

TOWN OF BELMONT

RECEIVED
TOWN CLERK
BELMONT, MA

DESIGN AND SITE PLAN REVIEW OPINION 2023 APR 19 PM 12: 50

PLANNING BOARD

CASE NO. 22-14 (terminated); 22-16 (terminated); 23-04

APPLICANT: Belmont Hill School Inc.

PROPERTY: 350 Prospect Street and at the joint properties of 283, 301, 305, and 315 Prospect Street & 12 and 20 Park Avenue

MEMBERS SITTING: Matt Lowrie, Chair, Jeff Birenbaum, Thayer Donham, Renee Guo, Karl Haglund, Carol Berberian (Associate)

MEMBERS PARTICIPATING AND VOTING: Matt Lowrie, Jeff Birenbaum, Thayer Donham, Karl Haglund, and Carol Berberian.¹

1. Introduction

This matter began its course through the permitting process over 9 months ago, with a July 5th, 2022, denial of a building permit by the Belmont Office of Community Development (“OCD”). Over the course of the last 9 months, the application has gone to Design and Site Plan Review (“DSPR”) before the Planning Board (“PB”) three times, with a Board resignation and recusal causing the hearing to be closed and restarted, objections to notice requirements for a continued meeting (not accepted), and further objections to notice requirements for postcard mailings to abutters for the restarted meeting – an objection made weeks after the fact – that also inarguably made no difference on public awareness of the hearing, but which caused the Belmont Hill School (the “School”) to request a second dismissal without prejudice and restart of the public hearing.

The record in this case includes hundreds of items of correspondence directed to and considered by the PB, as well as many hours of public input at PB hearings. The course of the proceedings and the record before the PB are summarized in Appendix A.

The project documents are also listed in Appendix A and include some amendments to the application over the course of the hearing process. This Board accepts the amendments, and the Board’s approval is based on the original application as amended by the later materials. The project disclosed in those materials, together with the conditions listed below (the “Conditions”), will be referred to as the “Project.”

As outlined below, on April 11, 2023, the Board voted to approve DSPR with three votes in favor (Mr. Lowrie, Ms. Donham and Mr. Haglund) and two against (Mr. Birenbaum and Ms. Berberian). The vote

¹ Before the public hearings began, Ms. Guo recused herself and did not sit on the panel for those parts of PB meetings where a substantive hearing was conducted on this matter. Ms. Berberian participated in Ms. Guo’s place as the PB’s associate member.

was taken after proper notification of abutters, posting of the hearing notice at Town Hall, and public hearings on the dates set forth in Appendix A.

This opinion memorializes the reasoning for the PB's earlier approval. The dissenters were offered the opportunity of presenting a dissenting opinion and declined.

2. Background Information

The School is an independent non-profit school for boys that was founded in 1923. The School currently serves a population of about 464 students and has about 153 faculty/staff members. The School has represented that it does not currently intend to expand the student population, though this PB does not (and assuredly cannot) impose any restrictions on the School's student or faculty population in this DSPR approval or this opinion.

The Project includes four components – changes to the Zamboni lot, changes to the existing upper lot on the Main Campus, and the addition of an "East Campus." The East Campus itself has two components – additional parking and a new maintenance facilities building with some associated parking. While the Main Campus and East Campus are sometimes discussed as separate campuses, that is not intended to suggest that they cannot also be viewed as a single campus with a public way passing through it. The final layout from the amended application for the changes to the Main Campus (Zamboni Lot and Upper Lot) parking area are this:



The changes to the Zamboni lot create additional parking on the Main Campus, better traffic flow within

the campus, and better access for visiting team buses. The changes to the upper lot results in a net loss of parking spaces, in favor of improved traffic flow and the creation of a student drop-off area that is currently lacking.

The East campus (superimposed over the existing landscape and houses) appears as this:



The East Campus adds additional parking and adds a new maintenance facility building with associated parking. In the future, the School presently intends to remove the current maintenance facility building on the Main Campus, in favor of a new student dining hall.

Currently, the East Campus area consists of five separate single residence lots. In connection with the Project, the School proposed to merge all five lots that constitute the East Campus,² with ownership transferred to the School (which also owns the Main Campus). The School informed the PB on April 11, 2023, that the process of merging and transferring lots has been completed and, in any event, common ownership will be a condition of approval. The Project proposes to raze the existing residence at 283 Prospect Street, repurpose the existing residential structure at 20 Park Avenue for unheated storage of tables, chairs, tents, and other occasionally used equipment, and use the 3 existing residential structures at 301, 305 and 315 Prospect Street as housing for School staff and faculty. At one point, there was an

² Combining lots may be necessary to avoid concerns about compliance with the ZBL among individual residential lots within the East Campus, although any such concerns may also be inapplicable if the Dover Amendment applies. That merger, however, creates a need for a waiver of the separation requirements between egress points within the same lot, as discussed below.

additional house in a lot running along the north part of the properties at 12 Park Avenue. The driveway and loop are shown in the above drawing and still exist on the site. The house next to the loop was razed by the School a number of years ago, sometime after the School acquired that lot.

According to the School, the total existing parking spaces is 318, with 268 on the Main Campus and 50 that are leased at 929 Concord Turnpike, Arlington, across route 2 (at St. Paul Lutheran Church). This latter lot can only be used for student parking and only during the week, as a lease condition required by the Church.

Depending on the time of year, students either walk or take periodic School shuttle buses to the School. According to Google maps, this is a .6 mile, 14 minute walk, along the on-ramp for Route 2 and down Park Avenue:



The path itself immediately abuts the Route 2 on-ramp and also Park Avenue, with vegetation crowding the path toward the Street:



In the winter, plows cover the path with snow and any students who walk are forced to do so on the road. While shuttle buses operate in the winter, the time that students finish their day can vary and students may sometimes be forced to (or simply choose to) take the 14 minute walk down Park Avenue and the Turnpike on-ramp, on the road and in the dark.

The East Campus Lot is proposed to have 143 spaces in total, to be used for staff and visitor parking. On the upper lot, 17 spaces are being replaced with a pick-up/drop-off area. On the Zamboni lot, 12 existing gravel parking spaces will become 26 paved spaces. The net effect is to increase parking at the School from 318 (268 on campus and 50 leased on the other side of Route 2) to 412 spaces,³ all on the Main and East Campuses – a net increase of 94 spaces. This Project is a part of a longer-term plan that includes building a dining facility on the Main Campus, which is expected to remove 43 parking spaces. This means that the net expected addition of parking is planned to be an additional 51 spaces above what is currently available on the Main Campus and leased at the Church.

The proposed use of the parking is as follows:

Table 2: Proposed Parking Use	
Student Parking	160
Employee Parking	153
Admissions/Visitor Main Campus	13
Visitor East Campus	6
Accessible Spaces East Campus	7
Accessible Spaces Main Campus	7
School Day /Athletic/ Academic Events	66
	412
Note: 43 spaces will be lost in dining hall project, reducing the number of spaces for events, and resulting in 369 on-site spaces.	

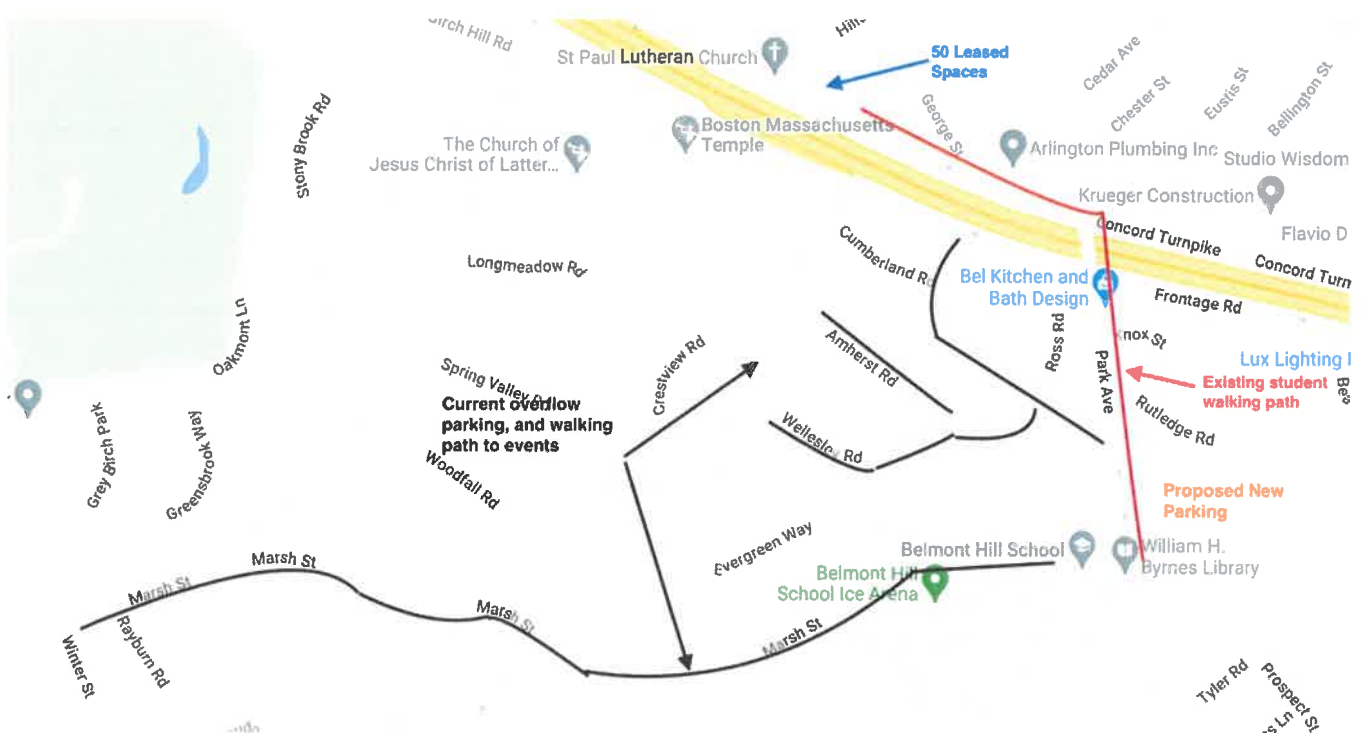
³ With the additional parking on campus, the School intends to stop leasing the 50 spaces across Route 2.

All of the student parking will be located on the Main Campus. The East Campus parking will be used for faculty and staff and also for overflow event parking.

With respect to the latter, overflow events include sporting events as well as other school functions like a semi-formal dance. The School hires police details where overflow parking is expected. Thus, there is a record of how often that occurs. On December 15, 2022, the School submitted a letter including a Table that lists the police details for the academic year of 2018/19, i.e., the most recent academic year before the COVID-19 pandemic.

According to that submission, there were approximately 121 separate police details across approximately 68 different dates, from 4 different police departments (typically the Belmont Police Department (“Belmont PD”) staffs the details, with other towns filling in when the Belmont PD cannot staff it). The police details are paid for by the School and for 2018/19 constituted approximately 112 details for sporting events, 5 for traditional school functions (like back-to-school events or a semi-formal student event), 2 for a “parent fund-raiser” and 3 for student fund-raisers. Apparently, alumni events typically occur in the evening and overflow parking is not required because the students and faculty have left and there is sufficient parking space on the Main Campus for those events.

According to Chief MacIsaac of the Belmont PD, typical overflow parking where a police detail is present is roughly 29 to 75 cars on the streets. Large events have overflow parking of well over 100 cars on a street. When that occurs, parking extends all the way down Marsh Street to Winter Street and then up Village Hill Road and into its surrounding neighborhood:



While overflow parking is generally first directed along Marsh Street, Belmont police have found that Marsh Street is not ideal because pedestrians must walk on Marsh Street up to the school – there is no sidewalk. The road is narrow, has lots of vegetation overgrowth, and has curves causing poor sight lines.



Plowing of snow in the winter only makes this worse. When you add parking to one side, vehicle traffic becomes more restricted with less room for pedestrians and vehicles. At times, the Belmont PD has closed the entire eastbound travel lane of Marsh Street over safety concerns. During large events, Belmont Police also place road closure barriers to prevent people from parking on Evergreen Way and Edmunds Way, but once Marsh Street has taken overflow parking all the way back to Winter Street, Belmont Police will direct vehicles to park on the entire length of Village Hill Road and into its surrounding streets.

3. Dover Amendment

The School has expressly sought to invoke the Dover Amendment, and so DSPR begins with a determination of whether it applies. *See Regis College v. Weston*, 462 Mass. 280 (2012) (noting earlier decision vacating the Weston zoning board's denial of an application and remanding to the zoning board to make a determination of whether the Dover Amendment applies, then, after the zoning board made that determination, reviewing it on a second appeal).

The PB received legal memoranda from:

- Jamy B. Madeja, Esq., Buchanan & Associates, on behalf of “Belmont Concerned Citizenry,” dated November 30, 2022 and which appears to be on behalf of unidentified individuals who were opposed to the Project as then-proposed;⁴
- Robert H. Fitzgerald, Esq., Goodwin Procter, on behalf of the Belmont Hill School, dated December 5, 2022; and
- Tanya Austin, Esq., on behalf of “a group of concerned citizens of Belmont,” dated December 13, 2022 and which appears to be on behalf of herself as an abutter and on behalf of other unidentified individuals who were opposed to the Project as then-proposed.

In light of the competing legal filings, the PB asked Town Counsel, George Hall, Esq., Andersen Kreiger, to evaluate and provide a public response to these materials on behalf of the Town. He did so by legal memorandum dated December 16, 2022, which is included in the DSPR file. Mr. Hall further appeared before the PB to answer PB questions on behalf of the Town, at the public hearing held on December 20, 2022.

The PB adopts the legal analysis of Town Counsel and hereby incorporates the December memorandum as a part of this decision.

The Supreme Judicial Court of Massachusetts imposes two limits to qualify for protection under the Dover Amendment for educational uses: (a) the “bona fide goal” must be “educationally significant,” and (b) the “educationally significant goal” must be the “primary or dominant purpose.” *Regis College v. Weston*, 462 Mass. 280 (2012). The burden of establishing that a proposed “use” is educational is on the School. *E.g., id.*

3.1 Maintenance Facilities Building and Maintenance Facilities Parking

The maintenance of school grounds is plainly an educational use, as that term is used in the Dover Amendment. Thus, in his legal memorandum, Town Counsel advised the PB that:

It is also not disputed that the Dover Amendment applies not only to the land and structures directly used for the education of students, but also the ancillary and accessory uses that are “directly related to the function” of BHS on its campus, ***such as parking***, residential buildings for students, faculty and staff, athletic facilities, administrative offices, ***and facilities buildings of the sort proposed by BHS in this application.***

(emphasis added). *See, e.g., The Bible Speaks v. Board of Appeals of Lenox*, 8 Mass. App. Ct. 19 (1978) (35’ light poles and snack bar associated with softball field deemed part of “educational use” of school property and therefor exempt from Lenox zoning restrictions under Dover); *Forster v. Belmont*, Mass. Civ. Ac. 01-3560 (1990) (Belmont restriction on height of light poles not enforceable against lighting for football field, under Dover Amendment).

⁴ Early in the process, certain abutters suggested that they would like their counsel to address the PB. Whether that counsel was Ms. Madeja or someone else, no counsel ever appeared before the PB on behalf of any abutters.

Indeed, there is no suggestion that the facilities could have any purpose other than serving the educational mission of the School, through maintenance of its property.

3.2 Additional parking

The stated use of additional parking is to permit parking on-campus rather than across Route 2, and to help accommodate event parking (as well as making traffic flow and safety improvements in support thereof). Indeed, it is difficult to imagine that there would be any conceivable use for the parking that is not in support of the School. There is no plan, for example, to lease spaces to commuters who would then have to find their way to Boston or Cambridge or wherever they are going. To the contrary, the School intends to restrict use of all spaces to students, faculty, staff and visitors of the School. The East Campus parking has gated entry to be activated off-hours, which would discourage or prevent surreptitious use of the parking area other than for a legitimate School use. And in any event, a condition of DSPR approval is that the predominant use of the parking be for School uses. The Dover amendment and attendant case law require no more.

It has been posited that, if the parking is vastly in excess of the School's needs, one might question whether the intended use is truly for the School's use. And if the School proposed to add 10,000 parking spaces, this is a question the PB might very well ask.

Here, however, the additional parking spaces (94 right away but with a long-term plan meaning that the School expects only 51 additional spaces) is not enough to accommodate overflow parking for larger events as estimated by the Belmont PD Chief. And parking for larger events is an "educational use" as Town Counsel represented to the PB in his legal memorandum:

[the] suggestion that the Board should determine that the BHS project exceeds that threshold [for how much parking the school needs] because the proposed lot will accommodate visitors for larger campus events, but is more than is necessary for the school's daily needs, ***would not be a defensible position if adopted by the Board.***

(emphasis added). Any contention that the number of spaces so exceeds the School's needs as to call into question whether the spaces are being used for the School approaches, if not crosses, the line into being frivolous. There should be no genuine question over whether the parking is an "educational use" for purposes of the Dover amendment. It is and no one has ever so much as suggested a possible "use" for the parking that is not in support of the School.

4. DSPR

4.1 DSPR generally

Under the Dover amendment, the PB cannot enforce use restrictions against an educational use. The PB can enforce "reasonable restrictions" ***of the ZBL*** as they pertain to "the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements." M.G.L. Ch. 40A, Sec. 3.

Here, DSPR was initiated because of a proposed nonresidential structure of more than 2,500 square feet (the Maintenance Facility building) and because of a proposal to add more than 6 parking spaces to a lot in a Single Residence District. (ZBL Section 7.3.2(a).)

These limits are not “restrictions” in the Belmont ZBL. If they were, they would be unenforceable in their entirety as against this Project, as in the case cited above about lighting for a softball field. Rather, “limited” site plan review is permitted, i.e., “limited” to assure compliance with reasonable regulations that appear in the applicable zoning bylaw. *Jewish Cemetery Assoc. of Mass., Inc. v. Wayland*, 85 Mass. App. Ct. 1105 (2014).

The Belmont ZBL is in accord. Under ZBL Sec. 7.3.3:

- d) The Design and Site Plan Review application shall be approved provided that all of the requirements of these By-Laws are fulfilled. The Board may attach reasonable conditions to any approval. An approval does not relieve the applicant of the responsibility of obtaining other required approvals and/or permits from local boards, state or federal agencies.
- e) If the Design and Site Plan Review application does not conform to the requirements of these By-Laws, the Planning Board shall identify these deficiencies in writing and may deny approval. A new application and hearing process will then be required for further consideration of the proposal.

Thus, the first (and only) approval criterion is meeting the requirements of the ZBL, which if “fulfilled” mean that the DSPR application “shall be approved.” It is not optional.

In the present case (and with the exception of egress separation discussed below), the Project both as initially proposed and as amended meets “all of the requirements of these By-Laws.” No PB member and no member of the public has ever identified any ZBL provision that is unmet⁵ (the School identified the egress separation issue). OCD and the PB have attempted to assure compliance, and everything from setbacks, to height, to size, to open space, to landscaping for parking, to lighting, all meet the provisions of the ZBL. How the “no” votes on DSPR might identify “in writing” how the application does not “conform to the requirements of these By-Laws” under Section 7.3.3(e) remains unstated.

While the above ZBL provision allows “reasonable conditions,” those are “reasonable conditions” to an *approval*. That is not a blank check to impose arbitrary restrictions not found in the ZBL against a Dover-protected use. Plainly a demand to materially change the scope of a project that meets the ZBL is not a “reasonable condition” to an approval of a proposed project; it would be a denial of the project as proposed and therefore a violation of Belmont’s ZBL.

⁵ Ms. Austin’s letter dated December 13, 2022, raised a question about whether the height of the Maintenance Facility building exceeded the 36-foot limit in the ZBL for Single Residence A. The letter failed to use the definition of “height” in the ZBL and, in fact, the proposed height then, and as later amended, is about 8 feet below the height limit of the ZBL. Since that time and after this was confirmed (again) by OCD and addressed at a public hearing, Ms. Austin signed a letter in support of approval of the Project and appeared before the PB to make a statement to that effect.

Perhaps more important, no one has ever suggested a reasonable condition that the School declined to voluntarily accept. The only suggestions left on the table involved materially altering the scope of the Project, e.g., by materially reducing the amount of proposed parking or by studying safety issues on Belmont public ways that the School neither owns nor controls (and which the Project improves by reducing congestion). These are not “reasonable conditions” to approving a proposed project, nor were they offered as such. The suggestions were for a denial of a project that nevertheless meets “all of the requirements of these By-Laws,” and would be contrary to the Dover Amendment and to the ZBL provision quoted above.

4.2 Egress separation

ZBL Sec. 5.1.3(g)(1) provides:

There shall be not more than two driveway openings onto any Street from any single premises unless each driveway is separated from all other driveways serving 20 or more parking spaces, whether on or off the premises, by at least 250 feet (measured between centerlines at the Street line) on arterial Streets and 150 feet on other Streets.

The existing driveways to 283 Prospect Street and 301 Prospect Street are closer together than the stated limit. They met the ZBL because they are separate premises. With the merger of the five lots into a single lot, however, there are now two driveways exiting from the same lot, within 150 feet of each other.

The ZBL does not specifically authorize a waiver of this requirement, under the circumstances of the present DSPR application. Since the Project is a Dover-protected use, the PB must determine if “compliance would substantially diminish or detract from the usefulness of a proposed structure . . . without appreciably advancing the municipality's legitimate concerns.” *Tufts College v. Medford*, 415 Mass. 753, 757-59 (1993).

Town Counsel informed the PB (in his December 2022 legal memorandum) that:

It should be noted that this is not a particularly high bar. To ‘substantially diminish or detract from the usefulness’ of a structure means to do so to more than a trivial or insubstantial degree. To “appreciably” advance the Town's interests means to do so measurably and concretely, not merely hypothetically.

According to Belmont’s peer reviewer, the Prospect Street entrance is the logical and needed location for a second entrance to the East Campus parking and to the maintenance facilities. Preventing an access point there would meaningfully diminish usefulness of the Project. The peer reviewer (and School engineer) also opined that these driveways would not pose any meaningful new safety or congestion problems in general or as compared to any alternative design. This is supported by the fact that most of the expected use of the parking is from Route 2, which would not likely use the Prospect Street entrance. And to the extent that they do, requiring them to continue through the rotary to an entrance on Park Avenue would increase congestion. No argument was made against waiver that was not hypothetical and which was measurable and concrete. No one during the hearing process went so far as to suggest that there was a meaningful alternative to waiver that would permit the Project to go forward in a reasonable way.

The *Tufts* standard has been met and, under the Dover amendment, ZBL Sec. 5.1.3(g)(1) will not be enforced against the Project.

4.3 Conclusion

With the waiver in Section 4.2 above, the Project meets the requirements of the ZBL and no PB member has advocated against the waiver or identified any other failure to “fulfill” the requirements of the ZBL. DSPR must be granted, as provided for in the Dover amendment and the ZBL.

The public and certain PB members raised a number of issues that will be addressed below. None address a failure to meet a ZBL requirement and none could therefore qualify as a basis to deny DSPR. Some suggest conditions, however, that might reasonably be attached to an approval.

5. Issues raised during the public hearings.

5.1 Number of spaces

During the public hearings, there were attempts to compare the School’s parking needs with other schools. The analysis was presented under the mistaken assumption that the School is serving 5th grade through 12th grade students, rather than the actual case of 7th through 12th. Plainly, a per-student comparison of parking at a school that includes 5th and 6th graders (who generally do not drive) is unhelpful. Other schools had boarding (which the School does not have) – again making for an apples to oranges comparison. One school was located in Boston and did not even permit student parking – also unhelpful. The effort may have been a good-faith attempt to look at other schools, but it was inarguably flawed. The School put forth its own analysis of these other schools purporting to show that its parking proposal is in line with other schools.

The PB appreciates the submissions but will not make detailed fact-findings about the comparisons. If a new church were being built, the PB would not demand explanations for why one church needed more parking than another, or how many pews belong within the church based on what other religious institutions have. The School gets to decide the best educational use of the property it owns, particularly where (as here) the project complies with the ZBL.

As discussed above, if the volume of parking were so great that it could not be explained, one might question whether a stated use is truly the *bona fide* one. That is simply not the case here.

To the contrary, the Project adds 94 spaces over the current Main Campus and church parking, with that number expected to go down to 51 spaces after a contemplated Dining Hall improvement in the future. The amount of on-Street parking during police details, i.e., 29-75 for average events and “well over” 100 cars for large events, establishes beyond genuine dispute that the added parking is no greater than the School’s existing documented needs, including the School’s desire to provide parking for students on the Main Campus rather than across Route 2. In fact, the existing need during large events would justify more spaces than the School proposes in this Project.

5.2 Efforts to impose conservation restrictions to bar or materially alter the Project

There was a great deal of public input concerning the “destruction” of 7 wooded acres. Signs even appeared on the street leveling this accusation at the School along with various other insults.

As a preliminary matter, the amount of tree removal is vastly below 7 acres:

Before:

TYPE	ACRE
 Impervious (Paving / Buildings)	0.73 acres
 Pervious Porous paving	0 acres
 Lawn	1.15 acres
 Garden	0.35 acres
 Canopy	4.83 acres
	7.06 ACRES TOTAL

After:

TYPE	ACRE
 Impervious (Paving / Buildings)	.99 acres
 Pervious Porous paving	1.24 acres
 Lawn	.93 acres
 Garden	.35 acres
 Canopy	3.54 acres
	7.06 ACRES TOTAL

Change:

0.26
1.24
-0.22
0
-1.29

Even this analysis overstates the clearing, because it includes as wooded area where the previous house had stood, next to the driveway loop. It would be difficult to call that area “wooded canopy.” The amount of wooded canopy that is being removed is about 1 to 1¼ acres.

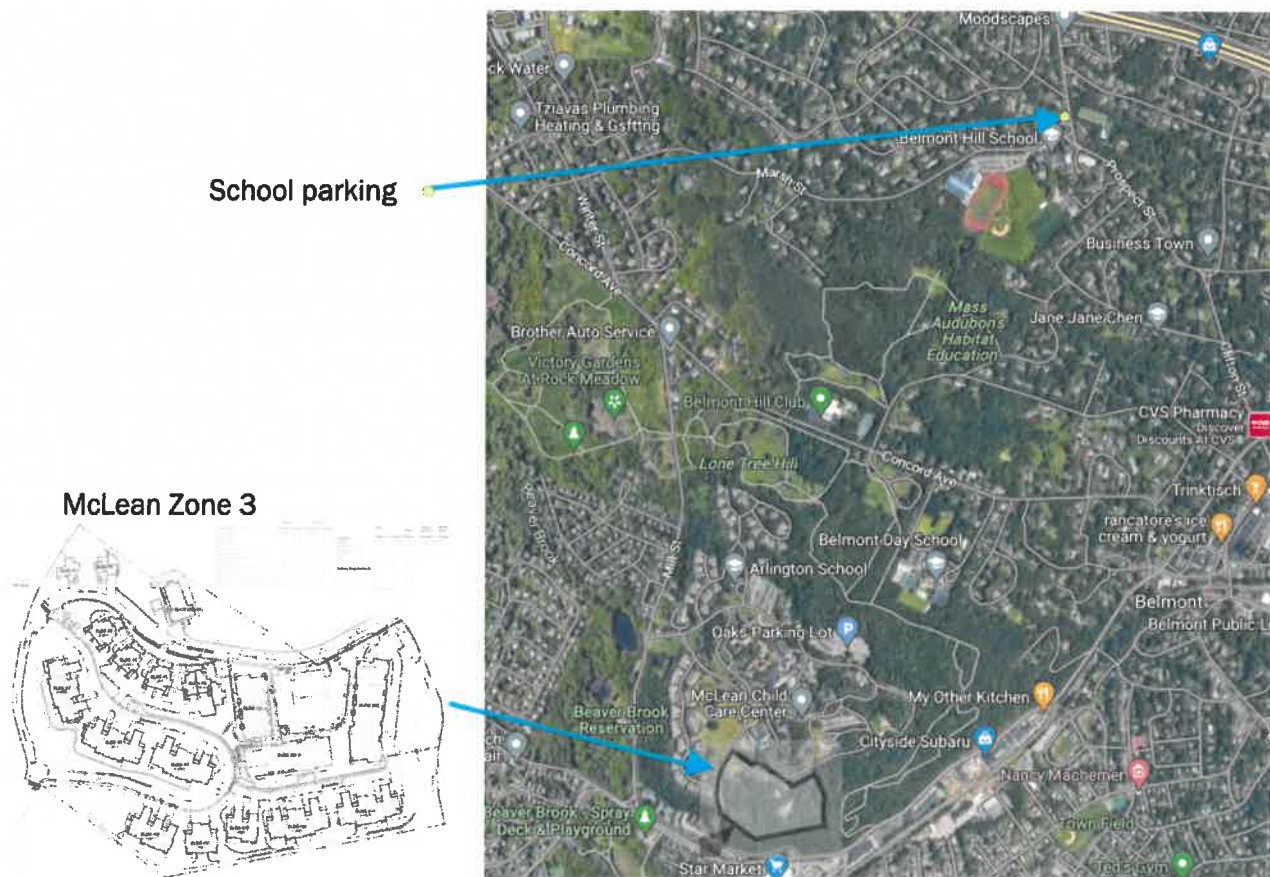
The ZBL does not contain limits on the scope of a project in the Single Residence districts, based on clearing woods. To the contrary, if one looks at the abutting properties on Rutledge Road, they are mostly clear-cut to about 80-90%. For example, 178 and 184 Rutledge Road:



Put another way, the land is zoned for single family residence – not for conservation. If Belmont, or the abutters, wish for the land to be preserved for conservation, they must acquire the land or acquire a conservation easement to it. No one has paid for that and, therefore, no one is entitled to encumber the land that way anymore than Belmont can require the Rutledge Road abutters to reforest their own Single Residence district properties.

Moreover, after the Project, over 50% of the East Campus lot will have a wooded canopy. That is materially more than most of the surrounding properties and materially more than the ZBL would permit *as of right and without DSPR*. That is, except for the protected use of school parking, the School is free to clear-cut the lot without DSPR or even a permit under the ZBL. What the School proposes is far less intrusive than the ZBL would permit as of right.

That conservation issues in the present setting cannot be used as a basis to require material alteration of the Project is confirmed by the recent DSPR approval of McLean Zone 3. McLean Zone 3 passed DSPR for a development on 12.8 mostly wooded acres, which will have to be cleared for construction. The approved project includes 40 townhomes and 2 apartment buildings with a total of 112 apartments and 251 parking spaces. The project's conservation impacts dwarf this one:



McLean Zone 3 drew no conservation objections, no objections about “natural habitats,” and no objections about volume of clearing. The Dover Amendment did not apply to protect the proposed use. But, like here, the land was not subject to conservation easements or covenants. DSPR was approved unanimously, 6-0.

To impose new restrictions here on volume of clearing, not found in the ZBL and never before imposed on privately owned land in Belmont, would violate the very reasons that the Commonwealth adopted the Dover amendment. Special conservation rules and restrictions applied to deny a Dover-protected use, and only a Dover-protected use, are antithetical to the statute. They would be the epitome of “local discrimination against an educational use.” *Tufts*, 415 Mass. at 757.

That said, at least for the present DSPR, the School has agreed to a condition where the disturbance of existing mature trees during construction is minimized, to the extent consistent with the Project. That is the most that the Dover amendment and ZBL permit.

5.3 Impact on abutters

The School made three accommodations to abutters over the course of the hearing process. The first was to reorient the parking to increase the distance between the abutters and a fence that is in front of parked cars. The second was to reorient and relocate the Maintenance Facility building to increase the distance between the building and the immediately abutting property. The third was to drop a proposal for small outdoor gas and diesel tanks (with the diesel tank being located indoors instead).⁶

The location of the fence is, in its way, remarkable. The School could put a fence at the border of the property, as of right, and put the parking right up to the fence. And that is exactly what most people do in a single residence district. Here, however, the School is moving the fence into the interior of the property, to lessen the impact on abutters – thereby cutting off the School’s enjoyment of part of the School’s own property.

For the Maintenance Facility building, the height is about 8 feet below the ZBL limit and, once reoriented, the location materially exceeds setback requirements.

It is not immediately clear that the PB could have properly required these changes to the design. The reorientation of the building both brought it closer to a School-owned house and caused the loss of three spaces at the Maintenance Facility building. The reorientation of the parking increased the cost (more grading is required) and again moved the parking closer to the School-owned residences. Since the initial proposal complied with the ZBL, and the changes disadvantaged the Project, increased its cost and reduced the School’s enjoyment of its housing on the East Campus, it is unclear that the PB could require these changes.

It does not matter, because the School voluntarily agreed to the changes for purposes of this DSPR.

As a result of these changes, the three abutters most closely impacted by the Project and who had been in strong opposition against it came out supporting the Project, specifically, 232 and 224 Rutledge Road (closest to the East Campus parking) and 269 Prospect (closest to the maintenance facilities):

⁶ The ZBL has no restrictions on fuel tanks and the PB has no authority to restrict addition of fuel tanks. This DSPR is not imposing any condition concerning fuel tanks. That would be governed by applicable law and whatever private agreement(s) the School may have entered into with abutters.



Those abutters issued a letter stating that:

Dear Fellow Members of the Belmont Community,

... We are pleased to report that Belmont Hill has agreed to a number of changes that we believe reduce impact on neighbors, improve sightlines, add greenery to the project, and limit disruption to local wildlife. ...

Today, we have reached an agreement on a new plan that allows us to offer our support of Belmont Hill School's East Campus Project.

Two of the abutters (224 Rutledge and 269 Prospect) further appeared before the PB not only to state that they no longer opposed the Project but also to express unequivocal support for approving the new design.

In assessing what impact on abutters the ZBL contemplates as permissible, a comparison may be made to what could be built as of right under the ZBL, if the property were privately developed. A primary residence could be 2½ stories with a height 8 feet higher than the proposed Maintenance Facility building, of far greater size than proposed here, along with one or more accessory structures, all at the applicable setbacks. The trees could be clear cut and replaced with a sodded lawn (as has been done on Rutledge Road properties). A 6-foot fence could be put in place at the border of the property and with no landscaping between it and the abutters yard.

What can be done *as of right* on the property under the ZBL would permissibly have a vastly greater negative impact on abutters than what the School proposes at DSPR for the Project.

Finally, with the changes from the original design, no one has suggested any step or adjustment that could further reduce impact on abutters, other than by materially reducing the scope of the Project. As noted above, the closest abutters are not requesting that and making that demand would violate the Dover amendment and the ZBL.

5.4 Stormwater

Initially, the School requested a determination by the Belmont Conservation Committee (“BCC”) that it lacked jurisdiction over the Project because no work was occurring within the wetland buffer zone. The BCC made that determination. An appeal was filed, although there were some questions about whether the appeal was timely. Some appellants have withdrawn from any appeal, but the appeal is still pending as it pertains to others. Since it is conceivable that an appeal, if heard on the merits, could impact the drawing of wetland boundaries and, therefore, the wetland buffer zone, a reasonable condition for work to begin near (e.g., within 100 feet) of the currently identified buffer zone is that the appeal be finally resolved in a manner where the Project continues to be outside the identified wetland buffer zone.

According to the analysis of the School’s engineer and of the Town peer reviewer, the net effect of the plan (as amended at the peer reviewer’s request) is to decrease run-off from the property toward the protected wetlands. The peer reviewer found the systems and filtration materials to meet accepted practices and to be sufficient to the task. The PB has been presented with no credible expert analysis to rebut the conclusion of the Town’s peer reviewer.

One public comment concerned frequency of monitoring and maintenance schedules. And indeed, if there are problems, more monitoring may be required, while if there have been no problems for years less monitoring may be sufficient. Belmont OCD is qualified to properly check reporting on maintenance and monitoring, and a condition of approval will be compliance not just with the submitted plan but also reasonable requests from OCD.

Finally, some concerns have been raised about the location for storage of snow plowed off of the maintenance facility parking area. Belmont’s peer reviewer did not share such concerns and it is not apparent that the snow which would have melted in the woods will have more or different run-off if that same snow is instead plowed into a pile before it melts.

Of course, if a problem becomes apparent, this DSPR does not relieve the School from any obligation to address it, whether under Commonwealth or Federal protections for wetlands, trespass on abutting properties, etc.

5.5 Traffic and Congestion

As a preliminary matter, the Project improves public safety in the following ways.

- During School events, there will be less people parking on-street and walking over the roads (especially Marsh Street) where there is no sidewalk and sight-lines are poor.
- By moving student parking to the Main Campus, a shuttle bus will no longer be needed and students will not have a need to walk down the Turnpike on-ramp and Park Avenue right next to the road.
- While staff may have to cross Prospect Street, the Project includes an improvement to the crossing that creates a safe place to stop when half-way across, again improving safety over existing conditions.

- At the request of the peer reviewer, the School will provide and maintain a surfaced sidewalk along Park Avenue, all the way to Rutledge Road.

According to the School Engineer and the Town peer reviewer, the Project results in less congestion than before. That is because most commuters to the School come from Route 2 and some (faculty and staff) have the opportunity to turn left into the East Campus parking rather than going through the rotary to the Main Campus as they do now.

In the public comments, concerns were raised about the safety of crossing Park Avenue at Village Hill Road. There is no public crossing there but, apparently, parents have been permitting their children to cross there and some have been in accidents.

The School traffic consultant and Town peer reviewer opined that the Project did not make the intersection less safe. This comports with common sense, because people turning left into the parking will, of necessity, slow down before getting to the intersection with Village Hill Road rather than continuing at full speed to the rotary and then on to the Main Campus parking.

Even so, the PB cannot require the School to make improvements to Belmont's public ways and it is the responsibility of the Town to provide safe access to legitimate uses of Belmont properties.

The School volunteered, however, to construct a cross-walk at the intersection in accordance with a pre-existing plan for improvements in that area, as described in the School's March 21 submission. That should put to rest concerns about traffic safety as it pertains to approval of this DSPR.

Thus, implementation of that crosswalk before opening of the East Campus parking will be a condition of approval. The School will be responsible for securing whatever authorizations and permits are needed for that work. To the extent that the work is not timely approved by whatever parties or authorities that may have jurisdiction, the condition will be void. *Sullivan v. Planning Bd. of Acton*, 38 Mass. App. Ct. 918 (1995) (voiding conditions requiring improvements to public ways).

6. Conditions ("Conditions")

The following conditions of approval were discussed during the public hearing process and shall be enforced by the Office of Community Development:

- a. It shall be the School's responsibility to, and the School shall, comply with the Belmont ZBL (unless specifically waived herein), and all applicable local, state and federal laws, regulations, codes and requirements. This specifically includes compliance with the substance and process of Belmont's Stormwater Bylaw and the need for any applicable permits such as for razing the property at 283 Prospect.
- b. Work shall not begin within 100 feet of the currently identified wetland buffer zone, until the pending appeal of the Belmont Conservation Committee's denial of jurisdiction has been finally resolved in a manner where the Project continues to remain outside the wetland buffer zone.

- c. Before construction begins and while the Project is being used, the properties on the East Campus shall be and remain merged into a single lot, under common ownership by the School with the Main Campus. The School will maintain its status as a not-for-profit 501(c)(3) qualified school.
- d. The predominant use of the parking in the Project shall be for educational purposes, including parking for school students, staff, faculty and visitors, including visitors coming for School sporting and other events.
- e. During construction, the School will seek to minimize elimination of established trees, provided however that invasive species may be removed in connection with planting of native species in their place.
- f. The School will comply with the monitoring and maintenance plan for pervious surfaces set forth in the Project materials, provided however that the School will comply with any OCD written requests for additional monitoring, maintenance and reporting and provided that OCD may authorize in writing any reasonable alterations to the plan.
- g. The School will keep the entrances to the Prospect Street East Campus driveway and the 301 Prospect Street driveway sufficiently free of foliage to permit clear sight-lines for vehicles entering and leaving the driveways.
- h. Before East Campus Parking is opened, the School will implement the cross-walk described in its March 21, 2023 submission. The School will be responsible for securing whatever rights and permits are needed for that work. To the extent that the work is not timely authorized after being requested by the School, by whatever parties or authorities may have jurisdiction, this condition will be void.

7. Conclusion

On April 11, 2023, the PB approved DSPR by motion made by Mr. Lowrie and seconded by Ms. Donham, on a roll-call vote of 3-2 (with Mr. Haglund also voting yes and Mr. Birenbaum and Ms. Berberian voting no). At the PB's April 18 hearing, the three PB members who voted "yes" authorized the undersigned to file this opinion.

Town of Belmont, Planning Board



Matthew B. Lowrie, Chair

APPENDIX A: Summary of proceedings and record

By letter dated July 5, 2022, the Belmont Inspector of Buildings denied the Belmont Hill School's ("School's") permit application for the construction of parking lots and maintenance facilities in Belmont's Single Residence A Zoning District ("SR-A"). The Belmont Building Inspector determined that the application did not comply with the Belmont Zoning Bylaw (the "ZBL"), because Design and Site Plan Review ("DSPR") is required under ZBL §7.3.2(a) on the grounds that (i) the application calls for the construction of a nonresidential building with more than 2,500 square feet floor space in the SR-A and (ii) the application calls for 153 parking spaces, which is in excess of the ZBL's limit of 6 within the SR-A without DSPR. In denying the permit application, the Building Inspector did not issue a decision for or against application of Mass. Gen. Law (MGL) Ch. 40A, § 3 (the "Dover Amendment") nor is it immediately apparent that the Dover Amendment was invoked at that point.⁷ In addition, for the reasons described in the opinion, the School identified for the Planning Board ("PB" or "Board") an additional issue concerning the distance between egress points, for which the School requests a waiver.

On August 8, 2022, the School requested DSPR.

This matter first came before the PB on September 13, 2022 (Case No. 22-14). The PB opened the public hearing and heard a presentation from the School to introduce the Project. The hearing was not opened for public comment. After that hearing the then-Chair of the PB resigned, noting among other things concerns over the increasing "vitriol" in public input to the Planning Board. By letter dated October 13, 2022, the School requested to withdraw the application, to permit a 5-member board to take it up after a new PB member was appointed (Ms. Guo being recused). On October 18, the PB granted School's request to dismiss the application without prejudice to a renewed application, by unanimous vote of those in attendance (Mr. Lowrie, Ms. Guo and Mr. Birenbaum).

On November 15, 2022, the PB opened the public hearing on a renewed application (Case No. 22-16). The written submissions from the School and from the public in the earlier matter were incorporated into the record. The School again made a presentation to introduce the Project. The PB continued the public hearings on the dates listed below, including input from the public, into the new year.

After the PB's hearing on January 17, 2023, an abutter pointed out that postcards had not been mailed out by the Town before the hearing was reopened on November 15, 2022. The failure to make the mailing was an inadvertent error by the Town. There was no explanation for the months-long delay objecting to that error and no claim of prejudice resulting therefrom. The reopening of the public hearing on November 15 was discussed at the properly noticed hearing, in the same way as any continuance of a public hearing – any prejudice would be difficult to imagine. On January 23, 2023, the School nevertheless requested that the hearing be closed and reopened with (post card) notice to abutters. The new public hearing commenced on February 7, 2023.

⁷ The Dover Amendment has been first applied as late as an appeal to the Massachusetts Appeals Court, of an appeal to the Massachusetts Superior Court, of a Belmont Zoning Board decision. *Forster v. Belmont, Mass. Civ. Ac.* 01-3560 (1990) (Belmont restriction on height of light poles not enforceable against lighting for football field, under Dover Amendment). The PB does not regard any failure to cite the Dover Amendment before the Building Inspector, were that to be the case, to be a waiver of its application now.

While the public hearing began anew, the PB began by incorporating into the record the written materials and spoken comments from the earlier public meetings, all of which are publicly available.

The written submissions to the PB are included in the record. Additional personal correspondence between individual PB members and either the School or the public are also a part of the file (a member of the public having requested such materials from the PB Chair during the hearing process and the PB Chair then asking the other PB members to also provide such materials).

The following hearings were held:

Case No. 22-14 (dismissed without prejudice, but included in the record for Case No. 23-04):

9/13/2022 (introduction; no public input)

10/11/2022 (no substantive discussion)

10/18/2022 (no substantive discussion; case dismissed without prejudice to renewal)

Case No. 22-16 (dismissed without prejudice, but included in the record for Case No. 23-04):

11/15/2022 (introduction; no public input)

12/6/2022 (public input taken)

12/20/2022 (input from Town Counsel; no public input)

1/10/2023 (public input taken)

1/17/2023 (public input taken)

2/7/2023 (case dismissed without prejudice, in favor of Case No. 23-04)

Case No. 23-04:

2/7/2023 (hearing opened; public input taken)

2/14/2023 (public input taken)

2/21/2023 (public input taken)

2/28/2023 (public input taken)

3/7/2023 (public input taken)

3/14/2023 (public input taken)

3/21/2023 (public input taken; hearing closed to further public input, with Mr. Lowrie, Ms. Donham and Mr. Haglund voting to close the public hearing, Ms. Berberian voting no and Mr. Birenbaum abstaining)

4/11/2023 (DSPR approved 3-2)

4/18/2023 (opinion adopted by majority of PB)

In addition, each PB member visited the Project site and, in the case of the PB Chair, there were three site inspections.

The following documents describe the Project, with the later documents amending the earlier submissions:

The initial application with supporting materials, filed August 8, 2022:

[Cover Letter](#)

[Application](#)

[Plans](#)

[Stormwater Plans \(Part 1\)](#)

[Stormwater Plans \(Part 2\)](#)

[Traffic Impact Assessment \(Traffic Report\)](#)

[Belmont Hill School Design & Site Plan Review, Belmont Planning Board, Sept 13, 2022](#)
[2022 10-13 BG_ACG Application for Design and Review 10-12-2022](#)

Partially revised plans 3/3-6/2023:

[Traffic Peer Review Belmont Hill School 3-6-2023](#)

[2023-03-03 Belmont Hill School Stormwater Management Report-Part 1](#)

[2023-03-03 Belmont Hill School Stormwater Management Report-Part 2](#)

[2023-03-03 BHS Revised Civil Plans](#)

[2023-03-03 BHS Revised Grading Plans](#)

[2023-03-03 BSC Comment Response Letter](#)

[2023-03-03 TRC Comment Response Letter](#)

Additional supporting materials 3/11-14/2023:

[Final layout – March 11, 2023](#)

[Grading plans – March 11, 2023](#)

[Additional Stormwater Revisions \(Groundwater Mounding Analysis\) - March 14, 2023](#)

[Additional Stormwater Revisions \(Response to Comments\) - March 14, 2023](#)

[Modified Plan - March 14, 2023](#)

[Rendered Elevations - March 14, 2023](#)

Proposed cross-walk design, dated March 21, 2023:

[Proposed Crosswalk Design](#)