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**Overview of the Legal Protections for the Siting of Social Service
Programs and Residences and Special Needs Schools**

Introduction

The Commonwealth of Massachusetts has a notable history of providing and supporting services and housing for persons with developmental and intellectual disabilities, mental illness, alcohol and drug addiction, and other special needs, including children who have been the victims of abuse and neglect. It has done so not only by building and funding a comprehensive network of public and private services, but by enacting laws to ensure the elimination of discrimination against such individuals.

These laws make it unlawful to discriminate against a handicapped person¹ in matters such as employment and housing (General Law Chapter 151B), and prohibit cities and towns from discriminating against “disabled persons” through local land use and health and safety laws, regulations, practices, ordinances, by-laws and decisions (General Law Chapter 40A, §3, ¶4).

In addition to such protections in state law, Congress has enacted a series of federal laws that provide “a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”² Section 504 of the Rehabilitation Act of 1973, the Federal Fair Housing Amendments Act of 1988 and the Americans With Disabilities Act of 1990, as well as the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution all prohibit unlawful discrimination against persons with a disability.

¹ A handicap is defined as “(a) a physical or mental impairment which substantially limits one or more major life activities of
² 42 U.S.C. §12101(b)(1).

Summary

The legal protections afforded to community-based social services programs and residences and special needs schools are derived from a combination of state and federal cases and statutes.

The most important state law in this regard is the so-called Dover Amendment to the Zoning Act (G.L. c. 40A, §3, ¶2). That act makes it illegal for cities and towns in Massachusetts to adopt any zoning ordinance or by-law that prohibits, regulates or restricts the use of land or structures for educational purposes on land owned or leased by a nonprofit educational corporation. However, such land or structures may be subject to reasonable dimensional regulations.

Not only does the Dover Amendment effectively exempt traditional educational uses from local zoning, it also protects a broad range of activities whose purpose is the furthering of the mental, moral or physical powers and faculties of individuals. Programs and services that provide support, training and skill building for persons with developmental disabilities, mental illness or alcohol and drug addiction have all been found to be educational in nature.

Note that the Dover Amendment is not, per se, a civil rights act. Rather, it seeks to advance the Commonwealth's interest in fostering a broad range of educational opportunities for its citizens by carving out from the home rule authority of municipalities, the ability to restrict or prohibit such uses in its local zoning. The effect of the Dover Amendment is often to ensure access to rehabilitative and therapeutic services for persons with disabilities.

Although reasonable dimensional regulations may generally still apply, the Zoning Act provides a narrow exemption from any dimensional lot requirements of any local zoning by-law or ordinance for the installation of handicapped access ramps on private property (G.L. c. 40A, § 3, ¶ 8)). It also contains a broad prohibition against discrimination against persons with disabilities in local land-use, and health and safety laws, regulations, practices and decisions, as well as special protection for group homes (G.L. c. 40A, § 3, ¶ 4).

Section 504 of the Rehabilitation Act of 1973, the Fair Housing Amendments Act of 1988, and the Americans With Disabilities Act of 1990 all seek to eliminate discrimination against individuals with disabilities. These federal laws prohibit cities and towns from discriminating against persons with disabilities through their land-use and zoning decisions and regulations.

Unlike the Dover Amendment which looks to the educational use or purpose of land or structures when considering the validity of local zoning, these federal acts analyze land use and zoning decisions and regulations to determine whether or not they discriminate against persons with disabilities in their intent, their effect, or their failure to make a “reasonable accommodation” for the needs of such persons by modifying those decisions or regulations.

When confronted by a municipal zoning ordinance or bylaw that will impact the siting of a social services program or residence or special needs school, a provider should consider the following:

- Whether the program *only provides housing for persons with disabilities*? If so, both the Fair Housing Amendments Act and the Americans With Disabilities Act will apply.
- Whether the service, program or activity being provided is *educational and serves persons with disabilities*? If so, then both the Dover Amendment and the Americans With Disabilities Act will apply.
- Whether the program provides *both housing and supportive or rehabilitative services for persons with disabilities*? If so, the Dover Amendment, the Fair Housing Amendments Act and the Americans With Disabilities Act will all provide legal protection.
- Whether *the city or town is a recipient of any federal financial assistance*? If so, then Section 504 of the Rehabilitation Act of 1973 will be applicable, in addition to any of the other previously cited state or federal laws.
- *In all instances*, the anti-discrimination provision of the Zoning Act will apply.

Frequently Asked Questions

1. What is the Dover Amendment?

The Dover Amendment is a provision in the state Zoning Act (G.L. c. 40A, §3, ¶2) that makes it illegal for cities and towns to adopt any zoning ordinance or by-law that prohibits, regulates or restricts the use of land or structures for religious or educational purposes.

2. Does the Dover Amendment apply to the City of Boston?

No. The Zoning Act applies to all 351 cities and towns, except the City of Boston.

Also, the Dover Amendment has limited applicability to the City of Cambridge.

3. Does the Dover Amendment protect all educational uses?

No. Only those educational uses that are provided by a nonprofit educational corporation are eligible for protection.

4. What is an educational use?

The term “educational use” is not defined in the Zoning Act. However, Massachusetts courts have historically applied an expansive definition to the term “education” that includes rehabilitative and therapeutic programs.

5. Does the Dover Amendment only apply to classroom buildings?

No. The Dover Amendment applies to dormitories, libraries, athletic facilities, parking garages and the like, if they support the educational purpose of the nonprofit corporation. It also applies to community programs in which residents receive rehabilitation, skill building or other supportive therapeutic services.

6. May a municipality impose any regulation on a nonprofit educational use?

Yes. Cities and towns may impose reasonable regulations concerning the bulk and height of structures, yard sizes, lot area, open space, parking and building coverage.

7. May a community require a special permit, variance or impose site plan review approval requirements on a nonprofit educational use?

No. Courts in Massachusetts have found that such requirements exceed the reasonable dimensional regulations permitted by the Dover Amendment. These requirements also have been found to violate the Americans With Disabilities Act and the Fair Housing Amendments Act when applied to community residences for persons with a disability.

8. What is a “reasonable” dimensional regulation?

The reasonableness of a local zoning requirement will depend upon the facts of each case. A zoning regulation would be unreasonable if compliance would substantially diminish or detract from the usefulness of a proposed structure or impair the character of the campus without appreciably advancing the community’s legitimate concerns.

9. Do group homes receive any special protection in the Zoning Act?

Yes. The Zoning Act (G.L. c. 40A, §3, ¶4) specifically prohibits cities and towns from imposing any health and safety laws or land-use requirements on congregate living arrangements among non-related persons with disabilities that are not imposed on families or groups of similar size or other unrelated persons.

10. Does the Zoning Act otherwise prohibit discrimination against persons with disabilities?

Yes. The Zoning Act (G.L. c. 40A, §3, ¶ 4) also prohibits cities and towns from adopting local land-use and health and safety laws, regulations, practices, ordinances, by-laws and decisions that would discriminate against a disabled person. This provision was made expressly applicable to the cities of Boston and Cambridge.

11. Does the Fair Housing Amendments Act of 1988 pre-empt local zoning ordinances and by-laws?

No. However, it does prohibit municipalities from making zoning or land use decisions or implementing land use policies that exclude or otherwise discriminate against protected persons, including individuals with disabilities (42 U.S.C., § 3604 (f)).

12. Who are persons with disabilities within the meaning of the Fair Housing Amendments Act of 1988?

The Fair Housing Amendments Act of 1988 prohibits discrimination on the basis of handicap, among other classes. “Handicap” has the same legal meaning as the term “disability” which is used in the Americans With Disabilities Act (ADA) and other federal civil rights laws. Persons with disabilities (handicaps) are individuals with mental or physical impairments that substantially limit one or more major life activities. The term mental or physical impairment may include conditions such as blindness, hearing impairment, mobility impairment, HIV infection, mental retardation, alcoholism, drug addiction, learning disability, head injury and mental illness. The term major life activity may include seeing, hearing, walking, breathing, performing manual tasks, caring for one’s self, learning, speaking or working.

13. Does the Fair Housing Amendments Act of 1988 or the Americans With Disabilities Act exclude any persons from the definition of “persons with disabilities?”

Yes. Current users of illegal controlled substances, persons convicted for illegal manufacture of a controlled substance, sex offenders, and juvenile offenders are not considered persons with a disability unless they are diagnosed with a mental impairment.

No protection is afforded to a person who poses a direct threat to the person or property of others. However, determining whether someone poses such a direct threat must be made on an individualized basis, and cannot be based on general assumptions or speculation about the nature of a disability.

14. On what basis will a court invalidate a local land use or zoning ordinance as a violation of the Fair Housing Amendments Act of 1988 or the Americans With Disabilities Act?

The courts rely on three theories to determine whether such local regulations are discriminatory against persons with disabilities: discriminatory intent; discriminatory effect; and the failure of the municipality to make a “reasonable accommodation” to its regulations for the needs of such persons.

15. What is an example of a zoning requirement that intends to discriminate?

A local ordinance that imposes a distance requirement (sometimes called a “spacing requirement”) between group homes for persons with mental retardation or mental illness would be facially discriminatory.

16. What is an example of a zoning requirement that has a discriminatory effect?

A local zoning regulation that allows the siting of a group home in a residential district as a matter of right, but requires the group home operator to notify neighbors of the proposed residence and subjects the group home to periodic evaluation by a program review board, would have a discriminatory effect upon the handicapped residents of the home.

17. What is an example of a failure of a municipality to make a “reasonable accommodation” in its zoning ordinance or bylaw?

The refusal of a city or town to modify its definition of “family” in its zoning code to permit a group home for men recovering from alcoholism or drug addiction would be a violation of the Fair Housing Amendments Act of 1988, the Americans With Disabilities Act and Section 504 of the Rehabilitation Act of 1973.

18. Does the Americans With Disabilities Act apply to local zoning?

Yes. Title II of the Americans With Disabilities Act prohibits discrimination against persons with disabilities by state and local governments. Local zoning decisions have been found to be an “activity” of cities and towns that are subject to the provisions of the ADA. Consequently, local governments must make reasonable accommodation for persons with disabilities by modifying their zoning decisions or regulations that would otherwise deny equal access to such persons, when requested to do so and when doing so would not impose an undue burden or expense upon the municipality or fundamentally alter its zoning scheme.

19. What action can a provider take if a community imposes upon educational uses a zoning requirement it believes is in violation of the Dover Amendment?

A provider may challenge the legality of any such requirement by appealing the decision of the building inspector (who is the zoning enforcement officer in most towns) to the local Zoning Board of Appeals. Decisions of the ZBA may be appealed by filing an action in state court (either the superior, housing or land courts).

20. How does a provider challenge a local regulation it believes violates the Fair Housing Amendments Act of 1988?

A provider may, in the first instance, file a complaint with the U.S. Department of Housing and Urban Development (HUD) which has authority to receive and investigate complaints of discrimination, including complaints that a city or town has discriminated against persons with disabilities in exercising its land use and zoning authority. HUD is obligated by statute to attempt to conciliate the complaints that it receives, even before it completes an investigation.

In matters of land use and zoning, HUD does not issue a charge of discrimination. Instead it refers matters it believes may be meritorious to the U.S. Department of Justice that, in its discretion, may decide to bring suit against the municipality.

A HUD or Department of Justice decision not to proceed with a land use or zoning complaint does not foreclose a provider or other private party from pursuing a claim in the federal district courts.

19. How does a provider challenge a municipal land use or zoning practice it believes violates the Americans With Disabilities Act?

ADA complaints may be filed with the U.S. Department of Justice or any other federal agency that has been designated to enforce the Americans With Disabilities Act with respect to state and local governments. Such agencies include the Department of Housing and Urban Development and the Department of Health and Human Services. Of course, a provider may bring an action in federal court if it believes a city or town has violated the ADA.