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Siting Opioid Treatment Programs: Legal Tools for Addressing Zoning Restrictions and other Municipal Impediments

By Paul Holtzman and Jill Brenner Meixel

The opioid epidemic has reached historic proportions in the Commonwealth and beyond, as we are reminded by near daily news stories detailing its devastating consequences. Massachusetts leaders have taken strong steps to curb the epidemic, including legislation signed by Governor Charlie Baker in March.[1] Similar legislative efforts, including additional funding for treatment, are advancing in Congress, and the Department of Health and Human Services ("HHS") announced in March an initiative to increase access to medication-assisted treatment ("MAT") which employs medication, counseling and education.

While the Commonwealth has prioritized the need for additional treatment, municipal restrictions often hamper efforts by nonprofit and other providers to site substance-abuse treatment programs. Although public opinion supports expanded treatment in the abstract, when a particular counseling or treatment program is proposed, opposition often arises from neighbors

(whether commercial or residential). In response, municipal officials sometimes advance pretextual bases to deny a building permit or certificate of occupancy.

Attorneys can play an important role in advocating for these programs by marshaling protections offered by state and federal law to overcome unlawful zoning restrictions and discriminatory NIMBY ("not in my backyard") opposition. This article outlines two statutory sources of protection for providers seeking to address the epidemic. In addition, it discusses case law supporting remedies for substance abuse and other social-service programs that have been impeded by neighborhood opposition grounded in stereotypes about, or hostility toward, those suffering from addiction or other disabilities.

1. The Dover Amendment, M.G.L. c. 40A, §3, ¶ 2.

While a municipality may generally impose zoning restrictions to regulate where different types of uses – residential, commercial, medical, etc. – may be sited, when an educational nonprofit seeks to site a predominantly educational program, M.G.L. c. 40A, §3, ¶ 2, also known as the "Dover Amendment," expressly prohibits a municipality's zoning ordinances or bylaws from "regulat[ing] or restrict[ing] the use of land or structures" for that purpose. This means that a qualifying use must be permitted as of right in *any* zoning district. This law "represents a specific exception to the general power of municipalities to adopt and enforce zoning regulations and by-laws." Regis College v. Town of Weston, 462 Mass. 280, 289 (2012).

The Massachusetts Zoning Act, which includes the Dover Amendment, authorizes courts to enjoin violations of the Dover Amendment. See M.G.L. c. 40A, §7. When representing a substance-abuse facility in response to a municipality's invocation of inapplicable zoning restrictions, the Dover Amendment is an important legal tool. Sometimes town officials are not familiar with the provision and a demand letter can resolve the dispute. In other cases, it is necessary to obtain injunctive relief. Qualifying nonprofit organizations have successfully negotiated settlements which include both permission to site their program at the chosen location and substantial attorney-fee awards.[2]

What uses qualify as predominantly educational?

If a program's educational purpose is subordinate to other purposes, it does not qualify for Dover protection. "The Dover Amendment protects only those uses . . . that have as their bona fide goal something that can reasonably be described as educationally significant"; such an "educationally significant goal must be the 'primary or dominant' purpose for which the land or structures will be used." Regis College, 462 Mass. at 285.

However, courts "have refused to limit Dover Amendment protection to traditional or conventional educational regimes." Id. In fact, recognizing that the term "education" is a "broad and comprehensive term," courts have determined that education is the primary or dominant purpose for which land or structures will be used in programs including substance-abuse treatment centers, group homes, programs serving formerly institutionalized adults with mental disabilities, facilities for the care and education of emotionally disturbed children, and

organizations helping the homeless. Id.; Campbell v. City Council of Lynn, 32 Mass. App. Ct. 152, 154 (1992); Fitchburg Housing Auth. v. Zoning Board of Appeals of Fitchburg, 380 Mass. 869, 874 (1980). Courts have specifically held that "[r]ehabilitation surely falls within the meaning of education." Gardner-Athol Area Mental Health Assoc., Inc. v. Zoning Board of Appeals of Gardner, 401 Mass. 12, 15 (1987). However, "purely residential and purely recreational projects" do not qualify as "educational." Regis College, 462 Mass. at 287.

Courts have consistently found that the Dover Amendment protects substance-abuse treatment programs with a primarily educational purpose, including both non-medication and medication-based treatment programs. Congregation of the Sisters of St. Joseph of Boston v. Town of Framingham exemplifies a non-medication based Dover-qualifying program. Recognizing that Massachusetts courts have interpreted education broadly to include activities "outside the realm of a traditional curriculum," the court held that a nonprofit educational program for families including those recovering from addiction was a protected educational use. 1994 WL 16193868, at *2 (Mass. Land Ct. 1994).

Recently, in Spectrum Health Sys., Inc. v. City of Lawrence, No. 2015-288-C (Essex Super. Ct.), the court granted injunctive relief to a substance-abuse counseling and education center. In a March 9, 2015 Order, the court held that the plaintiff was protected by the Dover Amendment, noting that "Lawrence is one of a handful of communities within the Commonwealth that is *significantly* adversely impacted by issues of the economy, crime and substance abuse (now, especially opiate distribution and use/overdosing)," and determined that "by statute, Spectrum has a right to now operate." The court entered a further order on April 6, 2015 requiring the defendant to "now issue to the plaintiff . . . an occupancy permit/certificate for the use and occupancy of" the commercial property at issue.

Courts also have held that programs that include medication (the focus of the recent HHS initiative) qualify for Dover Amendment protection. See, e.g., Fitchburg Housing Auth., 380 Mass. 869, 873 (1980) ("[t]he fact that many of the residents of the facility . . . will be taking prescription drugs does not negate its educational purpose or make its dominant purpose medical."). Likewise, the court in Spectrum Health Sys., Inc. v. Town of Weymouth, Civ. A. No. 06-12133-RWZ, 2006 WL 3487030, (D. Mass. Dec. 4, 2006) granted injunctive relief to a provider seeking to operate a MAT program. The court determined that the program was "likely to prevail on the merits" on its claim that the municipality acted in violation of the Dover Amendment by refusing to issue building permits. The court ordered the municipality "to immediately allow Plaintiff . . . to operate the subject program." See Order of December 7, 2006.

A similar ruling was made where a nonprofit corporation sought to site a MAT program in a commercial (and not medical) district. In Spectrum Health Sys., Inc. v. City of Haverhill, Civ. A. No. 2014-130-B (Essex Superior Court), by order dated January 31, 2014, the court endorsed an agreement whereby the municipality would issue the certificate of occupancy and the provider agreed to certain terms and conditions regarding the operation of the program. The order stated that the agreement was reached "after a full hearing by the Court, in which the Court advised that there was a likelihood of success on the merits of Plaintiff's case and that the City of Haverhill potentially could face a sizable judgment of damages should the Plaintiffs prevail."

The issue of whether a purpose is predominantly educational is often contested and may implicate disputed issues of fact. For example, in Regis College, the plaintiff proposed to construct a development at the college for older adults, which would require an application and interview process for admission. Regis College, 462 Mass. at 282. Residents would have academic advisors and "be required to enroll in a minimum of two courses per semester," and could potentially "pursue degrees and certificates awarded to the plaintiff's current student body." Id. at 282-83. While the Land Court entered summary judgment for the defendant determining that the use did not meet the educational requirement, the Supreme Judicial Court vacated the decision, holding that there existed a dispute of fact regarding whether the program "will primarily operate in furtherance of educational purposes." Id. at 281. The SJC noted that the "primary and genuine purpose" requirement ensures that "a party invoking Dover Amendment protection does so without engrafting an educational component onto a project in order to obtain favorable treatment under the statute." Id. at 290. In other words, it is not sufficient to rely upon a stray educational purpose which is a minor element of an otherwise non-exempt project.

Municipalities May Subject Dover-Protected Programs to Certain Restrictions

While municipalities cannot interfere with the siting of substance-abuse programs protected by the Dover Amendment, "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." M.G.L. c. 40A, §3, ¶ 2. However, municipalities may not restrict qualifying Dover uses beyond these regulations. See e.g., Bible Speaks v. Board of Appeals of Lenox, 8 Mass. App. Ct. 19, 33-34 (1979) ("provisions of the Lenox by-law go well beyond the scope of bulk, dimensional, and parking regulations permitted to be imposed on educational uses by G.L. c. 40A, s. 3, and place the board in a position to act, as it did in this case, impermissibly to impede the reasonable use of the (institution's) land for its educational purposes") (quotations omitted).

2. The Federal Fair Housing Act.

In addition to the Dover Amendment, the federal Fair Housing Act ("FHA") is often invoked in disputes regarding a municipality's opposition to the siting of a substance-abuse treatment program. The FHA establishes that it is unlawful to discriminate "in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of . . . that buyer or renter." 42 U.S.C. §3604(f)(1)(A). Further, the FHA provides that it is "unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of . . . any right granted or protected by" the Act. 42 U.S.C. §3617. This statute protects both for-profit and nonprofit providers of services to disabled individuals, and also provides for recovery of attorneys' fees where a violation is established.

Under the FHA, a plaintiff can assert three distinct causes of action: "intentional discrimination (or disparate treatment), disparate impact, or failure to make a reasonable accommodation." South Middlesex Opportunity Council, Inc. v. Town of Framingham, 752 F. Supp. 2d 85, 95 (D. Mass. 2010); Easter Seal Soc'y of New Jersey, Inc. v. Township of North

Bergen, 798 F. Supp. 228, 234 (D.N.J. 1992) (township's misclassification of the use, among other evidence, strongly suggested discrimination). Discriminatory intent "may be established against [a] public entity by demonstrating" discriminatory treatment, for example, by applying "different rules to the disabled than are applied to others." Arc of New Jersey, Inc. v. New Jersey, 950 F. Supp. 637 (1996) (D.N.J. 1996).

Further, any interference or delay in responding to an application for a local permit may constitute a separate violation of the FHA. Specifically, Section 3604(f)(3)(A) states that "discrimination includes … a refusal to permit … reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises." Case law highlights that municipalities may not impose artificial obstacles to the siting of a facility providing services to the disabled, including the imposition of delay. By way of example, in South Middlesex, 752 F. Supp. 2d at 89, nonprofit educational corporations operating residential substance abuse treatment programs sued when, in response to a proposed relocation within the Town, the plaintiffs "encountered resistance from some of the residents and local officials" over a period of years. The court determined that discrimination under the FHA "includes delays in issuing permits that are caused in part by discriminatory intent, even if the permits are ultimately granted," and stated that "[t]his case involves not only evidence in the record indicating delays, but also communications by the Defendants linking such delays to the nature of the projects and their residents." Id. at 97-98. Accordingly, the court denied the defendants' motion for summary judgment, finding that "there is sufficient evidence in the record to raise a dispute as to whether discriminatory action was taken." Id. at 98.

Most recently, the Second Circuit reached a similar result in Mhany Mgmt, Inc. v. County of Nassau, No. 14-1634, 14-1729, 2016 WL 1128424 (2d Cir. Mar. 23, 2016). A non-profit housing developer and several residents alleged that the governmental defendants had re-zoned parcels of county-owned land to prevent the construction of low- and middle-income housing as part of a long-standing discriminatory policy to exclude racial minorities. The court determined that the defendants' decision to re-zone was made with discriminatory intent and "was a knowing response to the vocal and racially influenced opposition among [defendants'] citizenry." Id. at *19. The court held that "the district court was entitled to conclude . . . that something was amiss here, and that [defendants'] abrupt shift in zoning in the face of vocal citizen opposition to changing the character of Garden City represented acquiescence to race-based animus." Id. at *24. Importantly, there was no requirement to establish that the governmental officials were themselves motivated by racial discrimination where they acted in "acquiescence" to the discriminatory objections from residents. The same principle applies in the context of Fair Housing Act liability for discrimination on the basis of disability or handicap.

Reasonable Accommodation Requirement

The FHA also establishes that it is a "discriminatory housing practice" to refuse to make

> reasonable accommodations in rules, policies, practices, or services when such accommodations may be necessary to afford [a handicapped] person equal opportunity to use and enjoy a dwelling.

42 U.S.C. §3604(f)(3)(B). When a municipality refuses to make a reasonable accommodation in the implementation of its zoning "rules," "policies," or "practices," the municipality violates the FHA. Oxford House v. Town of Babylon, 819 F. Supp. 1179, 1185 (E.D.N.Y. 1993).

It is settled law that a required reasonable accommodation may take the form of an exception to a zoning ordinance. As the First Circuit noted in Casa Marie, Inc. v. Superior Court, 988 F.2d 252, 270 n. 22 (1st Cir.1993), "compliance with the zoning ordinances should be 'waived'" as a reasonable accommodation. Similarly, the court held in Oxford House, 819 F. Supp. at 1186, that the failure to provide a reasonable accommodation is per se "discriminatory conduct" under the FHA, and stated:

> Because one of the purposes of the reasonable accommodations provision is to address individual needs and respond to individual circumstances, courts have held that municipalities must change, waive, or make exceptions in their zoning rules to afford people with disabilities the same access to housing as those who are without disabilities.

An accommodation is "reasonable," and hence required under the FHA, if it

> does not cause any undue hardship or fiscal or administrative burdens on the municipality, or does not undermine the basic purpose that the zoning ordinance seeks to achieve.

Id.; see also Oxford House v. Township of Cherry Hill, 799 F. Supp. 450, 462 n. 25 (D.N.J. 1992) ("'Reasonable accommodation' means changing some rule that is generally applicable to everyone so as to make its burden less onerous on the handicapped individual").

3. Conclusion

By invoking the robust protections afforded by the Dover Amendment, Fair Housing Act and other civil-rights statutes, attorneys can assist those on the front lines of substance-abuse treatment and prevention. While municipalities are empowered to impose reasonable regulations addressing the uses specified in the Dover Amendment, the proposed siting of a qualifying use cannot be derailed or delayed no matter how vociferous the opposition from neighboring residents or businesses. This set of legal protections constitutes a critical tool in promoting the availability of services for those suffering from the scourge of addiction.

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[1] An Act relative to substance use, treatment, education and prevention, Chapter 52 of the Acts of 2016 (March 14, 2016).

[2] While the Dover Amendment does not include an attorneys' fee provision, applicable civil rights statutes do. As a result, for example, the City of Pittsfield paid $100,000 in attorneys' fees to a nonprofit corporation after initially refusing to permit a substance-abuse treatment program to operate. See "Taxpayers to pay for $100K clinic settlement," Berkshire Eagle, August 14, 2012.

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