

Nonprofits Looking to Build Need to First Deal with Zoning Issues

By Paul Holtzman and Samuel Nagler

Nonprofits that embark on a growth strategy requiring adding new sites or improving or expanding their existing site need to consider, in addition to design, funding, and construction matters, local zoning issues and how they will address them.

Developing a new facility can be controversial for nonprofit providers and developers. While abutters can take issue with the placement of a ramp or tree on any type of development, it is not uncommon to face fierce neighborhood opposition to the siting of, for example, affordable housing, group homes for the disabled and programs addressing opioid addiction.



Paul Holtzman, left, and Samuel Nagler

Savvy nonprofit leaders should possess a basic understanding of the relevant legal principles that work in their favor to help them navigate the pieces of the zoning puzzle.

Zoning ordinances regulate both the use of a facility and non-use matters, such as lot size, setbacks, floor area ratio, and parking. In Massachusetts, each city and town has its own local zoning ordinance that must be consistent with state law, in particular Massachusetts General Laws Chapter 40A. (This statute does not apply to the City of Boston, with only one exception, which has its own zoning-enabling legislation.)

Nonprofits have a level of flexibility within Chapter 40A to site projects in atypical locations. There are two main legal principles within this law that give nonprofits relief from local zoning regulations: the use of facilities for educational purposes, and the prohibition of discrimination by municipalities against protected classes.

Educational Purposes and the Dover Amendment

The Dover Amendment, a provision within Chapter 40A, allows for relief when a facility's primary use is for "educational purposes," a category that has been interpreted broadly over the years. This is a heavily litigated issue, and case law has carved out zoning relief for specific uses common to nonprofits.

In cases where the Dover Amendment applies, the use is permitted regardless of the zoning ordinance provisions, and only eight specific non-use areas can be regulated: bulk of structures, height of structures, yard sizes, lot area, setbacks, open space, parking requirements, and building coverage requirements.

Uses that are considered educational under the Dover Amendment include residences for mentally ill or developmentally disabled individuals; homeless families, or persons with AIDS; methadone clinics with counseling; day camps with strong educational components; and residential communities for the elderly with a prescribed curriculum.

The primary use distinction is key to zoning relief under the Dover Amendment. Nursing homes containing "merely an element of education" or adult social day care facilities with only an "incidental educational component" have failed to meet the criteria.

Anti-discrimination Laws

There are a number of federal and state anti-discrimination laws that can be used to seek relief from zoning ordinances, as the protections afforded to individuals are transferrable to a nonprofit entity if the organization can prove it is providing needed services to a protected class:

- Cities and towns are required to make reasonable modifications to local zoning policies and regulations that deny equal access to individuals with disabilities upon request, with few exceptions. Despite the City of Boston's exemption from the rest of Chapter 40A, the city is still covered by the provision, which states that "by-laws and decisions of a city or town shall not discriminate against a disabled person."
- The Americans with Disabilities Act (ADA) provides comprehensive civil rights protections for individuals with disabilities, which includes persons recovering from or receiving treatment for addiction to alcohol or drugs.

- Federal courts have repeatedly held that local zoning enactments may be the subject of a legal challenge under the Fair Housing Act, which expressly prohibits discrimination in housing on the basis of a handicap. Massachusetts General Laws Chapter 151B also expressly prohibits discrimination in housing on the basis of a handicap.

Nonprofits that need formal legal assistance navigating these issues should engage an attorney who is deeply familiar with the local political climate within the specific city or town. They not only will understand how the pieces of the zoning puzzle fit together, but also will likely have relationships with building inspectors and boards of appeals members and know how they think about and approach the issues you'll need to address. It is just as important that your attorney have direct experience with your industry and the relevant state and federal protections afforded it.

Additionally, it is important to determine at the outset whether or not you have an “as of right” project. Seeking variances, special permits, and site plan approvals can be risky, time consuming, and costly. Armed with the knowledge of these guiding legal principles, nonprofits can better evaluate development decisions and understand when legal representation is needed.

If your project has an educational focus, or if your work focuses on a protected class, it is worth exploring zoning issues with your legal counsel— before engaging a designer or raising funds.

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July 2017