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December 13, 2022

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Belmont Planning Board
Belmont Office of Community Development
19 Moore Street
Belmont, MA 02478

Re: Planning Board Application No. 22-16-- 293, 301, 315 Prospect Street and 12 & 20 Park Avenue (Belmont Hill School)

To the Members of the Planning Board:

On behalf of a group of concerned citizens of Belmont, and at the request of Mr. Lowrie, Chair of the Planning Board, I submit the following memorandum with regard to the Dover Amendment and its application to the above-captioned Application submitted by the Belmont Hill School. I request that this memorandum be added to the Planning Board's file on this matter, and that the Board review it before making any decision on the Belmont Hill School's application.

I. INTRODUCTION

The purpose of the following memorandum is to outline the legal rights and obligations of the Town of Belmont (hereinafter, "the Town") with regard to its consideration of Planning Board Case No. 22-16, submitted by the Belmont Hill School (hereinafter, "BHS"). It is the position of abutters that the Town is entitled under Massachusetts law to enforce its bylaws so as to deny BHS's application and/or impose reasonable restrictions on the scope of the proposed construction project.

II. PROPOSED PROJECT

In its application, BHS proposes to build a 143-space parking lot and 7,000 square foot maintenance facility in a district zoned as Single Residence A. The construction of the parking lot and maintenance facility will require the razing of the existing residence at 283 Prospect Street

(see Application, page 1), clear-cutting of all but 28 of the existing trees on the 7-acre lot (see Plans, sheets CES-130, L-530), as well as re-grading the area to construct the maintenance facility.

A. Parking Lot

The proposed parking lot is approximately 43,500 square feet in area, 23% of which will be devoted to plantings rather than parking spaces. (Application, Page 39) This includes at least 15 feet of sideline plantings between the edge of the parking lot and the fence along the Rutledge Road property line.[1]

BHS contends that it currently has a total of 318 parking spaces available, including 268 on-campus spaces and 50 off-campus spaces. Its proposed construction project would add 143 off-campus spaces, increase the number of spaces in its "Zamboni Lot" by 14 spaces, and eliminate the row of parking in the "Upper Lot" that currently faces Underwood House and the Robsham Arts Center (Application, Fig. 2 and 3). BHS asserts that current student parking is inadequate, and that the spaces removed from the Upper Lot have been replaced at the Zamboni and East Campus lots. (Application, page 27)

BHS asserts that the construction of the new parking lot would obviate the requirement for it to lease the 50 off-campus parking spaces, and allow all student drivers to be accommodated in on-campus spaces. The new 143-space parking lot would have 100 spaces allocated to faculty and staff, with the remaining 43 spaces reserved for visitors, parents, and alumni, reducing the demand for street parking during the day and associated with large events. (Application, page 11)

BHS also asserts that "Under current conditions, (2022) school is short 29 spaces to accommodate all staff/faculty on the same day, these cars park along field in Main Lot," while additional room is currently available in the main lots and on adjacent streets for afterschool events. BHS asserts that for events during the school day, parent coffee and academic meetings require double parking in on-campus lots or on rare occasions, parking on the school's field. (Application, page 28)

In support of its contention that it has inadequate parking under existing conditions, BHS asserted at the December 6, 2022 Planning Board meeting that it performed a survey of its parking lots on a single day—October 26, 2022—and determined that 86% of its parking spots were in use for school events as of 4:30 p.m. Notably, despite contending that October 26, 2022 was not necessarily representative of its parking needs vs. parking capacity, BHS does not appear to have performed any further studies or surveys of its parking needs.

BHS acknowledges that it currently has no plans to increase student enrollment of approximately 464 students in grades 7-12, and that its faculty and staff number approximately 153. (Application, page 1)

[1] It is unclear why such plantings, designated by BHS as "screen planting," are located *inside* the parking lot fence rather than outside where they would screen the area from abutters.

B. Maintenance Facility

The planned maintenance facility is 38 feet above grade at the point facing the abutting property at 269 Prospect Street (Application, Fig. 9), and will include a 500-gallon above-ground gasoline tank and a 180-gallon above-ground diesel tank. (Application, page 13).

III. TOWN BYLAWS

The following is a selection of relevant bylaws; it is not intended to constitute a complete list. Failure to list any particular bylaw should not be construed as a concession that it does not apply to the situation at hand.

The Town of Belmont's Zoning Bylaw designates the land in question as Single Residence A—a residential area where parking lots of the size proposed by BHS are not permitted.

Section 4.2.2 (Linear Requirements for Residential Districts) specifically requires that building setbacks must be 30 feet from the front lot line, 15 feet from the side lot line, and 25 feet from the rear lot line. Further, the height of any building must not exceed 36 feet. In single residence districts, greater height is permitted only if "the building setback from each street and lot line exceeds otherwise applicable requirements by 10 feet plus one foot for each foot of excess height, but in no case shall building height exceed 60 feet or 4 stories in height." The proposed 38-foot building, which allows only a 15 foot setback from the side lot line abutting 269 Prospect Street, is therefore not in compliance with this provision.

Notably, if the maintenance building had been built in a commercial district, Section 4.2.3 (Linear Requirements for Commercial Districts) would have required the side setback to be "no less than building height or 20 feet, whichever is greater." Again, the proposed building is not in compliance with this provision.

Section 5.1.3 (Parking and Loading Area Location and Design) provides that required parking for nonresidential uses—such as a parking lot for a school—may only be located on a separate parcel "if the parcel is located within 400 feet of the building entrance to be served and is in a zoning district permitting or allowing by Special Permit the use it serves." Here, the proposed parking lot is located in a Single Residence zoning district, which does not permit nonresidential use.

Section 5.3 (Landscaping) provides that wherever possible, landscaping requirements—which include a minimum number of trees and ground cover—"shall be met by retention of existing plants. If located within 25 feet of a street, no existing tree of 6 inches caliper or greater (measured four feet above grade), dense hedgerow of four or more feet in both depth and height, or existing earth berm providing similar visual screening shall be removed or have grade changed more than one foot unless dictated by plant health, access safety, or identification of the premises." Here, while BHS maintains that "existing trees and shrubs have been retained to the extent

possible," (Application, page 40) review of sheet CES-130 demonstrates that the entire area of the 143-space parking lot will have each and every tree cleared, and sheet L-530 demonstrates that only 28 existing trees will be retained.

Section 7.4.3 (Special Permit Criteria) provides that Special Permits for non-confirming structures or uses shall be granted "only if the Special Permit Granting Authority determines that the proposal's benefits to the Town will outweigh any adverse effects for the Town or the vicinity," and specifically provides:

1. There shall be adequate provisions for water, sewerage, stormwater drainage for the proposed use and no additional adverse impacts should be created.
2. The site should be able to accommodate the proposed use without substantial environmental impacts, impacts to valuable trees or other natural resources.
3. The site should be able to accommodate the proposed use without substantial impacts on municipal infrastructure and with minimum traffic impacts on abutting residential neighborhoods.

The proposed project will have demonstrably adverse effects on the residential neighborhood surrounding it, will necessarily have negative impacts on the environment and trees, and will substantially contribute to traffic congestion in the immediate neighborhood.

Finally, Section 7.3.5 and 7.5 provide that the Planning Board may require the creation and submission of a Development Impact Report, to enable the Board to identify the environmental, social, physical, and infrastructure impacts of a requested activity, and determine if such impacts can be mitigated. Such report shall be produced at the expense of the applicant. It is our position that such a report should be completed and provided by BHS at its own expense before any further consideration of its application.

IV. DOVER AMENDMENT AND DISCUSSION

G.L. c. 40A, §3—enacted in 1950 and commonly referred to as the Dover Amendment—governs the permitted regulation of the use of land for educational purposes. Specifically, it provides in relevant part:

> No zoning ordinance or by-law shall regulate or restrict the interior area of a single family residential building nor shall any such ordinance or by-law prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a nonprofit educational corporation; 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.

However, Massachusetts courts have never held that the Dover Amendment provides a "free pass" for educational institutions to run roughshod over reasonable local regulations. Indeed, such a

holding would go against the explicit provisions of the Dover Amendment, which permit municipalities to impose reasonable regulations of specific types.

In what is considered to be the seminal case as regards the regulation of land for educational purposes, the Supreme Judicial Court in Trustees of Tufts College v. City of Medford, 415 Mass. 753 (1993) considered whether the City of Medford had violated the Dover Amendment by denying permission for or imposing restrictions on various construction projects proposed by Tufts. One such project was the construction of a five-story, 500-space parking garage in a residential zoning district. The Town, noting that the garage did not comply with front yard setback requirements (the garage had only a 30 foot setback where a 50 foot setback was required), denied the permit.

The Land Court had initially found that the setback requirement was unreasonable under Dover; however, the Appeals Court reversed, concluding that while compliance with the requirement would result in increased costs of construction, no estimate of the increased cost had been placed into evidence, whereas it was clear that the Town had a viable interest in requiring a setback on a narrow street that was nonetheless a major thoroughfare during rush hours. The Appeals Court therefore concluded that Tufts had not met its burden, which was to "show that the setback requirement impinges unreasonably on Tufts' use of its property for educational purposes." *See* Trustees of Tufts College v. City of Medord, 33 Mass.App.Ct. 580, 585 (Mass.App.Ct. 1992).

The Supreme Judicial Court recognized that the Dover Amendment "authorizes a municipality to adopt and apply 'reasonable regulations' concerning bulk, dimensions, open space and parking, to land and structures for which an educational use is proposed" for the purpose of striking a balance between "preventing local discrimination against an educational use, and honoring legitimate municipal concerns that typically find expression in local zoning laws." Id. at 757-758. (citations omitted) It further specifically recognized that

> Local zoning requirements adopted under the proviso to the Dover Amendment which serve legitimate municipal purposes sought to be achieved by local zoning, such as promoting public health or safety, preserving the character of an adjacent neighborhood, or one of the other purposes sought to be achieved by local zoning as enunciated in St.1975, c. 808, § 2A, may be permissibly enforced, consistent with the Dover Amendment, against an educational use.

Id.

In keeping with the above, the Court held that the burden of proving that local requirements are unreasonable is on the educational institution, and that the institution may meet such burden by "demonstrating that compliance would substantially diminish or detract from the usefulness of a proposed structure, or impair the character of the institution's campus, without appreciably advancing the municipality's legitimate concerns." Id at 759.

Against such background, the Supreme Judicial Court agreed with the Appeals Court's conclusion that "With no particularized evidence in this case as to the cost and difficulty of compliance that can be measured against Medford's legitimate concerns as to traffic congestion

and safety, the Land Court judge lacked an appropriate basis for the conclusion that Tufts had proved the setback requirement unreasonable as applied to construction of the parking garage." Id. at 763-764. Thus, the setback requirement could be enforced against Tufts as a reasonable restriction by the City, despite Tufts's contention that under Dover, the City's insistence on applying existing zoning laws impermissibly infringed upon its rights as an educational institution.

It is clear from the Court's holding in Tufts that a municipality may impose reasonable restrictions on an educational institution's use of land—particularly with regard to setbacks—and that a mere increase in cost (as opposed to a demonstrable impact on the school's educational use of the property) will not outweigh legitimate municipal purposes such as preserving the character of a neighborhood and regulating traffic.

In Radcliffe College v. City of Cambridge, 350 Mass. 613 (1966), the Supreme Judicial Court recognized that a municipal regulation is not unreasonable simply because it prevents a particular educational use of a particular parcel of land—rather, so long as the land is still available for educational purposes, restrictions may be imposed. In Radcliffe College, the City of Cambridge sought to impose restrictions on Radcliffe's proposed construction of a library—specifically, to require Radcliffe to include off-street parking as part of the plan. Radcliffe argued that it was exempt from the Cambridge ordinances under the Dover Amendment, and that if it were forced to construct parking for the library on parts of its land, it would be unable to use that land for educational purposes (Radcliffe cited plans to build new dormitories in the area, as well as a desire to retain landscaping and recreational areas). The Supreme Judicial Court, while recognizing that a municipal ordinance that actually prevents the use of land for an educational purpose would be invalid, noted that the provision of parking for a school's students, instructors, and employees was itself an educational purpose—thus, it concluded

> [A] regulation that requires that some of the college land be used for parking does not lessen the availability of all or any of the institution's land for some appropriate educational purpose. We think the statute does not bar such regulation. Plainly the statute does not do so in express terms. At most the Cambridge ordinance requires choices among the proper educational purposes of the institution. In so doing it does not impede the reasonable use of the college's land for its educational purposes. We rule, therefore, that it does not limit 'the use of (its) land for any educational purpose' within the meaning of G.L. c. 40A, s 2.

Id at 618. Notably, the Supreme Judicial Court in Tufts cited to Radcliffe College for the premise that "a local zoning provision that requires an educational institution to adapt plans for the use of its land may be enforced, so long as the provision is shown to be related to a legitimate municipal concern, and its application bears a rational relationship to the perceived concern." Tufts, *supra*, at 758. The Radcliffe College decision makes clear that so long as a municipality does not preclude *all* educational use of the land, it may impose requirements on the manner in which the school makes educational use of such land. In short, a restriction requiring a school to install parking or facilities on part of its property that it would prefer to use for another purpose (for example, a dining hall), is enforceable under the Dover Amendment.

Lower courts have similarly upheld the application of reasonable municipal zoning bylaws to prevent educational institutions' use of land in ways that would have an adverse impact on the municipality's legitimate interests.

In Rehabilitative Resources, Inc. v. Peabody, 18 Mass.L.Rptr. 361 (Mass. Super., 2004), the Superior Court considered the Town of Sturbridge's imposition of setback, frontage, and buffer zone requirements on a construction project proposed by Rehabilitative Resources, Inc., a nonprofit educational corporation entitled to the protections of the Dover Amendment. The Court, recognizing that the Town's requirements were use-neutral, and "serve legitimate and important objectives of local land use regulation: density control, provision of light and air, traffic safety and decongestion, and control of runoff," found that such regulations were not unreasonable as applied to the proposed project, and that Rehabilitative Resources had not shown that would be excessively burdened by substantial compliance with the zoning regulations—in other words, that such regulations "would unreasonably interfere with its educational mission." The Court therefore entered summary judgment in favor of the Town.

More recently, in Town of Sharon Board of Library Trustees v. Brahmachari, 2021 WL 4059907 (Land Court, Sept. 2, 2021), the Norfolk County Land Court reiterated the standard set forth in Tufts in considering a dispute between the Town of Sharon and its Board of Library Trustees. The Trustees sought to build a new public library, which the Town denied on the grounds that the library failed to meet minimum lot area, front yard, impervious coverage, and natural vegetation requirements. The Trustees filed suit and sought summary judgment, arguing that they were entitled to project approval under the Dover Amendment. The Town responded by asserting that the Trustees had failed to demonstrate that complying with zoning bylaws would detract from the project's usefulness as required by the Tufts decision. The Land Court, while concluding in that specific instance that the Town had failed to employ the proper balancing test and further failed to provide sufficient detail to support its initial denial of the Trustees' application, nevertheless refused to conclude as a matter of law that the Trustees were entitled to a ruling in their favor on the ultimate question of whether the Town's restrictions were permissible. It held

> [T]he Trustees are not entitled to a permit for the proposed project simply because the library is an educational use that enjoys protection under the Dover Amendment. Rather, they must establish that the dimensional requirements of the bylaw are unreasonable by showing that compliance will substantially diminish or detract from the usefulness of the proposed library without appreciably advancing the municipality's legitimate concerns.

Id. at *5. Because the Trustees had failed to meet their burden, the Land Court remanded the matter back to the Town for further consideration and employment of the proper test to determine whether to approve the construction project.

Here, where the Belmont Hill School has failed to demonstrate that additional parking is necessary at all, or that a reduction in the size of the proposed parking lot, increased setbacks from neighbors, or moving of the proposed fuel tanks underground would "substantially diminish or detract from the usefulness" of the project, it is apparent that the Town may weigh these factors

against the substantial effects on neighbors and on the Town in general when applying the Tufts standard.

Notably, in Martin v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints, 434 Mass. 141 (2001), a case actually involving the Town of Belmont, the Court's conclusion that the Church was in fact permitted under the Dover Amendment to build a steeple exceeding local height regulations was grounded on the fact that "*no* municipal concern was served by controlling the steeple height of churches." Id at 153 (emphasis supplied). In other words, the Town was unable to demonstrate any adverse impact on its residents or infrastructure resulting from the construction of a steeple taller than was permissible. That being said, the Court held that "it was permissible for the board to consider whether something less than the original design of the steeple height was reasonable," and noted that the Church, in response to Town concerns, had revised its proposed temple from 94,100 square feet to 68,000 square feet, and had reduced the number of steeples from six (the tallest of which would be 156 feet high) to a single steeple of 83 feet. The Martin case serves not only as a counterexample to BHS's proposal here—which would have demonstrably adverse effects on abutters and on traffic in the neighborhood as a whole—but as an example of how an applicant may significantly reduce the scope of its proposal in response to a municipality's concerns in order to reach a reasonable result.

V. APPLICATION

Based on the above cases, it is apparent that the Town of Belmont is entitled to impose restrictions on BHS's use of its land in order to minimize the adverse impact on neighbors and on the Town as a whole. Massachusetts courts have made clear that the relevant test, which is to be applied on a case-by-case basis, is whether the restrictions in question are reasonable in serving a legitimate municipal interest, while not preventing the school from putting its land to an educational use.

At the outset, it is clear that BHS has failed to meet its burden of demonstrating that the scope of its proposed project is consistent with deeming it an "educational use." Certainly, the creation of parking spaces for students, staff, and visitors is an educational use under Massachusetts law. *See*, Radcliffe College, *supra*. However, where construction of a single parking space or a dozen parking spaces might be an educational use, this cannot be the case *ad infinitum*—for example, it is self-evident that a thousand parking spaces would *not* be an educational use for a school of BHS's size and makeup. Where, then, does one draw the line between educational and non-educational uses? In the absence of any Massachusetts case addressing this issue, we submit that the boundary between such uses should be set by considering the actual needs of the educational institution, as determined by an independent study. Here, where BHS has provided only a single data point regarding the use of its parking spaces *at a specific time on a single day*—which data itself demonstrates that BHS parking is only at 86% capacity and is therefore not being fully utilized as it currently stands— the Town would be justified in finding that the 143 spaces sought to be constructed by BHS are in excess of what would constitute an educational use. At the very least, the Town should require BHS to commission a more comprehensive parking study to meet its burden under Tufts of showing that its planned construction of the parking lot is in fact an

educational use and that restrictions on its size and location would be an unreasonable imposition on such use.

Further, where the sheer scope of the proposed parking lot and equipment maintenance facility (including their close proximity to residential abutters) makes it inevitable that the project will have substantial effects on the neighborhood and its traffic patterns—not to mention the dangers of above-ground fuel tanks in a residential neighborhood— the Town's interest in regulating the proposed project is apparent. Given that BHS has admitted that it has a shortfall of only 29 parking spaces (and that only if every eligible student and faculty member drives to school in an individual vehicle on a given day, *and* it becomes unable to use its auxiliary leased lot) it cannot demonstrate that its educational goals cannot be served in any way other than by constructing a 143-space parking lot immediately abutting neighbors' property. Under the Tufts test, the school's interest in having more convenient parking for the infrequent occasions on which it holds large events outside of school hours, does not outweigh the Town's interests as described above. Further, BHS's claim that the 7,000 square foot maintenance facility is required to be located away from its main campus and immediately adjacent to neighbors, appears to be based solely on its desire to use space on its main campus (that could be devoted to such a facility without violating zoning bylaws) for other purposes—an argument explicitly rejected by the Radcliffe College court more than fifty years ago. Finally, given the danger of leaks and explosions stemming from above-ground fuel tanks, BHS's proposal to install such tanks mere feet from abutting residences is a clear and present danger to residents.

We submit that as a condition of issuing a Special Permit allowing BHS to construct a parking lot and maintenance facility in a Single Residence district, the Town of Belmont could properly require BHS to increase setbacks for the parking lot and facility to 50 feet from any abutters, retain all existing trees and ground cover within such setbacks, reduce the size of the parking lot to 75 spaces—more than twice the number of spaces BHS asserts that it currently lacks for daily use—and require the school to move its fuel tanks underground.[2] Such requirements would serve the Town's interests by reducing the impact on abutters, reducing the number of vehicles and thus the amount of traffic in the area, and mitigating the effect on the local environment and wildlife habitats. From BHS's point of view, increasing the setbacks in this manner would result in only a minimal decrease in the total square footage of land able to be used by the school, having little to no effect on their educational goals; reducing the size of the parking lot would, by their own admission, still afford them with more than enough parking for their stated needs. BHS has provided no reason why it could not move the fuel tanks underground so as to protect abutting residences.

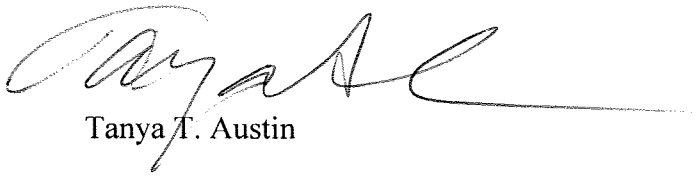
Finally, we respectfully submit that if the Town lacks sufficient information as to the adverse impacts of the proposed project on the environment, infrastructure, traffic, or the neighborhood in general, it should require the creation and submission of a Development Impact Report at BHS's expense, pursuant to Sections 7.3.5 and 7.5 of the Zoning Bylaw. Such report

[2] While such restrictions may not be expressly contemplated by individual Town Zoning Bylaws, the Bylaws also do not contemplate the construction of a parking lot or equipment maintenance facility in a single-residence area; the Town would therefore be justified in imposing project-specific restrictions to mitigate the effect of the project on the residential neighborhood.

would enable the Town to review impartially-gathered information and conclusions as to the effect of the project, and better formulate reasonable restrictions to serve the interests of the Town without unduly burdening BHS. While certain members of the Planning Board have expressed their disinclination to require such a report—choosing instead to request a peer review of traffic and stormwater issues only—it is our position that this project is of sufficient importance to warrant the creation of a Development Impact Report, particularly where BHS has failed to voluntarily provide information necessary to allow the Planning Board to fully consider the effect of the proposed project on the Town.

If you have any questions regarding the cases or analysis set forth above, please feel free to contact me; I and my fellow Belmont residents are always open to further discussion on this matter, and welcome any opportunity to open a dialogue with the Town or with Belmont Hill School. Thank you.

Sincerely,



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