Town of Arlington
Legal Department

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To: Arlington Redevelopment Board;
Jennifer Raitt, Director of Planning & Community Development

From: Douglas W. Heim, Town Counsel

Date: March 25, 2019

Re: 2019 Annual Town Meeting Article 20

I write at your request to provide an alternative means of performing reviews of so-called "Dover Amendment" uses covered under c. 40A sec. 3; specifically an option which vests the ARB with the authority to conduct a site plan-like review for reasonable regulations imposed upon religious, educational, and day care facility uses.

As a reminder, c. 40A sec. 3 provides in relevant part:

> "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."[1]
>
> and,

[1] Permit me to pause to note that "subdivisions" or "bodies politic" of the Commonwealth generally include municipal governments and their departments.

> "No zoning ordinance or bylaw in any city or town 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 reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements."

These Dover Amendment provisions have been generally interpreted to mean that cities and towns may not condition use of a property for educational, religious, or child care facilities upon the grant of a special permit.[2] *See e.g. Campbell v. City Council of Lynn*, 616 N.E.2d 445, (Mass. 1993); *Bible Speaks v. Board of Appeals*, 8 Mass. App. Ct. 19,(1979). Municipalities may impose reasonable regulations concerning bulk, height, parking, etc., but reasonableness is a context-specific assessment. *See e.g., Trs. of Tufts Coll. v. City of Medford*, 415 Mass. 753, 757-59 (1993)(noting that the reasonableness of regulations is "as applied" to a given religious, educational, or child care use); *Campbell v. City Council of Lynn*, 415 Mass. 772, 778 (1993)(City could not apply its facially reasonable regulations because they thwarted educational purposes without serving a sufficient regulatory need); *Bible Speaks*, 8 Mass. App. Ct. 19, 31-34 (regulations cannot be used to nullify Dover exceptions to special permit requirements).

In order to facilitate a review for application of reasonable regulations, municipalities implement a wide range of strategies, with some vesting authority entirely within the Building Inspector or Commissioner as Arlington has traditionally done, and others having their Planning Board, Board of Appeals, or other similar entities engage in so-called "Site Plan Review" or "Limited Plan Review." It is important to note at the outset that Site Plan Review as it is typically understood is a process entirely created by municipalities and their local ordinances with no explicit authority derived from or referenced to c. 40A. Accordingly, Site Plan Review means different things in different communities and a bylaw must set forth the process, criteria, and relief of Site Plan Review. It may however be best summarized by the Court in *Bowen v. Board of Appeals of Franklin*, "site plan review has to do with regulation of permitted uses, not their prohibition, as would be the case with a special permit or a variance," 36 Mass. App. Ct. 954, 954-955 (1994).

It must be stressed that any process for examining a Dover-protected use cannot be tantamount to a special permit process under a different title. Indeed, while Massachusetts Courts have not determined that Site Plan Review generally violates that Dover Amendment, they have found that specific Site Plan Review processes impermissibly exceed the regulatory authority afforded under c. 40A sec. 3. *See e.g., Jewish Cemetery Ass'n of Mass. v. Bd. of Appeals of Wayland*, 18 LCR 428, 432 (Mass. Land Ct. 2010)(discussing the permissibility of site plan

[2] At different periods of time, some cities and towns may have maintained the technical requirement of a special permit under their zoning bylaws for religious or educational uses. However in such instances Courts have found that they often have "no discretion" to deny such special permits. *See Forster v. Bd. of Appeals of Belmont* (14 Mass. L. Rep. 463, 2002 Mass. Super. L. Rep. 463 (Mass. Super. Ct. Mar. 15, 2002)(School required to apply for special permit, but Dover Amendment afforded zoning board no discretion to deny a special permit application as submitted).

review requirements)(internal citations omitted). Particular concern arises in the context of our zoning bylaw, where we do not have Site Plan Review for any other purpose allowed by right. Given the scope of the warrant article before Town Meeting, in my opinion, a more in-depth Site Plan Review amendment cannot be placed before Town Meeting.

Thus, if the Board is inclined to amend its current vote to provide for an administrative review by the ARB or ZBA instead of the Building Inspector and Planning Department, I recommend the following as the most feasible alternative which codifies a greater role for the Board:

Add a new SECTION 3.5 RELIGIOUS AND EDUCATIONAL USE REVIEW that codifies an administrative review process that is consistent with M.G.L. Chapter 40A, Section 3

3.4 RELIGIOUS AND EDUCATION USE REVIEW

3.4.1 Purposes

The purpose of Section 3.5 is to provide for reasonable regulation of religious, non-profit educational, and child care facilities used primarily for such purposes consistent with G.L. c. 40A, §3. Specifically, reasonable regulation refers to the bulk and height of structures and in determining yard sizes, lot area, setbacks, open space, parking, and building coverage requirements. When applying reasonable regulation, the Town shall not unreasonablye impede the protected use without appreciably advancing critical municipal goals.

3.4.2 Procedures

A. Building Inspector Review: To determine whether a religious, non-profit educational, or child care facility use is protected under G.L. c. 40A, §3, the property owner or agent of an owner shall submit to the Building Inspector such information necessary to make the following findings:

(1) That the applicant has sufficiently demonstrated that the proposed use of the property or structures is for a religious, non-profit educational, or child care purpose, or appropriate combination thereof; and

(2) That the applicant has sufficiently demonstrated that the proposed use of the property or structure for these purposes is the dominant or primary use.

B. ~~Department of Planning and Community Development~~Arlington Redevelopment Board Review: If the applicant has satisfied the Building Inspector per Section 3.5.2.A., the Building Inspector shall inform the Redevelopment Board~~Department of Planning and Community Development ("Department")~~ that a given application is appropriate for administrative review for the purposes set

forth in Section 3.4.2.J. The BoardDepartment shall apply those requirements allowed by G.L. c. 40A, §3, in a reasonable fashion within the specific context of the proposed project as an administrative permitting process with the following responsibilities:

(1) The applicant bears the burden of establishing that the application of a given regulation should be waived, reduced, or altered as unreasonable within the specific facts of both the site and the proposed use.

(2) The Department Board bears the burden of applying only those regulations which serve a legitimate municipal concern.

(2)(3) The Board shall issue an administrative decision setting forth only those conditions allowed by c. 40A sec. 3 within ninety (90) days of receipt of the application from the Building Inspector unless an extension of time is agreed upon by the parties, but in any case, shall not withhold approval under this administrative review section.

3.4.3 Appeal

An appeal to the Board of Appeals or the Arlington Redevelopment Board may be taken by any person aggrieved due to the determination of the Building Inspector or the Department, as provided in G.L. c. 40A, § 8 and § 15.

An appeal of the decision of the Redevelopment Board's decision may be made as set forth in G.L. c. 40A, Section 17 to a court of competent jurisdiction.