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

From: Douglas W. Heim, Town Counsel

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Re: Follow up on Dover Review Process

I write in follow-up to my previous memo regarding review of "Dover Amendment" uses covered under c. 40A sec. 3, and in response to member questions regarding same. In short, the Town cannot require a Special Permit for Dover Amendment protected uses; may apply reasonable regulations in those categories enumerated by c. 40A sec. 3; and should either vest staff with the authority to conduct such "Dover Reviews;" or consider the development of comprehensive Site Plan Review standards not limited to Dover-protected uses only.

Dover Amendment & Special Permits

By way of further background, permit me to note that the Dover Amendment was adopted in 1950 because a Town of Dover bylaw had prohibited educational uses in a residential district. *See. e.g., The Bible Speaks v. Board of Appeals of Lenox*, 8 Mass. App. Ct. 19, 27, n. 10 (1979)(discussing the legislative history of the Amendment. Forty years later, G.L. c. 40A sec. 3 was amended to include child care facilities and certain other uses. In sum, a Town may not "prohibit, regulate or restrict the use of land or structures for religious purposes or for educational [or child care facility] purposes...[but] such land or structures may be subject to reasonable regulations" in eight categories enumerated in the statute. *Trustees of Tufts College v. Medford*, 415 Mass. 753, 757 (1993)

Courts have interpreted c. 40A sec. 3 to prohibit the requirement of a party pursuing a religious or educational use to obtain a special permit because the special permit process grants "a considerable measure of discretionary authority over an educational [or religious] institution's use of its facilities and create[s] a scheme of land use regulation for such institutions which is antithetical to the limitations on municipal zoning power in this area prescribed by G.L. c. 40A, § 3." *The Bible Speaks*, 8 Mass. App. Ct. at 33; *Campbell v. City Council of Lynn*, 616 N.E.2d 445, (Mass. 1993);.[1] Moreover, while towns may adopt reasonable regulations with respect to limited categories of concern – bulk and height of structures and determining yard sizes lot area, setbacks, open space, parking and building coverage, those regulations may not serve to nullify the Dover Amendment's protections. *See Trustees of Tufts College*, 415 Mass. at 757; *The Bible Speaks*, 8 Mass. App. Ct. at 33 (prohibited bylaw "would enable the board 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.")

The 1990 Amendment to "Dover" added childcare facilities to the list of protected uses and was codified with the benefit of the 1979 *Bible Speaks* decision, reading:

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. As used in this paragraph, the term "child care facility" shall mean a child care center or a school-aged child care program, as defined in section 1A of chapter 15D.*

G.L. c. 40A sec. 3, paragraph 3(emphasis added).

However, the 1990 Amendment's explicit prohibition on a special permit for child care facilities should not be mistaken to imply that a special permit may be required for other Dover uses in light of Courts' holdings in *The Bible Speaks and Trustees of Tufts College.* Indeed while numerous Dover cases discuss special permits, it is often the case that Dover-eligible applicants sought multiple avenues for the relief, leading to avoidable confusion.

For example in *Martin v. Corp. of Presiding Bishop of the Church of Jesus Christ of Latter Day Saints*, 434 Mass. 141 (2001), the Church "applied for a special permit to exceed the height limit [relative to their steeple] and, alternatively, a determination that application of the bylaw's height restriction to the steeple would violate the Dover Amendment." *Martin* 434 Mass. 141 at 143-44. After months of hearings, the Belmont Board of Appeals granted the

[1] Permit to again note that some cities and towns may have maintained the technical requirement of a special permit under their zoning bylaws for religious or educational uses under certain circumstances. 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" under certain facts, but Dover Amendment afforded zoning board no discretion to deny a special permit application as submitted).

special permit request on the dual grounds that the steeple height was reasonable "as a Dover type regulation of height" and reasonable as a "special permit matter." *Id.* at 144.

Plaintiff abutters successfully challenged the issuance of the special permit in Superior Court, in part because the Court found the steeple height non-essential to the practice of the Mormon religion, and in part because the Board of Appeals had abused its discretion given special permit criteria in the Zoning Bylaw. *Id.* at 144-45. The Superior Court was ultimately reversed on the grounds that the proper question was whether or not the structure was to be used for a religious purpose, and therefore the Court's inquiry (and by implication the Board's) into the genuine religious need for a steeple exceeding the Zoning Bylaw's height restriction was improper. *Id.* at *passim.*

Hence, in addition to questions about whether or not a special permit should have been considered in the first place under the holdings of *The Bible Speaks*, months of hearings yielded a finding of an abuse of discretion against the Board by the Superior Court, as well as a reversal of the lower court on the grounds that Dover-eligibility precluded a determination as to how central the steeple was to the religious use of the applicant anyway. Both findings provide reasons to be wary of a quasi-special permit hearing process on Dover uses under the Zoning Bylaw of Arlington.

ARB Review vs. Staff Review Considerations

As noted in my previous memorandum, municipalities implement a wide range of strategies for Dover eligibility and regulation "Reviews," with some vesting authority entirely within the Building Inspector or Commissioner as Arlington has traditionally done, and others having their Planning Director, Planning Board, Board of Appeals, or other similar entities engage in so-called "Site Plan Review" or "Limited Plan Review."[2] A Site Plan Review however is not a product of c. 40A. Rather, it is entirely created by local ordinance to further regulate permitted uses (often focusing on design), not determine whether a given use should d be allowed as with special permits or a variances. *Bowen v. Board of Appeals of Franklin,* 36 Mass. App. Ct. 954, 954-55 (1994). Moreover, any process for examining a Dover-protected use cannot be tantamount to a special permit process under a different name. *See e.g., Jewish Cemetery Ass'n of Mass. v. Bd. of Appeals of Wayland*, 18 LCR 428, 432 (Mass. Land Ct. 2010)(discussing Site Plan Review's limitations under Dover)(internal citations omitted).

In addition to concerns about the potential for Site Plan Review to venture into the realm of special permit considerations, the *Martin* case highlights the difficulties of a public hearing process applied to controversial uses where the use itself by law is not the proper subject of discussion. In that vein, it also bears noting that other elements and requirements of c. 40A for special permits and variances – abutter notifications for example – are not typical of Site Plan

[2] Site Plan Review processes themselves vary widely in scope, application, and administration. In some communities, Site Plan Review is conducted by staff. In others, it is conducted in a hearing-like process. In still others, the requirements of Site Plan Review depend of the project.

Review ordinances. Thus, the transparency afforded by a Board-driven Site Plan Review-style Dover Review is mitigated by the far more limited scope of consideration and process of same.

In light of the foregoing opportunities for complication and misunderstanding, Dover Reviews (as well as other Site Plan Reviews) are often administratively conducted by the Building Commissioner and/or Planning Department. As such, this Department's initial recommendation was to vest the Building Inspector with the authority to determine eligibility for Dover protection consistent with the Zoning Bylaw's designation of the Inspector as the Zoning Enforcement Officer; and further to share responsibility to ensure reasonable regulations are applied between the Inspector and the Department of Planning and Community Development. In such a process, the Zoning Board of Appeals could hear an appeal of the decision of a Building Inspector, and of course retains substantial access to both offices relative to the application of reasonable regulations.

If the Board is inclined however to have a greater role in Dover Reviews, I strongly recommend the development of a more comprehensive Site Plan Review process, which could include, but not limit itself to Dover protected uses. For one, such a comprehensive process ameliorates concern that a Site Plan Review is a special permit process by a different name for religious, educational, and child care uses only. More importantly, it would provide opportunity to clearly delineate the substantive and procedural goals and metrics of a public review process designed not to consider the uses themselves, but the design conditions of those uses consistent with both c. 40A sec. 3, and the Zoning Bylaw.