes located thereon, shall be not less than 40 acres, and . . . (14) Before the Planning Board makes its recommendations to the Building Commissioner a public hearing shall be held by the Planning Board.

should either be eliminated³ or the reference to religious and educational uses in the first sentence of that subsection should be removed from the list of nonprofit uses. This should then allow for site plan review to be used in instances involving Dover Amendment uses that meet the already established requirements for review.

In addition to the areas of regulation specifically identified in § 3, courts have given deference to regulation based on traffic concerns and possibly environmental concerns. See Trustees of Tufts College, 415 Mass. at 755; Watros v. Greater Lynn Mental Health and Retardation Association, Inc., 37 Mass. App. Ct. 657, 665 (1994); The Southern New England Conference Association of Seventh-Day Adventists v. Town of Burlington, 21 Mass. App. Ct. 701 (1986) (§ 3 did not exempt religious use from provisions of a town's zoning by-law requiring a special permit for construction within a wetlands district). However, the Appeals Court did not find “land erosion or loss of tree cover” to be appropriate considerations under § 3. The Bible Speaks, 8 Mass. App. Ct. 31.

³ If eliminated, then it would also be necessary to remove III.A.2.a. Further, it should be noted that III.A. does not have a provision allowing for “educational purposes on land owned by a nonprofit educational organization.”

3. Could Pending Proposed Changes to the Zoning By-Law Be Applied to 517 Winter Street Presuming Passage by Town Meeting on August 3rd?

If the proposed use contains a demonstrable educational component offered by SMOC as a nonprofit educational corporation, then it would be a permissible “as of right” use for this area, despite the fact that the Section III.1. of the By-Law does not include clear language allowing for this use in an area zoned for single residence use. See Trustees of Tufts College v. City of Medford, 415 Mass. 753, 760 (1993). It is ultimately SMOC’s responsibility to present the necessary evidence to the Town to support an assertion that it meets the requirements of G.L. c. 40A, § 3, for protection as an educational use.

Whether the proposed changes to the By-Law could be applied to SMOC is directly guided by G.L. c. 40A, § 6, ¶ 1, which provides that “a zoning ordinance or bylaw shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law.” In the present case, the Planning Board filed its Notice of Public Hearing with the Town Clerk on July 11th, SMOC filed its building permit for a change of use with the Building Commissioner on July 13th, and newspaper notice of the proposed by-law changes was published in the Metrowest Daily News on July 14 and 21, 2005. No building permit was issued prior to the first publication of notice of the proposed changes to the By-Law. Therefore, SMOC would be subject to and required to comply with changes in the Zoning By-Law made in accordance with this public notice, presuming such changes are adopted by Town Meeting on August 3, 2005.

However, according to G.L. c. 40A, § 5:

The effective date of the adoption or amendment of any zoning ordinance or by-law shall be the date on which such adoption or amendment was voted upon by a city council or town meeting; if in towns, publication in a town bulletin or pamphlet and posting is subsequently made or publication in a newspaper pursuant to section thirty-two of chapter forty. If, in a town, said by-law is subsequently disapproved, in whole or in part, by the attorney general, the previous zoning by-law, to the extent that such previous zoning by-law was changed by the disapproved by-law or portion thereof, shall be deemed to have been in effect from the date of such vote.

This language will control if the Attorney General’s Office determines that the changes to By-Law could not be amended as proposed and specifically that Section IV.I.2. cannot be amended to allow site plan review of Section 3 uses. For the reasons described above, however, we believe that the Attorney General’s Office likely will approve the changes to the Zoning By-Law to no longer exempt Dover Amendment uses from site plan review where applicable, at least to the extent consistent with the Public Hearing Notice published in the Metrowest Daily News published on July 14, 2005.

4. Can the Town Require Tax-Exempt Uses to Repay the Town for Municipal Services through a PILOT Program?

State law has established numerous exemptions that release certain tax-exempt property owners from the obligation to pay all or a portion of the taxes assessed on a parcel of property. Property owned by nonprofit charitable organizations are exempt pursuant to G.L. c. 59, § 5. An organization or institution is considered a charitable organization if the work they perform is for the public good and not for the benefit of its members or a limited class of persons. The burden is on the organization asserting tax-exempt status to establish it. For every parcel of property that is exempted from taxation an increase is required in the amount of taxes that must be collected from other properties that are taxable to cover the cost of necessary funding for municipal services to all properties.

Despite the fact that properties owned by charitable organizations are exempt from taxation, such organizations still utilize municipal services including police, fire, public health, and other resources. Cities such as Boston have made a concerted effort to address this problem through the initiation of Payment in Lieu of Tax Programs (“PILOT”). Through its PILOT Program, the City of Boston receives contributions from educational, medical and cultural institutions which have entered into agreements to help cover the costs of municipal services. Currently 52% of all Boston real estate is owned by tax-exempt organizations. Without the PILOT Program the cost of municipal services would be borne exclusively by residential and commercial taxpayers in the city. Boston’s PILOT program has received favorable recognition as a model program. The City’s tax policy unit has provided us with a copy of their Guidelines for establishing a PILOT Program, a copy of which are attached hereto as Exhibit E. Given the success of the Boston PILOT Program and the high level of participation that Boston has been able to achieve, it is worthwhile to spend a few moments analyzing Boston’s program here.

PILOT Programs are voluntary; the local municipality has no authority by which it can require a tax exempt organization to participate. Yet, there are many organizations that realize that they are receiving valuable services without paying their share of the costs and have voluntarily agreed to pay for those services. Every year the City of Boston publishes a list of contributing non-profit organizations that have made contributions through the PILOT Program, which affords them with recognition by the local community for their support. If Framingham ultimately adopts a PILOT program, I see no reason why all currently existing non-profit organizations in Framingham should not be asked to participate, insofar as participation is voluntary.

Boston’s PILOT process begins at the time a tax-exempt organization acquires new property or begins new construction. Notifications of those actions are provided to the Assessing Department by the Boston Redevelopment Authority. The Assessing Department then contacts the organization and request a PILOT. This includes a New Project Profile Form to be completed by the organization regarding its property, revenue raising capability, intended use of the property, ad other related information. Once the Assessing Department reviews the New Project Profile, representatives of both the tax-exempt institution and the Assessing Department begin discussions about the proposed acquisition or development, determine the appropriate

contribution amount, and address various other terms to be incorporated into the PILOT agreement. The Assessing Department then makes an initial draft of the agreement which is forwarded to the organization for further review. Once approved, it is signed by all the necessary parties. The amount of contribution to be paid is based on a percentage of the normal property tax or tax estimate for the improvement. In addition the program allows that a portion of the payment be made via direct community services or monetary donations to other city-sponsored or sanctioned community programs.

I understand that the Board and the Moderator are in the process of appointing a PILOT Review Committee. I recommend that a copy of this memorandum be given to appointees to this Committee. I also would be glad to look into further issues with respect to PILOT Programs to the extent requested by the Board.

CONCLUSION

Based on the foregoing discussion, before SMOC can use the facility at 517 Winter Street for a non-residential purpose, it must either show that the use will not be substantially more detrimental than the existing nonconforming use to the neighborhood or that it is an allowed use in this zoning district pursuant to G.L. c. 40A, § 3. As it is unlikely that SMOC will have obtained the necessary permits to begin this use before the Town meets the notification requirement for the amendment to the By-Law, SMOC's use of the property may be subject to some form of review and regulation pursuant to By-Law Section IV for site plan review and parking. The Town should consider adopting a PILOT Program that is similar to Boston's program; however, it is recommended that the scope of the program be expanded to include existing organizations.