

**Environmental & Land Use - Emerging Issues
Boston Bar Association
November 8, 2001**

ZONING UPDATE AND DOVER AMENDMENT

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I. STANDING

Although Martin v. Board of Appeals of Belmont, 434 Mass. 131 (2001), is known for its interpretation of the Dover Amendment regarding religious uses (see Section II, below), the decision also is significant regarding standing in zoning cases.

In Martin, the Board held that a 139-foot spire on a proposed temple was exempt from the 72-foot height limit in the Belmont Zoning Bylaw under the Dover Amendment and, in the alternative, granted a special permit for the spire. Several neighbors appealed. The plaintiffs argued that (1) they would unavoidably see the spire, which would be lighted until 11:00 p.m., from their houses and yards, whereas they see little if any of the temple building itself, and (2) the spire would cast a shadow on one of their yards for up to 40 minutes in the afternoon and evening, with some shadowing for 17 weeks.

The Bylaw requires the Board, in deciding a special permit, to take into consideration the visual consequences of a proposed building. It states that views from developed properties “should be considerately treated in the site arrangement and building design”. The plaintiffs argued that that provision gave them standing under Monks v. Zoning Board of Appeals of Plymouth, 37 Mass. App. Ct. 685 (1994). In Monks, homeowners appealed a special permit for the height of a communications tower. The bylaw authorized a special permit for height only where the board

found that “the proposed structure will not in any way detract from the visual character or quality of the adjacent buildings, the neighborhood or the town as a whole”. The Appeals Court reversed summary judgment for the defendants because the bylaw had “created and defined a protected interest”. It held that the plaintiffs’ evidence that the tower would be visible from their house and neighborhood “sufficiently particularizes their general contention of visual impact to remove it from the realm of speculative and generalized aesthetic concern”. Id. at 688-689.

In Martin, the Superior Court found that the spire would cause appreciable periods of shadowing of the plaintiffs’ properties and substantially reduce their enjoyment of their properties. It found that the plaintiffs had standing based on both visual impact and shadows. In the “unique factual circumstances” in that case, it found that:

The presence of such an enormous structure looming over the plaintiffs’ properties creates a visual impact different in kind and degree from the aesthetic concerns of incompatible architectural styles, neighborhood appearance, and diminished open space which have been deemed insufficient to confer standing.

The impacts on the plaintiffs would be “extreme and unique”, and not too speculative or remote. The court relied in part on the bylaw provision quoted above, but declined to treat that provision as conclusive because it is less definitive than the bylaw provision in Monks.

The SJC agreed that one of the abutters had standing, but based solely on the bylaw provision quoted above and Monks.¹ As a starting point, the Court summarily dismissed the plaintiffs’ arguments and judge’s decision regarding visual impacts apart from that bylaw provision. It held

¹ The Superior Court also held that the plaintiff who lives across the street from an abutter to the temple is within the class of “parties in interest” under c. 40A, § 11, who have a presumption of standing, and had standing in that case. That decision may be broader than the statute (parties in interest include “abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within [300] feet”). However, the SJC did not address that issue, or the standing of the other two plaintiffs who were direct abutters, because only one plaintiff needs standing in a zoning case. 434 Mass. at 145.

that visual impacts are generally insufficient for standing, and was unpersuaded by the Superior Court's distinction of that general rule in that case. 434 Mass. at 146, citing Harvard Square Defense Fund, Inc. v. Planning Board of Cambridge, 27 Mass. App. Ct. 491, 496 (1989) (a "general civic interest" in the enforcement of zoning laws or the preservation of Harvard Square is insufficient); see id. at 147 n. 17 (the evidence of shadow from the spire was speculative and insufficient). However, it then noted that a "defined protected interest may impart standing to a person whose impaired interest falls within that definition". Id. at 146-147, citing Monks. Noting the judge's finding that "the towering steeple would be visible to Martin from most, if not all, of her property", day and night, it held that she came within the bylaw protection sufficiently for standing. Id. at 147.

Martin raises, or at least leaves unanswered, several questions about standing:

- Apart from any particular provision of the bylaw, does visual impact ever suffice for standing? This case suggests that it rarely does. However, in Tsagronis v. Board of Appeals of Wareham, 415 Mass. 329, 330 (1993), the Court held summarily that abutters had standing to challenge a variance for a house, where one plaintiff's view of Buzzards Bay would be "partially obstructed by construction on the locus" and the value of his property would be diminished. Tsagronis may be distinguishable based on the lost property value. However, lost property value is not required, at least at the summary judgment stage, where the plaintiff's standing rests on traffic impacts. See Marashlian v. Zoning Board of Appeals of Newburyport, 421 Mass. 719 (1996); Evarts v. Planning Board of the City of Somerville, Civil Action No. 01-0145 (Middlesex Superior Court, September 28, 2001) (Houston, J.) (denying the defendants' motion for summary judgment regarding a proposed Home Depot in the Assembly Square Mall in Somerville, where the plaintiff

would have particular problems exiting her house onto Route 28); see also Barvenik v. Board of Aldermen of Newton, 33 Mass. App. Ct. 129, 133 (1992) (although perhaps the courts' narrowest view of standing and partially rejected in Marashlian, nevertheless noting that a plaintiff did not need to incur lost property value to have standing). Do Martin and Tsagronis mean that aggrievement based on visual impact must be supported by lost property value even though more tangible kinds of impacts such as traffic do not?

- The Court reaffirmed that speculative impacts are insufficient for standing. See Riley v. Janco Central, Inc., 38 Mass. App. Ct. 984 (1995) (rescript), quoted in Marashlian, 421 Mass. at 723 & n.5 ("uncorroborated speculation" that headlights would shine in a plaintiff's window). However, the fact that *some* shadow from the spire would fall on the plaintiff's house and yard was undisputed. The Court may have been saying that that narrow shadow, which would sweep across the property fairly quickly, was too insignificant for standing. Compare Alroy v. World Realty and Development Co., 5 LCR 245 (December 22, 1997) (Scheier, J.) (abutters' appeal from a building permit for a single-family residence; denying the defendants' motion for summary judgment because the proposed house would cast a shadow over the abutters' house "for much of the afternoon, diminishing the enjoyment of their house"). However, if so, it seems to re-introduce into standing law a threshold of significance not required in Marashlian. In that case, the Court reversed summary judgment for the defendants, holding that abutters may have standing to challenge a special permit and variances for a hotel that would cause a "minimal" increase in traffic and a decrease in parking spaces. 421 Mass. at 722; see id. at 729-730 (dissenting opinion) (the impacts were quite minimal). A truly trivial impact always may have been insufficient for standing (at least at trial, if not at the summary judgment stage), but Martin leaves that line unclear.

- Does any bylaw provision regarding community appearance, neighborhood scale, and other factors create a protected interest that will support standing? How clear a view of the project must the plaintiff have? The Court could have distinguished the precatory and generally applicable special permit language in Belmont from the mandatory and height-specific provision at issue in Monks, as the Superior Court had done, but it declined to do so.

II. DOVER AMENDMENT AND ANALOGOUS ISSUES

Over the past year, the courts have decided several significant cases regarding religious and educational uses under the Dover Amendment, Chapter 40A, Section 3, 2nd par., and other uses under other paragraphs of that section. The Dover Amendment provides that:

No zoning ordinance or by-law shall ... prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures 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.

G.L. c. 40A, § 3 (second par.). Other paragraphs of § 3 extend similar, though not identical, protection to agriculture, horticulture, floriculture and viticulture, child care facilities, solar energy facilities, and ham radio antennas, as well as prohibiting discrimination against group homes and handicapped facilities.²

² The paragraphs of § 3 that are similar to the Dover Amendment provide as follows:

No zoning ordinance or by-law shall ... prohibit, unreasonably regulate or require a special permit for the use of land for the primary purpose of agriculture, horticulture, floriculture, or viticulture; nor prohibit, or unreasonably regulate, or require a special permit for the use, expansion, or reconstruction of existing structures thereon for the primary purpose of agriculture, horticulture, floriculture, or viticulture, including those facilities for the sale of product and wine and dairy products....

No zoning ordinance or bylaw ... shall prohibit, or require a special permit for, the use of land or structures, or the expansion of existing structures, for the primary, accessory or incidental purpose of operating a child care facility; provided, however that such land or structures may be subject to

A. The Previous Caselaw

The SJC interpreted the Dover Amendment in Trustees of Tufts College v. City of Medford, 415 Mass. 753, 757 (1993), and Campbell v. City Council of Lynn, 415 Mass. 772 (1993). The statute "seeks to strike a balance between preventing local discrimination against [a protected] use ... and honoring legitimate municipal concerns". Tufts, 415 Mass. at 757. Dimensional regulations need not be drafted specifically for educational or religious uses, though that would be ideal. Id. at 760. They are "presumptively valid" as long as they do not facially discriminate against those uses. Id. at 765. Because zoning regulations are intended to be uniformly applied, a Dover institution bears the burden of proving that they are unreasonable as applied to its proposed project. It might do so:

by demonstrating that compliance would substantially diminish or detract from the usefulness of a proposed structure, or impair the character of the institution's campus, without appreciably advancing the municipality's legitimate concerns.

Id. at 759; see also Campbell, 415 Mass. at 778 (regulations may be unreasonable where they "would" improperly nullify the protection granted to the use, or ... compliance with the requirements would significantly impede [the] use, in either instance without appreciably advancing municipal goals"). Alternatively, the institution might show that the cost of compliance with the regulation would be "excessive" without "significant gain in terms of municipal concerns". Tufts, 415 Mass. at 759.

Under the Dover Amendment, regulation of a protected use is *per se* invalid. See Tufts, 415 Mass. at 760, 765 (variance and special permit). In Petrucci v. Board of Appeals of Westwood, 45

reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.

G.L. c. 40A, § 3, 1st and 3rd pars. The courts have used the Tufts test under these paragraphs, as well.

Mass. App. Ct. 818, 824 (1998), *review denied*, 428 Mass. 1112 (1999), the court held that the analysis does not turn on impacts of the use but only those of the structure itself, though the court actually considered use-related impacts in that case.

In Tufts, the Court also held that a zoning regulation (other than a use regulation) may not be evaluated in the abstract:

The central question is whether application of the requirements to a specific project in a particular setting furthers legitimate municipal concerns to a sufficient extent to warrant requiring an educational institution ... to alter its development plans. As the Appeals Court correctly stated, this "is essentially a fact-based determination, one that cannot properly be made for possible future construction projects not detailed in the evidence." 33 Mass. App. Ct. at 583.

415 Mass. at 764. The Court rejected Tufts' argument that such relief was permissible under Chapter 240, Section 14A. Id. at 765-766.

In Campbell, where the Court annulled bulk, dimensional and parking requirements as applied to the renovation of a large non-conforming structure for an educational use on a very small lot, it noted that:

It is unlikely that an educational user proposing to build a new structure on a single small lot could argue successfully that dimensional, coverage and parking requirements would be unreasonable as applied to the property.

Id. at 780 n. 9. In those circumstances, "local officials might be warranted in requiring that an educational user seek an alternative site". Id. at 772 n. 9; see id. at 782 (Wilkins and Lynch, JJ., dissenting in part; it would be reasonable to apply the regulations to the premises if other premises in the town were reasonably available).

B. Religious Uses.

Two recent cases addressed the Dover Amendment as applied to the Mormon Temple in Belmont. In Martin, the SJC held that the Church of Jesus Christ of Latter-Day Saints was entitled to build a spire on the temple notwithstanding the height limit in the Belmont Zoning Bylaw. In Boyajian v. Gatzunis, 212 F.3d 1 (1st Cir. 2000), *cert. denied*, ___ S. Ct. ___ (2001), the court upheld the statute as applied to the temple under the Establishment Clause of the First Amendment.

1. Martin v. Board of Appeals of Belmont

The Church proposed a 56-foot temple (60 feet was permitted as of right) with a 139-foot spire (total height), based on one of its prototype designs. It asserted that the temple had to be three stories to accommodate an ascendancy of space for different ceremonies, and the spire had to be proportional to the building height.

The Board concluded that it was unreasonable under the Dover Amendment to apply the 72-foot height limit of the Bylaw to the spire. It also concluded, under a Bylaw provision requiring that the benefits of the spire outweigh the adverse impacts, that the Church was entitled to a special permit. It declined to find that the benefits of the spire outweighed the impacts, but concluded that the Dover Amendment provided a conclusive presumption of benefit.

The evidence at trial included the following:

- Under Mormon doctrine, spires are significant symbolically. However, their height is not prescribed, and every temple is as sacred as any other regardless of its architecture.
- Although the temple was intended to serve 45,000 Church members in New England and the Canadian Maritimes when it was proposed, the Church had built or was building three other temples in that area by the time of trial.
- Of the approximately 52 temples built world-wide in 1995-2000, 42 of them are 18 feet high, one story, with a total spire height of 71 feet, based on a new prototype design.

The Superior Court rejected the Church's testimony regarding the need for the spire to be proportional to the temple building. It noted that both Church witnesses admitted that the spire height was purely an aesthetic issue. In the alternative, it held that, even if a spire provides some religious symbolism, the Church failed to carry its burden of proof under the Dover Amendment:

The Church has not shown that limiting the spire to 12' would prevent or significantly impede the religious use of the Temple or substantially diminish or detract from its usefulness, without appreciably advancing the Town's legitimate concerns. See [Tufts].³

The court also found that, to the extent proportionality is relevant, the Church could have achieved it by reducing the height of the temple building, using steps rather than separate stories to achieve ascendancy of space, and reducing the spaces for non-religious uses.

The court also annulled the special permit. It noted that, to the extent the Town benefits from religious diversity, such a benefit flows from the Temple itself, not the spire. Similarly, concessions made by the Church in order to obtain the special permit, such as an agreement to provide utilities connections, were not benefits of the spire. The court also held that mitigation of the adverse impacts of a project through special permit conditions does not satisfy the Bylaw requirement that benefits outweigh the adverse effects.

The SJC reversed the judgment under the Dover Amendment.⁴ The Court recited the Tufts test, though it referred to "critical municipal goals" instead of "legitimate" ones at one point. 434 Mass. at 148. It then rejected the Superior Court's analysis. First, it held that the appropriate inquiry is whether the whole temple is used for religious purposes, rejecting the judge's focus on the spire and conclusion that the spire would not be used for those purposes. It also rejected the conclusion that the spire is not a necessary element of Mormon religion, holding that such an

³ The court assumed that the bylaw limited the spire to 12' as a shorthand description based on an as-of-right height of 60'. However, the Building Inspector never interpreted the bylaw because the Church proceeded directly to the ZBA, and the Board did not address that issue.

⁴ The Court did not reach the special permit issue. Thus, the Superior Court's annulment of the special permit on the ground that the bylaw requirement of benefits to the Town was not satisfied survives as a persuasive decision.

inquiry is beyond courts' authority. Id. at 149-151.⁵

Second, the Court addressed the application of the Tufts test, the Superior Court's alternate ground. It held that the court's focus on whether the height regulation would impair the temple's usefulness was too narrow. It held that that regulation would impair the temple's character, which encompasses matters of "aesthetic and architectural beauty", because the design was based on an approved Church prototype, the Church values an ascendancy of space for religious ceremonies, the architect considered a proportional design to be part of his assignment, and most Mormon temples have spires. In fact spires are common on churches and practically define building as such for the public. Id. at 152-153. In so holding, the SJC ignored that (1) the Church had adopted a much smaller prototype worldwide while it was proposing this temple, (2) the Church considers that an ascendancy of space can consist of merely a step or two, (3) the trial judge explicitly rejected the architect's testimony about proportionality as a *post hoc* justification (hence the SJC's focus on what the architect *thought* his assignment was, an unprecedented factor), and (4) most (11/19) houses of worship in Belmont do not have spires. Faced with authoritative Mormon texts that all temples are equally sacred regardless of their architecture, the Court commented that "religious 'doctrine'" is not the defining test of whether the imposition of a zoning regulation will impair the character of a religious building. Id. at 153.

Turning to the second half of the Tufts test, the Court noted that the Board had found that the height limit would serve no municipal concern, and the Court saw no evidence to the contrary. The basis of that conclusion is unclear. If the Court was deferring to the Board's finding on that

⁵ As a corollary, the Court rejected the judge's inquiry into whether the temple could have been smaller or certain rooms eliminated. Id. at n. 19. The plaintiffs had raised that argument only because the Church defended the spire height as based on proportionality with the building, but the SJC ignored the proportionality issue.

issue, as its discussion suggests, its decision seems to violate the well-established principles that a zoning trial is *de novo* and a board's factual findings have no weight. *E.g.*, Josephs v. Board of Appeals of Brookline, 362 Mass. 290, 295 (1972). If the Court was making a finding of fact on that point, the record, if anything, pointed to the opposite conclusion (the Superior Court had not reached that specific point but found that the Church had failed to carry its burden under the Tufts test). If the Court meant that regulating steeple height *never* advances a municipal concern, such a blanket conclusion would contradict the premise of the Dover Amendment's authorization of reasonable height regulation of religious buildings.

Martin raises significant questions about the application of the Dover Amendment to religious uses. They include the following:

- What remains of the institution's burden of proof established in Tufts?
- Should a court defer to the municipality's conclusion about whether application of a zoning regulation to a proposed building would serve municipal interests?
- Must the municipal interest advanced by a zoning regulation now be "critical", or does a "legitimate" one still suffice? If the former, few if any interests will qualify.
- Most fundamentally, how much authority to regulate religious uses is left after this decision? The SJC appears to have granted *carte blanche* to religious institutions proposing to build houses of worship and other facilities. If a church asserts that it needs a 500-foot steeple for its particular religious (*i.e.*, inspirational, aesthetic or other) purposes, can a board or court question that? What if a church asserts that it needs particular interior dimensions or shape for its ceremonies that require eliminating the required setback? Short of documentable traffic safety concerns, as in Tufts itself, are there any limits to what a religion can build?

2. Boyajian v. Gatzunis

While Martin was pending in the state courts, an overlapping group of neighbors challenged the constitutionality of the Dover Amendment in federal court. While it was pending on appeal, the First Circuit affirmed the district court and upheld the statute (and the Town bylaw) by a 2-1 vote. Boyajian v. Gatzunis, 212 F.3d 1 (1st Cir. 2000), *cert. denied*, __ S. Ct. __ (2001).

Applying the three-part test under Lemon v. Kurtzman, 403 U.S. 602 (1971), under which (1) a statute must have a secular legislative purpose, (2) its principal or primary effect must neither advance nor inhibit religion, and (3) it must not foster excessive government entanglement with religion, the court found that the first and third parts were met and focused on the second part. It found that the Dover Amendment:

does not exempt religious property uses from substantial standard zoning requirements that are designed to ensure compatible uses of land.... Thus, a religious institution, no less than any other group, must comply with reasonable regulations designed to preserve a comfortable, desirable community. *See Tufts College...*

Id. at 6; see also id. at 8-9 (recognizing “the requirement that religious uses conform to the standard physical limitations imposed on all buildings located in that zone”). The court then held that Chapter 40A, Section 3 does not impermissibly advance religion because it protects educational, agricultural and other secular uses as well as religious ones. Id. at 7. It also held that, even if the statute boosted religious uses more than others, that was permissible to alleviate a burden on religious uses in the form of adverse local zoning decisions. Id. at 7-8.⁶

⁶ In opposing the Plaintiffs’ Petition for Certiorari, the Church echoed the court’s interpretation of the statute. It argued that the Dover Amendment “only shields protected uses from categorical exclusion” and “merely preempts exclusionary zoning”. It also argued that the treatment of churches is “precisely the same as that accorded these other permitted uses. This utterly refutes the notion that religious uses are singled out for extraordinary benefit.”

3. Can *Martin* and *Boyajian* be reconciled?

The decision in Martin is difficult to reconcile with the First Circuit's view of the Dover Amendment in Boyajian. The SJC appears to have nearly exempted religious uses from height (and other dimensional) regulations, whereas the Court of Appeals read the statute much more narrowly (and the Church itself argued for that narrow reading). Moreover, the SJC's great deference to the Church's choice of size and design, notwithstanding its intervening construction of other temples in the service area, simultaneous adoption of a smaller design worldwide, and undisputed doctrine that temples' architecture is irrelevant to their sacredness, casts the federal court's conclusion that Section 3 treats all uses equivalently into serious doubt. It is difficult to imagine the SJC's being as solicitous of vineyards, solar panels or even educational uses as it was of the temple in Martin. Nor did the Court suggest such solicitude for child care uses in its only other recent decision under Section 3. See Rogers v. Town of Norfolk, 432 Mass. 374 (2000), discussed below.

If the Court interprets Section 3 similarly for the other uses, it would raise widespread problems for municipalities trying to maintain rational and uniform planning and zoning. If not, it would seem to reopen the Establishment Clause questions answered by the First Circuit in Boyajian.

C. Educational Uses

Three Land Court decisions over the past year have addressed the issue of educational uses under the Dover Amendment. Two of the cases involved the definition of a educational use. In Julia Ruth House, Inc. v. Board of Appeals of Westwood, 8 LCR 451 (December 11, 2000), Chief Justice Kilborn upheld the Board's denial (by a 2-1 vote) of a permit for an adult day-care center. Julia Ruth House is a nonprofit corporation organized to:

provide supportive and educational services to elderly residents ... to assist clients to optimize their independence and self-esteem ... through individualized educational programs with a goal towards offering clients and their families an organized alternative program to long term care....

It would offer a Social Day Care Program, “provid[ing] structured community settings for persons who require daytime supervision due to social/or emotional problems or physical impairments”, such as early Alzheimer’s, multiple sclerosis, traumatic injuries, stroke, etc. Julia Ruth House proposed to offer the following types of educational opportunities: training in various activities of daily life, instruction or programs in current events, physical exercise, and the arts, and counseling, including to the clients’ caregivers.

The court held that the proposed activities are not “educational purposes” protected by the Dover Amendment. It concluded that the facility would be adult day care with “incidental educational components”, rather than having education as the “primary or dominant purpose”. *Id.* at 453, citing Whitinsville Retirement Society, Inc. v. Northbridge, 394 Mass. 757, 760 (1985). The court found it noteworthy that the legislature has protected day care uses for children in Chapter 40A, Section 3, but not for adults.

In Spectrum Health Systems, Inc. v. Framingham Zoning Board of Appeals, 9 LCR 113 (February 22, 2001), Justice (now Appeals Court Judge) Green addressed the application of Framingham’s parking requirements to a drug-treatment facility. In 1999, the court had granted Spectrum partial summary judgment that the facility was an educational use under the Dover Amendment, but had denied summary judgment regarding the reasonableness of the parking requirement as applied to that facility.

The Framingham zoning bylaw required 26 off-street parking spaces required for the Spectrum facility (borrowing the requirement for the most comparable permitted use), whereas

Spectrum proposed only 19 off-street spaces. The court found that parking demand might exceed that number of spaces during peak period of methadone distribution. However, enough spaces also were available on the street in front of the facility to handle the peak demand. The court held that the bylaw requirement of 26 spaces did not reasonably advance a legitimate municipal concern in light of those additional spaces, and therefore it was unreasonable to apply the requirement to the facility. Id. at 116.

The third educational use case is Trustees of Boston College v. Board of Aldermen of the City of Newton, 9 LCR 1 (January 22, 2001), cross-appeals pending as Appeals Court Case No. 2001-P 334.⁷ BC, faced with insufficient classroom and office space and an outdated student center, proposed to raze the student center and build the Middle Campus Project (“MCP”), three connected buildings totaling 479,000 square feet at a major intersection across the street from a residential neighborhood. For several years before proposing the MCP, BC had planned to renovate its existing student center and build a new building with additional student center functions in the middle of the campus. It had obtained permission for that alternative from the Board and had pursued it nearly to the point of ground-breaking before proposing the MCP.

The Newton Zoning Ordinance has a separate table of dimensional regulations for religious and educational uses, adopted in 1987, including regulations for height and stories, setbacks, and floor area ratio (“FAR”). The FAR regulation limits the FAR of the Middle Campus to 0.48, whereas the actual FAR of the Middle Campus was 0.95 in 1987 and 0.98 at the time of trial. Based on the non-conformities of the existing student center and the Middle Campus’ non-conformity as to FAR, BC sought a special permit from the Board of Aldermen to reconstruct and extend a non-

⁷ The appeal was fully briefed in October 2001. No argument date has been set yet.

conforming structure under the Newton analogue to under Chapter 40A, Section 6 (based on the familiar standard of whether the extension would be substantially more detrimental to the neighborhood than the current building). The Board voted 13-11 in favor of the special permit, but that fell short of the 2/3 supermajority required under the Ordinance, resulting in a denial. It also denied BC's application for a special permit to reduce the required number of parking spaces for the MCP.

BC appealed the denial of the special permit under Chapter 40A, Section 17. Under Chapter 240, Section 14A, it also challenged the application of the dimensional and parking regulations to the MCP and the whole Middle Campus as unreasonable under the Dover Amendment, though it had not raised that issue before the Board. After a 24-day trial, Justice Scheier:

- Held that, under Chapter 240, Section 14A, BC could challenge the underlying dimensional regulations; it was not limited to seeking permission to extend a non-conforming structure under Section 6 and the Ordinance analogue, though it could pursue that remedy, as well.
- Annulled the FAR regulation as applied to the whole Middle Campus on the ground that, because BC had to obtain a special permit to add any new floor area on the Middle Campus since the regulation was adopted in 1987, it was tantamount to a *use* special permit, prohibited under Tufts. Based on that holding, the court did not reach the application of the FAR regulation to the MCP even though it would singlehandedly raise the Middle Campus FAR by nearly 1/6, to 1.14.
- Upheld the height and stories and setbacks regulations for the Middle Campus, but annulled them as applied to the MCP on the ground that they would prevent BC from building an adequate project without significantly advancing Newton's municipal interests.
- Annulled the Ordinance parking requirements as applied to both the Middle Campus

and the MCP on the ground that they overestimate parking demand on a college campus. However, it also upheld the Board's denial of a special permit for a parking waiver under Section 17. It concluded that precisely what number of additional parking spaces would be reasonable for the MCP under the Dover Amendment was not before it and remanded the parking issue to the Board.

- Upheld the special permit procedure, including the supermajority requirement.
- Annulled the Board's denial of a Section 6 finding under the Dover Amendment because it annulled the dimensional regulations that generated the nonconformities as applied to the MCP. The court declined to review the Board's denial under Chapter 40A, Section 17, outside the context of the Dover Amendment (*i.e.*, the "not substantially more detrimental" issue).

In reaching those conclusions, the court largely dismissed BC's previous pursuit of an alternative student center proposal as irrelevant to the Dover Amendment analysis, notwithstanding the SJC's comments in Campbell.

D. Other Protected Uses

In Rogers v. Town of Norfolk, 432 Mass. 374, 383 (2000), the SJC addressed a child care facility under the third paragraph of Section 3. The bylaw limited the footprint of child care facilities to 2,500 square feet, whereas the plaintiff proposed to convert her 3,169 square foot house into such a facility. The plaintiff's lot was more than an acre, and her nearest neighbors were 140 feet from her house. She challenged the bylaw limitation both on its face and as applied to her facility.

Applying the Tufts test, the SJC upheld the 2,500 square foot limit on its face, with two judges dissenting. It emphasized that the bylaw was presumed valid and held that the Town's purpose, to protect its residential character from large child care facilities that could generate more

traffic and noise, was legitimate. The Court held that the bylaw did not unreasonably restrict the siting of child care facilities in the Town, for two reasons. First, it noted that 90% of the 2,300 residences have footprints of less than 2,300 square feet, so the bylaw limit made relatively few of the houses ineligible for child care. Second, in non-residential zones, which comprise 5% of the Town, a child care facility may operate in a building smaller than 2,500 square foot. Id. at 379-181.

However, the Court annulled the regulation as applied to the plaintiff's proposed facility. The house could be reduced to 2,500 square feet by removal of the porch and garage, but that would affect the building's structural integrity and, in light of the lot size, screening and distance from neighbors, serve no useful purpose. Id. at 383-384.

Finally, the Court rejected the Town's argument that a court may not grant an exemption "without particularized evidence that no other options ... [on or off the property] were available for the plaintiff's proposed child care facility", though it related that issue to the "cost of compliance" alternative test under Tufts in a way that is unclear. In any event, the Court noted that alternative locations would be relevant if the plaintiff were building a new building. Id. at 385 & n. 15.

In Town of Rowley v. Kovalchuk, SJC-08436 (May 10, 2001), the SJC addressed the exemption of land used for the "primary purpose of agriculture, horticulture, floriculture, or viticulture" under the first paragraph of Chapter 40A, Section 3 . It affirmed summary judgment for the Town that a sawmill that processed lumber brought to the site, not raised there, was not incidental to an agricultural use. See Appeals Court's Memorandum and Order Pursuant to Rule 1:28, citing Building Inspector of Peabody v. Northeast Nursery, Inc., 418 Mass. 401, 405 (1984) (agriculture involves "the raising or propagation of plant or animal life").

III. RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT

Any case involving a religious use may implicate the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”), as well as the Dover Amendment. 42 U.S.C. § 2000cc.⁸ RLUIPA is the latest chapter in a decade-long disagreement between Congress and the Supreme Court regarding regulation of religious uses. Congress enacted the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (“RFRA”), to overturn Employment Division, Department of Human Resources of Oregon v. Smith, in which the court had held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest, and restore the compelling state interest test. In 1997, the Supreme Court struck down RFRA on the ground that it exceeded Congress’ enforcement power under the 14th Amendment. City of Boerne v. Flores, 521 U.S. 507 (1997). RLUIPA is Congress’ second attempt to protect religious uses.

RLUIPA states as follows:

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution-

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc, § 2(a)(1). That prohibition applies if:

(C) The substantial burden is imposed in the implementation of a land use regulation or systems of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses of the property involved.

Id., § 2(a)(2). The plaintiff bears the burden of persuasion that the challenged regulation

⁸ Because it granted relief under the Dover Amendment, the SJC in Martin did not reach the Church’s RLUIPA argument.

substantially burdens its exercise of religion. Id., § 4(b).

“Land use regulation” under RLUIPA includes a zoning law or its application that limits or restricts the use or development of land or a building, and the use or building of real property for the purpose of religious exercise is considered to be religious exercise. *Id.*, §§ 8(5) and (7). However, the fact that RLUIPA applies to religious buildings, as well as the religious practices themselves, does not necessarily invalidate a regulation of a proposed expansion or feature of a house of worship. The claimant still must prove that the regulation involves an individualized assessment of the proposed use and that the application of the regulation would impose a substantial burden on the exercise of religion.

The reference in the statute to regulations that involve individualized assessments appears to apply to special permits, variances, and other discretionary use-related processes, similar to the Dover Amendment. However, where, for example, a zoning bylaw simply imposes a neutral height limit on all structures in the district, no individualized assessment of the proposed use is involved. It does not appear that that regulation would be vulnerable under RLUIPA regardless of the burden it imposed on a particular use.

A discretionary *dimension*-related process, such as a special permit to exceed the height limit as in Martin or a Section 6 finding to extend a non-conforming structure as in Boston College, may be seen as involving an individualized assessment, triggering RLUIPA. However, such a regulation is intended to be a safety valve for the religious institution (or other landowner), relieving it of the neutral regulation that otherwise would apply, rather than a way in which a municipality could covertly exclude or discriminate against the use. In any event, if the regulation was invalid under RLUIPA, the remedy would be to annul that safety valve, leaving the underlying regulation intact. That result hardly would benefit religious uses.

There is only one zoning case under RLUIPA to date (as under RFRA, most of the cases involve prisoners' religious practices). In C.L.U.B. v. City of Chicago, 157 F. Supp. 2d 903 (N.D. Ill. 2001), the court, assuming that RLUIPA is constitutional, granted summary judgment upholding the Chicago zoning ordinance where the city had amended the ordinance to bring the treatment of religious uses into line with that of other uses.

IV. MERGER

In Preston v. Board of Appeals of Hull, 51 Mass. App. Ct. 236 (2001), the Appeals Court decided a previously unresolved issue about the “merger” of adjacent non-conforming lots in common ownership. In that case, two adjacent vacant lots conformed to the minimum lot area and frontage requirements of the Hull zoning bylaw when they were created. The dimensional requirements were increased in 1969 and 1978, while the lots were owned separately, and therefore the lots were still buildable at that time under Chapter 40A, Section 6.⁹

However, Ms. Preston bought both lots in 1987. In 1996, she applied for a building permit to build a house on one of the lots. The Building Commissioner denied her application and the Hull Board of Appeals affirmed his decision. The plaintiff argued that the often-cited statement in Adamowicz v. Ipswich, 395 Mass. 757, 762 (1985), that “the status of the lot immediately prior to the zoning change is controlling” meant that the lots were permanently exempted if they were separately owned at that time, regardless of their subsequent history. See Healy *et al.*,

⁹ The statute provides as follows:

Any increase in area, frontage, width, yard or depth requirements of a zoning ordinance or by-law shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner[,] was not held in common ownership with any adjoining land, conformed to then existing requirements and had less than the proposed requirement but at least five thousand square feet of area and fifty feet of frontage.

G.L.c. 40A, § 6, 4th par.

Massachusetts Zoning Manual § 7.4 (Rev. 1999), interpreting Carciofi v. Board of Appeals of Billerica, 22 Mass. App. Ct. 926 (1986), as so holding.

However, the Appeals Court rejected this argument in a two-step analysis. First, it took pains to establish that the merger was a pre-existing common law doctrine. In addition to citing the numerous decisions construing and applying Section 6 and its predecessors, it cited two pre-zoning decisions, Batchelder v. Rand, 117 Mass. 176, 178 (1875), and Orr v. Fuller, 172 Mass. 597, 600 (1899), which held that adjacent parcels shown on a plan may constitute a single lot for purposes of the attachment of a mechanics lien. 51 Mass. App. Ct. at 238-246.

Second, the Court turned to the construction of the statute, finding an “apparent conflict between the pre-existing common law principle of merger” and the words of Section 6. Id. at 240. It began by reviewing the statutory history of the grandfather provisions of Section 6. The plaintiff noted that the original 1972 Report of the Department of Community Affairs had proposed an express exception for a lot that was separately owned at the time of the amendment, provided it was “not subsequently held in common ownership” with adjoining land, but that language was omitted from the statute as adopted in 1975. The court decided that that history did “not persuade us that the Legislature ‘rejected’ the concept that subsequent common ownership did not require a merger.” It stated that the language “appears to have fallen by the wayside” in committee in 1974, and noted there had never been a legislative vote on the subject. It presumed that the Legislature “was aware of the preexisting and well-established merger doctrine” and concluded that the history did “not constitute the kind of clear expression [of intent to override the common law] the cases require”. Id. at 242-243.

The court distinguished Carciofi, one of the very few cases which had not required merger

of adjacent lots. See Bobrowski, Handbook of Massachusetts Land Use and Planning Law § 5.3.1, for a discussion of the cases. It noted that Carciofi was “a two-page rescript which has never been cited and has been undermined by subsequent case law”. 51 Mass. App. Ct. at 239-240, citing DiStefano v. Stoughton, 36 Mass. App. Ct. 642, 644-645 (1994), which discussed the practice of checkerboarding.¹⁰ Although the court went to significant lengths to give the merger doctrine a common law pedigree as a basis for its conclusion that the legislature did not intend to reject common law merger, it appears to have relied primarily on the long line of cases requiring merger and what it viewed as the legislative policy of eliminating non-conforming lots by use of adjacent land if it is available. Id. at 238; see Asack v. Board of Appeals of Westwood, 47 Mass. App. Ct. 733, 735-736 (1999) (using that policy to support merger, where the lots also came into common ownership after the adoption of the bylaw).

¹⁰ In Carciofi, a lot was originally owned in common by two apparently unrelated persons, one of whom transferred his half-interest to Carciofi and the latter’s wife, at a time when Carciofi owned an adjacent parcel individually. The court held that Carciofi and his wife were entitled to a building permit for the undersized lot, even though he had sold his adjacent parcel. Carciofi is, as the court in Preston noted, a rather obscure decision, which can be distinguished on various grounds, including the language of the local bylaw, which expressly focuses on the ownership “at the time of adoption” of the amendment. Alternatively, it may have turned on a determination that the husband and wife were sufficiently independent that the land never came into “common” ownership. See Planning Board of Norwell v. Serena, 27 Mass. App. Ct. 689, 691 (1989) (issue of common ownership does not turn on record title but facts about extent of “control”).

