
TO: Town of Hamilton Select Board
Joseph J. Domelowicz Jr., Town Manager
(*By Electronic Mail Only*)

FROM: Amy Kwesell, Esq.

RE: HWRHS Athletic Fields – Planning Board Review

DATE: January 3, 2024

I have been informed that the Hamilton Wenham Regional High School (“HWRHS”) through its Superintendent (the “Applicant”) has filed an application with the Planning Board pursuant to the Hamilton Zoning Bylaw¹, Section 10.7, Site Plan Review for Religious and Educational Uses and Certain Child Care Centers, and the Hamilton General Bylaw², Chapter XXIX, Stormwater Management for the installation of an infilled synthetic turf softball field, baseball/multi-purpose field, and football field, as well as the reconstruction of the bituminous concrete running track, four new bituminous concrete tennis courts, a new amenities building, new grandstand seating and press box, relocation of various track and field events, and other associated improvements (the “Project”) at 775 Bay Road, Hamilton (the “Property”).

You have asked what limitations are involved with the Planning Board’s scope of review, particularly with regard to per-and polyfluoroalkyl substances (“PFAS”) chemicals.

Hamilton Zoning Bylaw, Section 10.7:

Section 10.7 of the Hamilton Zoning Bylaw provides for a limited review of religious and educational uses and certain child care centers.³ In fact, Section 10.7.3 states:

10.7.3 Scope of Site Plan Review. Under this Section, Site Plan Review shall be limited to two (2) inquiries:

1. Whether the use qualifies for protection under G.L. c. 40A, s. 3; and, if so,

¹ Dated August 11, 2021.

² Dated August 7, 2023. While I am aware that the Stormwater General Bylaw was revised at the November 6, 2023 Special Town Meeting, upon review, the Massachusetts Attorney General has not yet approved the amended Bylaw.

³ I note that Section 10.7.2 provides that: “Site Plan Review Required. Prior to the issuance of any Building Permit or certificate of occupancy, the establishment, alteration, change, extension, or reconstruction of uses B.1, B.3, and B.7 as set forth in the Table of Use Regulations shall require Site Plan Approval from the Planning Board pursuant to this Section.” However, the Table of Use Regulations does not provide corresponding uses designated as B.1, B.3, and B.7, but does provide corresponding uses as “A. COMMUNITY FACILITIES”, A.1, A.3 and A.7 with A.3 being: “Use of land or Structures for educational purposes on land owned or leased by the Commonwealth of Massachusetts or any of its agencies, subdivisions or bodies politic or by a religious sector denomination, or by a nonprofit educational corporation.”

2. What reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements, if any, should be imposed on the use.

In my opinion, the Dover Amendment, G.L. c. 40A, §3, exempts the proposed Project from zoning requirements as the use is undeniably educational, and located on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic.

While the use is exempt, the Zoning Bylaw does allow a limited review “concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements” so long as the requirements as applied are not so unreasonably burdensome as to effectively prohibit the exempt educational use. Bay Farm Montessori Academy, Inc. v. Town of Duxbury, 75 Mass. App. Ct. 1103 (2009) (Unpublished decision.)

Further, in my opinion, if application of the local zoning regulation would result in preventing the exempt use, then the regulation may not be enforced against the educational organization. In Trustees of Tufts College v. Medford, 415 Mass. 753, 757 (1993), the Massachusetts Supreme Judicial Court summarized the policy behind Chapter 40A, §3, paragraph 2:

The whole of the Dover Amendment, as it presently stands, seeks to strike a balance between preventing local discrimination ... and honoring legitimate municipal concerns that typically find expression in local zoning laws.

In construing whether a particular local dimensional or other zoning regulation has the effect of unlawfully prohibiting or restricting an exempt use, the court will consider the reasonableness of the regulation as applied to the particular facts of the case before it. Id. at 758-59, n. 6, 764; Campbell v. City Council of Lynn, 415 Mass. 772 (1993). It is also important to note that some conditions imposed for a valid objective, but effectively preventing an as-of-right use, may be considered unreasonable under some circumstances. Castle Hill Apartments Limited Partnership v. Planning Board of Holyoke, 65 Mass. App. Ct. 840 (2006) (explaining that there is no discretion to deny site plan approval for a by-right use, absent intractable conditions threatening public health and safety). In my opinion, a condition is more likely to be considered unreasonable if the court concludes that the condition either prevents the educational use of the property or imposes unreasonable burdens. If application of such specific requirements would substantially diminish or detract from the usefulness of the Project or impair the integrity of the Project without appreciably advancing legitimate municipal concerns, those requirements must be waived, in my opinion. Trustees of Tufts College v. City of Medford, 415 Mass. 753, 757 (1993).

It is my further opinion that the materials used to construct the athletic field, such as artificial turf, do not fall into the allowed review of “bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage” and therefore should not be considered or conditioned during this limited Site Plan review for the Project. See, Martha's Vineyard Regional School District v. Town of Oak Bluffs Planning Board, 31 LCR 557, 560 (September 5, 2023) (“I recognize that the protection of groundwater is of critical importance to any municipality ... But I am constrained by the language of the Dover Amendment and the

cases that have construed it. The Legislature has limited the application of local zoning bylaws to an educational use to dimensional controls, only.”) (emphasis added).⁴

Hamilton General Bylaw, Chapter XXIX:

The Stormwater Management General Bylaw, Chapter XXIX, applies to activity that result in disturbance of one or more acres of land that drains to the Municipal Separate Storm Sewer System.⁵

The purpose and intent of the Stormwater Management General Bylaw are to:

- A. protect water resources
- B. require practices that mitigate soil erosion and sedimentation and control the volume and rate of stormwater runoff resulting from land disturbance activities;
- C. promote infiltration and the recharge of groundwater;
- D. ensure that soil erosion and sedimentation control measures and stormwater runoff control practices are incorporated into the site planning and design process, and are implemented and maintained;
- E. encourage the use of Low-Impact Development practices such as reducing impervious cover and the preservation of green space and other natural areas, to the maximum extent practicable;
- F. comply with state and federal statutes and regulations relating to stormwater discharges;
- G. establish the Town of Hamilton as the legal authority to ensure compliance with the provisions of this by-law through inspection, monitoring, and enforcement.

While the Bylaw does not specifically lay out the requirements to achieve the purpose and intent of the Bylaw, Section 5(F)(1) states:

“The Permit Authority will utilize the policy, criteria and information including specifications and standards of the latest edition of the Massachusetts Stormwater Management Policy to execute the provisions of this Bylaw. This Policy includes a list of acceptable storm water treatment practices, including the specific design criteria for each. The Policy may be updated and expanded periodically, based on improvements in engineering, science, monitoring, and local maintenance experience. Unless specifically altered in the Regulations, storm water treatment practices that are designed, constructed, and maintained in accordance with these design and sizing criteria will be presumed to be protective of Massachusetts water quality standards.”

⁴ Additionally, while the Application provides information on traffic during construction, in my opinion, traffic is not a consideration under G.L. c. 40A, § 3 nor Zoning Bylaw Section 10.7.

⁵ The application notes that all sub-basins drain into wetlands, therefore I have asked the Town to confirm that these wetlands are part of the Municipal Separate Storm Sewer System. If they are not, the Applicant and/or the peer review engineer should confirm if the General Bylaw even applies to the Project. If it does not, only the Zoning Bylaw, Section 10.7 would apply which, in my opinion, would significantly reduce the review role of the Planning Board.

Therefore, in my opinion, the Applicant has to comply with the latest edition of the Massachusetts Stormwater Management Policy Handbook published by MassDEP. Additionally, the Stormwater Management Permit Rules & Regulations⁶ Section 8(C) (Standards) provides standards for a submitted Stormwater Management Plan which requires compliance with the Massachusetts Stormwater Handbook. In my opinion, the Planning Board may require that the Applicant fund a peer review (by a professional engineer) to analyze whether the proposed Stormwater Management Plan adheres to the Massachusetts Stormwater Handbook. However, it is my understanding that the Massachusetts Stormwater Handbook does not require a toxicology analysis.

Further, Section 9 (Employment of Outside Consultants) states:

“The Permit Authority may employ outside consultants, at the Applicant’s expense, under the terms of the Zoning Bylaw, and Planning Board Rules and Regulations, to assist in its permit decision, including but not limited to plan review, drainage and stormwater analysis; to determine conformance with this Bylaw section and other requirements; and for construction inspection, etc.”

While I understand that the above section is qualified with “including but not limited to”, in my opinion, peer review may only be used to assist the Planning Board in determining conformance with the Bylaw. As discussed above, compliance is determined, in my opinion, based upon the Massachusetts Stormwater Handbook which does not include toxicology reports and does not prohibit artificial turf fields.

Wetland Protection Act:

I also note that the Project received an Order of Conditions (“OOC”) from the Hamilton Conservation Commission on April 28, 2023 (which I have not been informed that the OOC was appealed and is therefore final). As noted in the application submitted to the Planning Board, all stormwater ultimately drains into nearby wetland resources. The OOC notes that the interests of the Wetland Protection Act considered include ground water protection, prevention of pollution, protection of wildlife habitat, and flood control. Further, the OOC indicates that the Project is subject to the Massachusetts Stormwater Standards and therefore the standards were properly analyzed by the Conservation Commission and conditions were imposed. Moreover, the Commission notes that there are no drinking water wells within the Miles River Basin but nonetheless has imposed a stringent water sampling protocol on the Project particularly with regard to PFAS chemicals.

If you have any further questions, please do not hesitate to contact me.

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⁶ Revised, Approved, and in effect as of November 9, 2021.