



Robert H. Fitzgerald  
+1 617 570 1343  
rfitzgerald@goodwinlaw.com

Goodwin Procter LLP  
100 Northern Avenue  
Boston, MA 02210

goodwinlaw.com  
+1 617 570 1000

August 14, 2023

Casey Williams, Chair  
Zoning Board of Appeals  
Office of Community Development  
Homer Municipal Building, 2<sup>nd</sup> Floor  
19 Moore Street  
Belmont, MA 02478

**VIA EMAIL TO GDISTLER@BELMONT-MA.GOV**

**Re: June 26, 2023 Notice of Appeal and Request for Enforcement  
Design and Site Plan Review -- Belmont Hill School, Inc.  
ZBA Case No. 23-21**

Dear Members of the Zoning Board of Appeals:

On behalf of the Belmont Hill School, Inc. ("BHS"), this correspondence is filed in opposition to the above-referenced Notice of Appeal and Request for Enforcement in advance of the Board of Appeals' hearing on this matter scheduled for August 21, 2023. For the reasons discussed below, the appeal is without merit and should be denied.

## **I. Background**

On July 5, 2022, the Inspector of Buildings ("Inspector") denied BHS' application for a building permit to make certain improvements to its property located at 283, 301, 305, 315, and 350 Prospect Street & 12 and 20 Park Avenue (collectively, the "Property"). As grounds for the denial, the Inspector concluded that the project required Design and Site Plan Review from the Planning Board because it involved the construction of a maintenance facility of greater than 2,500 square feet of Gross Floor Area and the construction of more than 6 parking spaces (and with other site improvements, such as landscaping, the "Project"). On August 5, 2022, BHS submitted its application for Design and Site Plan Review to the Planning Board. After more than nine months of proceedings, the Planning Board filed with the Town Clerk its Decision and Site Plan Review Opinion on April 19, 2023 (the "PB Decision", attached as Exhibit A), granting approval of the Project, subject to the conditions set forth therein.

On June 8, 2023, the Office of Community Development issued two permits for the Project – a storm drain installation permit and a sanitary sewer installation permit (attached as Exhibit B). Both permits were issued pursuant to Belmont General Bylaw §60-325 (Stormwater Management and Erosion Control). On June 26, 2023, correspondence purporting to be both a Notice of Appeal under Zoning Bylaw §7.3.3(f) and M.G.L. c. 40A, §§8 and 15, as well as a Request for Enforcement under

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M.G.L. c. 40A, §7, was filed on behalf of various residents of the Town (attached as Exhibit C). According to the correspondence:

- the Notice of Appeal was made to the Zoning Board of Appeal “in connection with appealing the decision of the Office of Community Development, on or about June 8, 2023, to issue permits in connection with” the Project; and
- the Request for Enforcement was directed to the Office of Community Development to “enforce the Town’s Zoning Bylaw ... by revoking and annulling any permits issued to BHS following the [PB Decision] and withholding any further permits pending further action by the Zoning Board and Planning Board.”

On June 30, 2023, the Inspector responded in writing to the Request for Enforcement (attached as Exhibit D) by denying that request on the grounds that the Project has received the required Design and Site Plan approval from the Planning Board and concluding that M.G.L. c. 40A, §7 does not furnish “any lawful basis for me to revoke or annul the permits already granted to BHS for this project, or deny those permits that BHS is expected to apply for in the future.” The Inspector further stated that an appeal of his response to the Request for Enforcement may be filed to the Zoning Board of Appeals “[t]o the extent that G.L. c. 40A, §8 applies to this response.” To our knowledge, no such appeal has been filed.

## II. Argument

Appellants’ arguments with regard to both the Request for Enforcement and Notice of Appeal have no merit and should be dismissed with prejudice. Each is addressed in detail below.

### A. Request for Enforcement

Pursuant to M.G.L. c. 40A, §7:

If the officer or board charged with enforcement of zoning ordinances or by-laws against any person allegedly in violation of the same and such officer or board declines to act, he shall notify, in writing, the party requesting such enforcement of any action or refusal to act, and the reasons therefor, within fourteen days of receipt of such request.

See also Belmont Zoning Bylaw, §7.1.1 (same). The Inspector complied with this requirement by responding in writing, with supporting rationale, to the Request for Enforcement within 14 days of receipt. Pursuant to M.G.L. c. 40A, §8, an appeal of the Inspector’s response may be filed “as the zoning ordinance or by-law may provide” by “any person aggrieved” by reason of his inability to obtain ... enforcement action from any administrative office under the provisions of this chapter.” The Belmont Zoning Bylaw grants the Board of Appeals the authority to hear such appeals. See Belmont Zoning Bylaw, §7.6.2.

However, pursuant to M.G.L. c. 40A, §15, any appeal under M.G.L. c. 40A, §8 “**shall be taken within thirty days from the date of the order or decision which is being appealed**” (emphasis

supplied). In this case, an appeal of the Request for Enforcement was due on or before July 31, 2023. Having failed to file a timely appeal from the Inspector's written determination, the appellants are barred from any further challenge to the Inspector's determination. See, e.g., McIntyre v. Zoning Board of Appeals of Braintree, 94 Mass.App.Ct. 204, 206-207 (2018) (30-day deadline under §15 is "strictly enforced and a jurisdictional prerequisite to the board's jurisdiction to hear an appeal"); citing Connors v. Annino, 460 Mass. 790, 797 (2011) (failure to file within 30 days as required under §15 "deprives the board or other permit granting authority, and later the courts, of jurisdiction to consider the appeal"). Thus, the Inspector's determination – that M.G.L. c. 40A, §7 does not provide "any lawful basis for me to revoke or annul the permits already granted to BHS for this project, or deny those permits that BHS is expected to apply for in the future" – is the final and binding word on the matters addressed in the Request for Enforcement.<sup>1</sup>

## **B. Notice of Appeal**

Appellants assert that the Notice of Appeal is grounded in §7.3.3(f) of the Belmont Zoning Bylaw and triggered by the Inspector's issuance of unspecified permits for the Project. Appellants' argument that these permits be revoked and all future permits for the Project denied is wholly without merit.

### 1. Appellants are not appealing from the grant of a Building Permit.

According to §7.3.3(f) of the Belmont Zoning Bylaw, "[a]ny appeal [of a Design and Site Plan Review decision of the Planning Board] may be filed with Zoning Board of Appeals (ZBA) in conjunction with an appeal from the denial or grant of a Building Permit for the subject site." There is no dispute – and indeed appellants even concede – that a building permit has not issued for the Project. See Notice of Appeal, p.2, n.1 ("We recognize that the permits issued on June 8, 2023 by OCD were not building permits *per se*."). This concession is compelled by the same case law appellants cite, all of which holds that an appeal (if otherwise proper) is triggered by the issuance of a building permit. See St. Botolph Citizens Committee, Inc. v. Boston Redevelopment Authority, 429 Mass. 1, 9 (1999), ("The Appeals Court has said, we think correctly, that the right of an aggrieved person to appeal a local planning board's site plan review decision arises only when the building permit for the proposed project is issued or denied by the building inspector."); Dufault v. Millennium Power Partners, L.P., 49 Mass.App.Ct. 137, 141-142 (2000) (quoting the same language in St. Botolph); Cumberland Farms, Inc. v. Planning Bd. of Bourne, 56 Mass.App.Ct. 605, 608-610 (2002) (site plan review as a pre-requisite to the issuance of a building permit). Put simply, there is no legal support – and, indeed, only contrary legal precedent – for appellants' argument.

The appellants compound their meritless argument with another – that M.G.L. c. 40A, §§8 and 15 "provide for a right of appeal to the Zoning Board of Appeals for any person aggrieved by *any* action of a zoning enforcement officer, not only the issuance of a building permit." See Notice of Appeal, p.2, n.1 (emphasis in original). Not only do the appellants provide no legal support for that argument, but

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<sup>1</sup> The Notice of Appeal could not itself be considered an appeal of the Inspector's response to the Request for Enforcement. It was filed the same day as the Request for Enforcement, before the Inspector could even address the matter. Simply put, because the Inspector issued his determination on June 30, 2023, it could not have been the subject of an appeal filed four days earlier.

they also neglect to include critical language from the beginning of §8, which only authorizes “[a]n appeal to the permit granting authority **as the zoning ordinance or by-law may provide**” (emphasis supplied). The Belmont Zoning Bylaw only provides for an appeal of a Design and Site Plan Review decision in conjunction with the grant or denial of a building permit. Appellants also ignore Section 1.4 of the Zoning Bylaw which defines a “building” to be a “roofed structure enclosing useful space”, compelling the conclusion that the permits issued by the Inspector on June 8 are not building permits. Appellants have not, and cannot, point to any provision in the Belmont Zoning Bylaw authorizing an appeal of the PB Decision upon the issuance of a storm drain installation permit or a sanitary sewer installation permit issued pursuant to General Bylaw §60-325 (Stormwater Management and Erosion Control), neither of which is a building permit. Thus, the Notice of Appeal should be denied.

2. Appellants have not alleged harm sufficient to establish standing to appeal.

Even if the Notice of Appeal is properly before the Zoning Board of Appeals, which it is not, the Appellants have not provided any basis for this Board to conclude they have standing to appeal. According to M.G.L. c. 40A, §8, appeals under that section may be brought by a “person aggrieved” by the Inspector’s decision. “Aggrieved person status is no less a jurisdictional condition to maintaining an appeal under G.L. c. 40A, §8, than it is to maintaining judicial review under [G.L. c. 40A] §17.” Chongris v. Bd. of Appeals of Andover, 17 Mass.App.Ct. 999, 1000 (1984).

[W]hether a party has standing to participate in a judicial proceeding is not simply a procedural technicality but rather involves remedial rights affecting the whole of the proceeding. ... The multiplicity of parties and the increased participation of persons whose rights are at best obscure will, in the absence of exact adherence to requirements as to standing, seriously erode the efficacy of the administrative process ... [T]o preserve orderly administrative processes and judicial review thereof, a party must meet the legal requirements necessary to confer standing.

Save the Bay, Inc. v. Dep’t of Pub. Utils., 366 Mass. 667, 672 (1975). To establish standing, aggrievement must be based on a private interest of the appellant and cannot be based purely on matters of general public interest or concern. See Harvard Square Def. Fund, Inc. v. Planning Bd. of Cambridge, 27 Mass.App.Ct. 491, 492-493 (1989). Moreover, any alleged harm to an appellant must be shown to be definite and material and not predicated merely on “speculative personal opinion.” Rinaldi v. Bd. of Appeal of Bos., 50 Mass.App.Ct. 657, 659 (2001).

The Notice of Appeal does not allege any harm, to any appellant, as a result of the issuance of either the storm drain installation permit, sanitary sewer installation permit, or the PB Decision. More particularly, the Notice of Appeal does not allege any harm to the private interest of any appellant, or provide any definite and material evidence of such a harm. The fact that the Notice of Appeal is filed on behalf of approximately 100 residents, many of whom live at significant distances from the Project, is clear evidence that appellants are addressing only the legally-insufficient “general public interest” rather than any legally-sufficient private interests. This proceeding is not a referendum on the Project, and to uphold the deficient Notice of Appeal and return this matter to the Planning Board would deprive BHS of its rights to proceed with Project.

3. The Planning Board clearly understood and applied the applicable law.

Even if the Notice of Enforcement and/or the Notice of Appeal were properly before the Zoning Board of Appeals, which they are not, appellants' arguments should be rejected on the merits.

The appellants concede that the "Dover Amendment protects the proposed educational use, and under both the Zoning Bylaw and the Dover Amendment the Planning Board was not free to deny an application for a protected use." Notice of Appeal, p.3. Yet the appellants argue that the Planning Board somehow misunderstood its authority to impose reasonable conditions on the Project. Once again, appellants provide no legal support for their position and have ignored the extensive findings and conclusions reached by the Planning Board in the PB Decision.

The law is entirely contrary to appellants' position. The Dover Amendment permits reasonable regulations only with respect to a specific list of topics: "the bulk and height of structures ... yard sizes, lot area, setbacks, open space, parking and building coverage requirements." M.G.L. c. 40A, §3. The Planning Board found conclusively that, with one exception,<sup>2</sup> the Project complies with all provisions of the Belmont Zoning Bylaw addressing these topics: "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." PB Decision, p.10. It would be patently unreasonable for the Planning Board to impose requirements more restrictive than the Belmont Zoning Bylaw requires in the applicable zoning district for these topics – in fact, it would be a textbook example of "local discrimination against an educational use" prohibited under the Dover Amendment. See Trustees of Tufts College v. City of Medford, 415 Mass. 753, 757 (1993). Moreover, the Planning Board expressly sought guidance from Town Counsel on this very point, and was advised in plain terms that it did not have such authority:

[The comment letter] suggests, however, that BHS would have a similar burden with regard to conditions that the Planning Board might impose that would go above and beyond the dimensional limitations contained in the bylaw for this district, such as greater setbacks for the proposed facilities building, wider buffers between the parking areas and abutting properties, or even a reduction in the total number of parking spaces. The Board should not be misled by those arguments. Each of the cases discussed ... address a school's claim to be exempt from dimensional regulations adopted by the city or town in its zoning ordinance or bylaw, not the power of planning boards to impose additional requirements through site plan approval. ... Any court is going to begin with the presumption that compliance with the dimensional requirements applicable in the underlying district will be sufficient to protect the neighborhood in the way the Zoning Bylaw intended.

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<sup>2</sup> Section 5.1.3(g) of the Zoning Bylaw provides, in relevant part, that driveway openings serving a single premises be separated by at least 150 feet on arterial streets. Two existing driveways on Prospect Street are located less than 150 feet apart and historically served separate premises. Solely as a result of the consolidation of several lots into a single lot, the driveway openings do not comply with this requirement. The PB Decision reasonably approved the continued use of these driveway openings, as explained in detail on pp. 11-12 of the PB Decision.

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See Memorandum of Town Counsel to Planning Board, December 16, 2022, p. 3 (incorporated by reference into PB Decision at p. 8) (attached as Exhibit E).

Equally implausible is appellant’s argument that the Planning Board “failed to consider whether to condition its approval – and if so, how – to protect the abutters, the neighborhood, and the environment, as the Zoning Bylaw allows.” Notice of Appeal, p.3. The PB Decision addresses these topics at length in Section 5.3 (Impact on Abutters), Section 5.4 (Stormwater), and Section 5.5 (Traffic and Congestion) and documents the changes to the Project voluntarily adopted by BHS during the proceeding to accommodate abutter concerns, including to “reorient the parking to increase the distance between the abutters and a fence that is in front of parked cars,” to reorient and relocate the Maintenance Facility building to increase the distance between the building and the immediately abutting property,” and “to drop a proposal for small outdoor gas and diesel tanks (with the diesel tank being located indoors instead).” PB Decision, p.15. The Planning Board concluded:

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.

PB Decision, p. 16. The appellants cannot plausibly claim that the Planning Board failed to consider impacts to abutters when reaching its decision, as any reasonable reading of the PB Decision demonstrates the Board’s evaluation of such impacts. The PB Decision, over more than twenty pages, covered in detail the nature of the Project, the concerns expressed by the public, the modifications made by BHS in response to those concerns, and conditions imposed. Indeed, the Planning Board found that there were no other reasonable conditions offered for consideration:

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 the 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 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 [Section 7.3.3].

PB Decision, p. 11. The two members voting “no” were asked whether they would like to issue a dissenting opinion, which presumably would afford them the opportunity to explain their votes based on the extensive record before the Planning Board. They declined to do so. See PB Decision, p.2.

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For the foregoing reasons, the Request for Enforcement and the Notice of Appeal should be rejected with prejudice. Appellants have mis-characterized the PB Decision and advanced arguments



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that are contradicted by the law. Their submission appears to be a thinly veiled attempt to return the matter to a reconstituted Planning Board, as underscored by their requested relief which, rather than allowing the Board of Appeals to decide the matter as required under Zoning Bylaw, §7.3.3(f), calls for a remand to the Planning Board to have a second bite at the apple. BHS' Design and Site Plan Review application was reviewed by the Planning Board over many months with the advice of Town Counsel and technical experts retained by the Planning Board itself. The Planning Board issued a comprehensive twenty-page decision approving the Project, and appellants offer no sound basis to disturb it.

Respectfully submitted,

*/s/ Robert H. Fitzgerald*

Robert H. Fitzgerald

RHF

**EXHIBIT A**

**PLANNING BOARD DECISION**

**TOWN OF BELMONT**

**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.<sup>1</sup>

**1. Introduction**

This matter began its course through the permitting process over 9 months ago, with a July 5<sup>th</sup>, 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

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<sup>1</sup> 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,<sup>2</sup> 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

<sup>2</sup> 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,<sup>3</sup> 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:

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.	

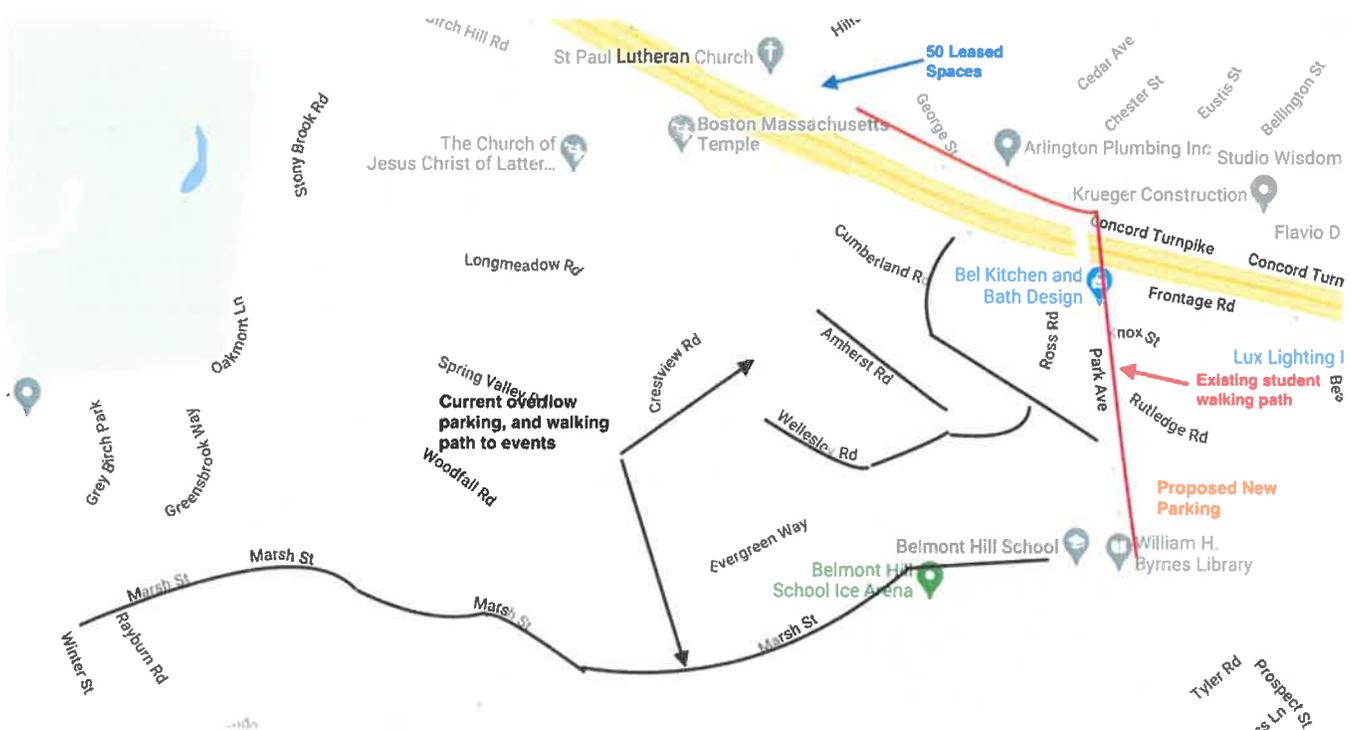
<sup>3</sup> With the additional parking on campus, the School intends to stop leasing the 50 spaces across Route 2.

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;<sup>4</sup>
- 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).

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<sup>4</sup> 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 unmet<sup>5</sup> (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.

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<sup>5</sup> 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 5<sup>th</sup> grade through 12<sup>th</sup> grade students, rather than the actual case of 7<sup>th</sup> through 12<sup>th</sup>. Plainly, a per-student comparison of parking at a school that includes 5<sup>th</sup> and 6<sup>th</sup> 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**

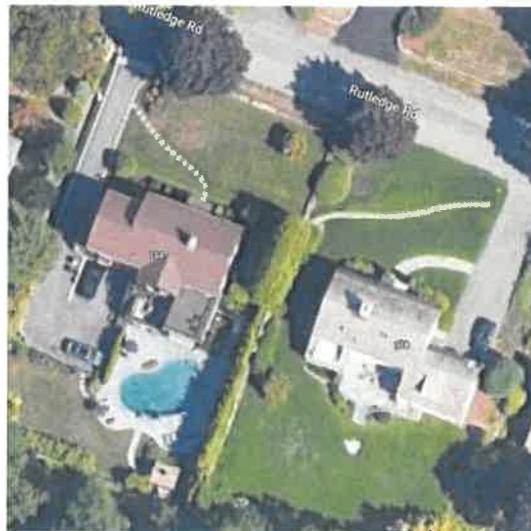
There was a great deal of public input concerning the “destruction” of 7 wooded acres. Signs even appeared on the street leveling this accusation at the School along with various other insults.

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

Before:		After:		Change:
TYPE	ACRE	TYPE	ACRE	
 Impervious (Paving / Buildings)	0.73 acres	 Impervious (Paving / Buildings)	.99 acres	0.26
 Pervious Porous paving	0 acres	 Pervious Porous paving	1.24 acres	1.24
 Lawn	1.15 acres	 Lawn	.93 acres	-0.22
 Garden	0.35 acres	 Garden	.35 acres	0
 Canopy	4.83 acres	 Canopy	3.54 acres	-1.29
7.06 ACRES TOTAL		7.06 ACRES TOTAL		

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.

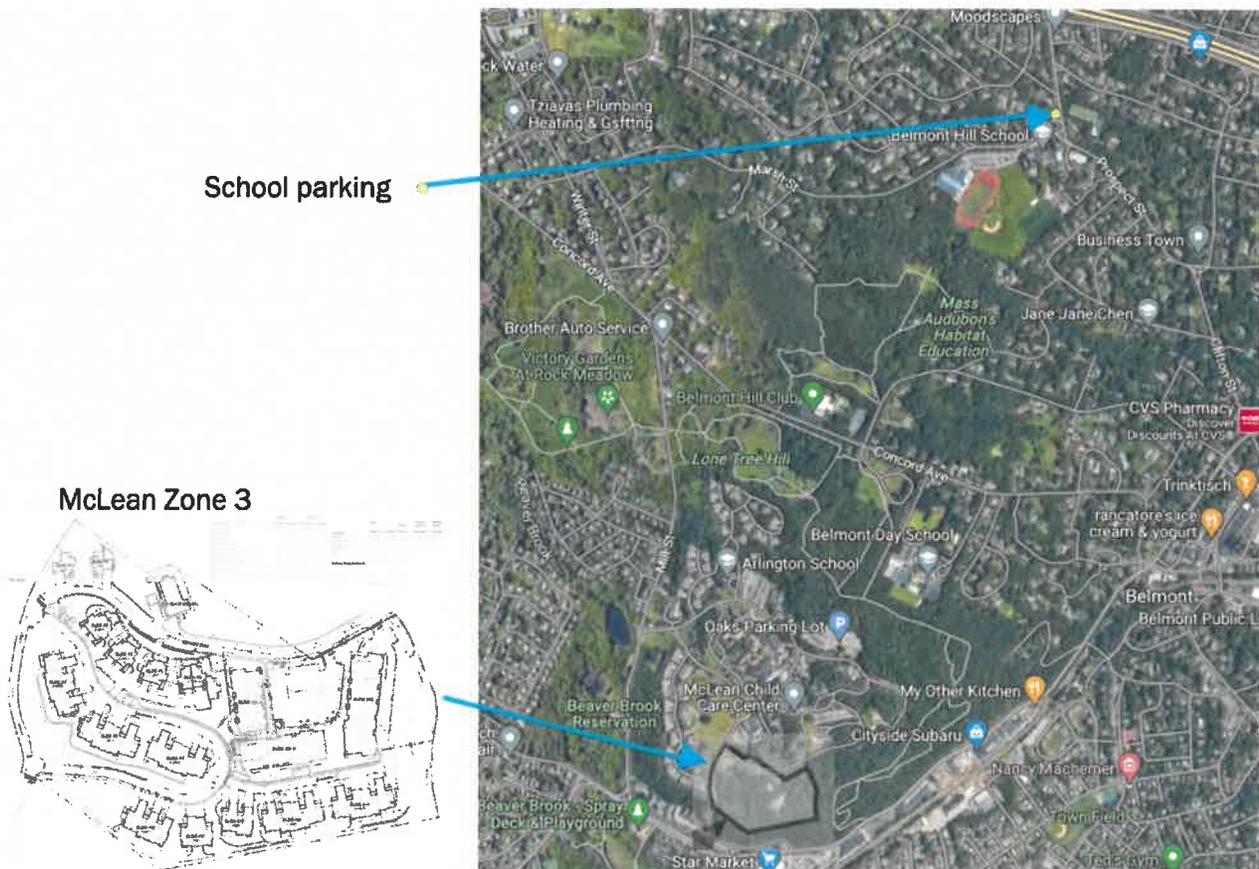
The ZBL does not contain limits on the scope of a project in the Single Residence districts, based on clearing woods. To the contrary, if one looks at the abutting properties on Rutledge Road, they are mostly clear-cut to about 80-90%. For example, 178 and 184 Rutledge Road:



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).<sup>6</sup>

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):

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<sup>6</sup> 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



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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.<sup>7</sup> 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.

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<sup>7</sup> 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](#)

**EXHIBIT B**

PERMITS ISSUED ON JUNE 8, 2023

OFFICE OF COMMUNITY DEVELOPMENT



TOWN OF BELMONT  
Belmont, Massachusetts 02478

PERMIT to Install  
**Sanitary Sewer**

---

A review of the **Sanitary Sewer Permit** application has been completed for:

**Applicant:** Belmont Hill School  
350 Prospect Street  
Belmont MA 02478

**Contractor:** F.E. French Construction  
**Phone:** 617-484-3000

The proposed **Sanitary Sewer** is in conformance with the **Town of Belmont Regulations and Specifications** and said applicant has been granted permission to install the Sanitary Sewer at the following location:

**Address:** 283 Prospect Street  
**Issue Date:** June 8, 2023  
**Approved Total Volume:** GPD

The Office of Community Development **MUST** be called 24 hours in advance of the beginning of work. Inspections are **MANDATORY** and can be scheduled by calling 617-993-2665

---

Glenn R. Clancy, P.E.  
Director

This permit is also your receipt. Total paid in full = \$100.00

OFFICE OF COMMUNITY DEVELOPMENT



TOWN OF BELMONT  
Belmont, Massachusetts 02478

PERMIT to Install  
**Storm Drain**

---

A review of the **Storm Drain Permit** application has been completed for:

**Applicant:** Belmont Hill School  
350 Prospect Street  
Belmont MA 02478

**Contractor:** F.E. French Construction  
**Phone:** 617-484-3000

The proposed **Storm Drain** is in conformance with the **Town of Belmont Regulations and Specifications** and said applicant has been granted permission to install the Storm Drain at the following location:

**Address:** 20 Park Avenue  
**Issue Date:** June 8, 2023  
**Approved Total Volume:** GPD

The Office of Community Development **MUST** be called 24 hours in advance of the beginning of work. Inspections are **MANDATORY** and can be scheduled by calling 617-993-2665

---

Glenn R. Clancy, P.E.  
Director

This permit is also your receipt. Total paid in full = \$100.00

**EXHIBIT C**

JUNE 26 CORRESPONDENCE



C. Dylan Sanders  
155 Federal Street, Suite 1600  
Boston, MA 02110  
(617) 419-2311  
DSanders@bdlaw.com

June 26, 2023

Ms. Ellen O'Brien Cushman  
Town Clerk  
Town of Belmont  
455 Concord Avenue  
Belmont, MA 02487

Mr. Glen R. Clancy, P.E.,  
Director of the Office of Community  
Development  
Town of Belmont  
19 Moore Street  
Belmont, MA 02487

Re: *Notice of Appeal (Zoning Bylaw § 7.3.3(f); G.L. c. 40A, §§ 8, 15);  
Request for Enforcement (G.L. c. 40A, §7);  
April 19, 2023 Design and Site Plan Review Opinion (Planning Board 23-04);  
Belmont Hill School, Inc.*

Dear Ms. Cushman and Mr. Clancy:

This firm and I represent the residents of the Town of Belmont named on the attached list.

Pursuant to Section 7.3.3(f) of the Zoning Bylaw of the Town of Belmont, and Gen. L. c. 40A, §§ 8 and 15, these residents are hereby appealing the April 19, 2023 Design and Site Plan Review Opinion and Decision (“BHS Site Plan Review Decision”), in Planning Board application 23-04, for a multi-phased project proposed by Belmont Hill School, Inc. (“BHS”). This appeal is made in connection with appealing the decision by the Office of Community Development, on or about June 8, 2023, to issue permits in connection with the BHS project that was the subject of the BHS Site Plan Review Decision. For the same reasons discussed below, these residents also request that the Office of Community Development enforce the Town’s Zoning Bylaw, pursuant to G.L. c. 40A, § 7, by revoking and annulling any permits issued to BHS following the BHS Site Plan Review Decision and withholding any further permits pending further action by the Zoning Board of Appeals and Planning Board.

The Planning Board’s approval as reflected in the BHS Site Plan Review Decision was a prerequisite to the right of the BHS project to receive the June 8, 2023 permits from the Office of

Ms. Ellen O'Brien Cushman  
Mr. Glen R. Clancy, P.E.  
Town of Belmont  
June 26, 2023  
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Community Development (or any other permits from OCD), and thus that decision may be appealed in connection with the issuance of such permits. Section 7.3.3(f) of the Zoning Bylaw provides that “any appeal” of a decision on a Design and Site Plan Review application “may be filed with [sic] Zoning Board of Appeals in conjunction with an appeal from the denial or grant of a Building Permit for the subject site.” Decisions by the Massachusetts Supreme Judicial Court and Appeals Court confirm that a right of appeal of site plan review decisions to the Zoning Board of Appeals, for projects not requiring a special permit, may be exercised in connection under with an appeal under G.L. c. 40A, §§ 8 and 15 of a permit that has been issued in connection with the project that is the subject of the site plan review decision. *See St. Botolph Citizens Comm., Inc. v. Boston Redev. Authy.*, 429 Mass. 1, 9 (1999); *Dufault v. Millennium Power Partners, L.P.*, 49 Mass.App.Ct. 137, 142 (2000); *Cumberland Farms, Inc. v. Planning Bd. of Bourne*, 56 Mass.App.Ct. 605, 608–610 (2002).<sup>1</sup>

The grounds of the appeal are as follows: The BHS Site Plan Review Decision was premised on a misapplication of ¶ 2 of G.L. c. 40A, § 3, the so-called “Dover Amendment,” to the proposed project, and a misinterpretation of the Planning Board’s authority under the Dover Amendment to reasonably regulate and condition its approval of the proposed project. Under the Planning Board’s misinterpretation of the Dover Amendment, the Planning Board understood that the Dover Amendment precluded the board in approving the project from nevertheless applying conditions to the project where such conditions did not reflect regulations expressly set forth in the Zoning Bylaw. Under the Planning Board’s interpretation of the Dover Amendment as it applied to the proposed BHS project, the Planning Board erroneously believed it was permitted only to apply regulations that were expressly set forth in the Zoning Bylaw. As the misunderstanding was succinctly illustrated on Page 9 in the BHS Site Plan Review Decision, the Planning Board believed it could only enforce “reasonable restrictions’ *of the ZBL*” (emphasis in the original), meaning the Planning Board understood that it could not condition the Planning Board’s approval of the BHS project on conditions if such requirements were not expressly set forth in the Zoning Bylaw. (This misunderstanding also manifested itself in numerous statements made by Planning Board members at the public hearing stating to the public, in effect, that the board’s hands were “tied” by the Dover Amendment such that the board

---

<sup>1</sup> We recognize that the permits issued on June 8, 2023 by OCD were not building permits *per se*. However, G.L. c. 40A, §§ 8 and 15 provide a right of appeal to the Zoning Board of Appeals for any person aggrieved by *any* action of a zoning enforcement officer, not only the issuance of a building permit. Moreover, this appeal also is a request for enforcement of the Town’s Zoning Bylaw under c. 40A, § 7 on the grounds that the BHS project lacks the required valid Design and Site Plan Review opinion and approval from the Planning Board.

Ms. Ellen O'Brien Cushman  
Mr. Glen R. Clancy, P.E.  
Town of Belmont  
June 26, 2023  
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was not permitted to place conditions on its approvals if such requirements were not express requirements of the Zoning Bylaw.)

This interpretation of the Dover Amendment, respectfully, was error on the part of the Planning Board. The Dover Amendment permits municipalities to apply reasonable regulations and conditions to a project that is nonetheless protected by the Dover Amendment through site plan review, so long as such reasonable regulations and conditions do not discriminate against a protected use or nullify the protected use. Indeed, every project that undergoes site plan review under Belmont's Zoning Bylaw is, by definition, a project allowed as of right. Nevertheless, such projects can be subjected to reasonable conditions. And nothing in the Dover Amendment itself, or the caselaw interpreting the statute, precluded the Planning Board from conditioning its approval on conditions not expressly set forth in the Zoning Bylaw, so long as such conditions were reasonable and did not nullify the protected educational use. The Dover Amendment protects the proposed educational use, and under both the Zoning Bylaw and the Dover Amendment the Planning Board was not free to deny an application for a protected use; but the Planning Board was always permitted to require the project to meet reasonable, non-discriminatory conditions protective of legitimate municipal interests that did not nullify the protected use. The Planning Board's misunderstanding that it could not so condition its approval fatally infected its consideration throughout its review, and its ultimate decision.

Under the Zoning Bylaw, the purpose of the Design and Site Plan review includes the following:

7.3.1(b): to insure that the development which is subject to this review is planned and designed to minimize impacts on its abutters, the neighborhood, and the environment; [and]

7.3.1(c): to provide an orderly review procedure where site plans of proposed projects can be approved with reasonable conditions which will further the purposes of these By-laws.

However, under the Planning Board's misapplication of the Dover Amendment to the application, the board believed that it could *not* condition the project so as to minimize adverse impacts "on its abutters, the neighborhood, and the environment," and to otherwise further the purposes of the Zoning Bylaw. Accordingly, the Planning Board failed to consider whether to condition its approval – and if so, how – to protect the abutters, the neighborhood, and the environment, as the Zoning Bylaw requires to board to do.

Ms. Ellen O'Brien Cushman  
Mr. Glen R. Clancy, P.E.  
Town of Belmont  
June 26, 2023  
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For these reasons, the residents named below appeal to the Zoning Board of Appeals and respectfully ask that the Zoning Board of Appeals:

- (1) schedule a public hearing on this appeal in accordance with G.L. c. 40A, § 15;
- (2) revoke the permits issued the Office of Community Development on June 8, 2023 for the BHS project,
- (3) revoke any other permits issued by the Office of Community Development for the BHS project;
- (4) void or otherwise overturn the April 19, 2023 Decision of the Planning Board on Design and Site Plan Review Opinion; and
- (5) remand the application of the Belmont Hill School for Site Plan Review to the Planning Board for further review proceedings and consideration under the correct application of the Dover Amendment and the Zoning Bylaw, including whether further *reasonable* conditions to the Planning Board's approval on design and site plan review of the BHS proposed development are necessary to insure "that the development . . . is planned and designed to minimize impacts on its abutters, the neighborhood and the environment," as required by § 7.3.1(b) of the Zoning Bylaw.

For these same reasons, these residents ask that OCD enforce the Zoning Bylaw by revoking the permits issued for the BHS project and withholding all other permits for the BHS project pending further proceedings by the Zoning Board of Appeals and Planning Board.

Thank you for your attention to this matter.

Sincerely yours,

*/s/ Dylan Sanders*

Dylan Sanders

Ms. Ellen O'Brien Cushman  
Mr. Glen R. Clancy, P.E.  
Town of Belmont  
June 26, 2023  
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cc: Zoning Board of Appeals, Town of Belmont, MA  
Planning Board, Town of Belmont, MA

Ms. Ellen O'Brien Cushman  
Mr. Glen R. Clancy, P.E.  
Town of Belmont  
June 26, 2023  
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### Appealing Residents

Raif Geha 248 Rutledge Rd, Belmont  
Orietta Geha 248 Rutledge Rd, Belmont  
Christian Liles 216 Rutledge Rd, Belmont  
Dagmar Liles 216 Rutledge Rd, Belmont  
Melissa Liska 208 Rutledge Rd, Belmont  
Matthew Schwartz 200 Rutledge Rd, Belmont  
Carolyn Gillette 200 Rutledge Rd, Belmont  
William Bihrl 178 Rutledge Rd, Belmont  
Mary Bihrl 178 Rutledge Rd, Belmont  
Brian Palmer 210 Clifton St, Belmont  
Lisa Palmer 210 Clifton St, Belmont  
Ann Roe 269 Prospect St, Belmont  
Barry Lubarsky 257 Rutledge Rd, Belmont  
Amy Grossman 249 Rutledge Rd, Belmont  
Mark Grossman 249 Rutledge Rd, Belmont  
Lois Pines 175 Rutledge Rd, Belmont  
Barsam Joyce 170 Rutledge Rd, Belmont  
Barsam Paul 170 Rutledge Rd, Belmont  
Ellen Harris 162 Rutledge Rd, Belmont  
Matthias Mokros 162 Rutledge Rd, Belmont  
Fred Heller 154 Rutledge Rd, Belmont  
Glenn Morgan 144 Rutledge Rd, Belmont  
Sandy Fleming 144 Rutledge Rd, Belmont  
Hillary Berkman 141 Rutledge Rd, Belmont  
Wendelyn Kistler 97 Rutledge Rd, Belmont  
Philip Kistler 97 Rutledge Rd, Belmont  
Scott Miller 200 Clifton St, Belmont  
Nancy Almquist 121 Clifton St, Belmont  
Eric Almquist 121 Clifton St, Belmont  
James Dow 95 Clifton St, Belmont  
Jacquie Dow 95 Clifton St, Belmont  
Peter Burke 216 Prospect St, Belmont  
Rosemary Burke 216 Prospect St, Belmont  
Bob Orfaly 225 Prospect St, Belmont  
Sylvia Orfaly 225 Prospect St, Belmont  
Michael Moskowitz 257 Prospect St, Belmont  
Mary Moskowitz 257 Prospect St, Belmont  
Carolyn Schwartz 46 Prospect St, Belmont  
Michael Schwartz 46 Prospect St, Belmont  
Rebecca Schwartz 46 Prospect St, Belmont

Marcia Sugrue 15 Village Hill Rd, Belmont  
David Lesnit 15 Village Hill Rd, Belmont  
Margaret Barsam 83 Village Hill Rd, Belmont  
Deran Muckjian 108 Village Hill Rd, Belmont  
Cynthia Muckjian 108 Village Hill Rd, Belmont  
Jane Lappin 37 Amherst Rd, Belmont  
Frederique Rigoulot 80 Woodfall Rd, Belmont  
Vincent Rigoulot 80 Woodfall Rd, Belmont  
Courtney Sturgeon 409 Common St, Belmont  
Chloe Sturgeon 409 Common St, Belmont  
Jean Devine 52 Raleigh Rd, Belmont  
Phil Chisholm 52 Raleigh Rd, Belmont  
Elaine Dimopoulos 51 Oakmont Ln, Belmont  
Samuel Rubin 168 Claflin St, Belmont  
Linda Levin-Scherz 75 Woodbine Rd, Belmont  
Jeff Levin-Scherz 75 Woodbine Rd, Belmont  
Suhgenie Kim 26 Prentiss Lane, Belmont  
Janet Liddell 83 Leicester Rd, Belmont  
Bruce Liddell 83 Leicester Rd, Belmont  
Carolyn Bishop 7 Orchard St, Belmont  
Walter Bishop 7 Orchard St, Belmont  
Vanessa DiMauro 92 Richmond Rd, Belmont  
Andrew Schiermeier 90 Fletcher Rd, Belmont  
Benoit Schiermeier, 90 Fletcher Rd, Belmont  
Marie-Cecile Ganne 90 Fletcher Rd, Belmont  
Sarah Wang 273 Orchard St, Belmont  
Allison Lenk 145 Sherman St, Belmont  
William Anderson 76 Stony Brook Rd, Belmont  
Katherine A Anderson 76 Stony Brook Rd,  
Belmont  
Pam Moore 47 Fletcher Rd. Belmont  
Lucy Brown 35 Ross Rd, Belmont  
Summer Brown 35 Ross Rd, Belmont  
Judith McSwain 35 Ross Rd, Belmont  
Constantine Chinoporos 25 Crestview Rd,  
Belmont  
Alix Pollack 15 Dean St, Belmont  
Brian Iler 482 School Street, Belmont  
Russell Mann 68 Wellesley Rd, Belmont  
Diane Toomey 46 Flett Rd, Belmont

Ms. Ellen O'Brien Cushman  
Mr. Glen R. Clancy, P.E.  
Town of Belmont  
June 26, 2023  
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Cabell Eames 26 Lewis Rd, Belmont  
Curtis Eames 26 Lewis Rd, Belmont  
Chris Doyle 15 Cedar Rd, Belmont  
David Brams 15 Cedar Rd, Belmont  
Shealagh Brams 15 Cedar Rd, Belmont  
Craig White 25 Lewis Rd, Belmont  
Laura Duncan 699 Concord Ave, Belmont  
Peter Lappin Griffiths 39 Amherst Rd, Belmont  
Joseph Baldwin 24 Ross Rd, Belmont  
Jennifer Baldwin 24 Rodd Rd, Belmont  
Annette Hannon 74 Village Hill Rd, Belmont  
Frank Hannon 74 Village Hill Rd, Belmont

Portia Thompson 11 Beatrice Cir, Belmont  
Barbara Chinoporos 25 Crestview Rd, Belmont  
Anne DIGiovanni 29 Woodbine Rd, Belmont  
Jim Sullivan 32 Richmond Rd, Belmont  
Lisa Johansen 32 Richmond Rd, Belmont  
Emily Sullivan 32 Richmond Rd, Belmont  
Grace Sullivan 32 Richmond Rd, Belmont  
Allison Martin 1 Hillcrest Terr., Belmont  
Juliet Jenkins 76 Lorimer Rd, Belmont  
Judith Feinleib 87 Oakley Rd, Belmont  
Lisa Oteri 31 Waverley Terrace, Belmont  
Ralph Jones 56 Summit Rd, Belmont

**EXHIBIT D**

**INSPECTOR'S RESPONSE**



OFFICE OF COMMUNITY DEVELOPMENT  
TOWN OF BELMONT  
19 Moore Street  
Homer Municipal Building  
Belmont, Massachusetts 02478-0900  
Telephone: (617) 993-2650 Fax: (617) 993-2651

Building Division  
(617) 993-2664  
Engineering Division  
(617) 993-2665  
Planning Division  
(617) 993-2666

June 30, 2023

Mr. C. Dylan Sanders  
Beveridge & Diamond  
155 Federal Street  
Suite 1600  
Boston, MA 02110

Re: Request for Enforcement (G.L. c. 40A, § 7) – Belmont Hill School

Dear Mr. Sanders:

This is in response to the “Request for Enforcement (G.L. c. 40A, § 7)” included within your letter to me and the Belmont Town Clerk dated June 26, 2023. More specifically, you request, on behalf of the persons listed in the Appendix to your letter, “that the Office of Community Development enforce the Town's Zoning Bylaw, pursuant to G.L. c. 40A, § 7, by revoking and annulling any permits issued to [the Belmont Hill School (“BHS”)] following the BHS Site Plan Review Decision and withholding any further permits pending further action by the Zoning Board of Appeals and Planning Board.” The remainder of your letter, as I understand it, relates to your client group’s appeal of the Belmont Planning Board’s April 19, 2023 Design and Site Plan Review Opinion and Decision to the Zoning Board of Appeals.

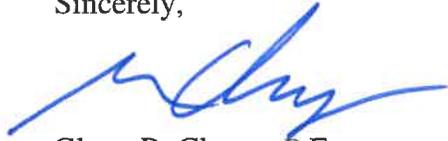
To date, the Office of Community Development has issued two permits for the site that is subject to the BHS Decision: (1) a Storm Drain installation permit, and (2) a Sanitary Sewer installation permit, both dated June 8, 2023.

G.L. c. 40A, § 7 states that “no permit or license shall be granted for a new use of a building, structure or land which use would be in violation of any zoning ordinance or by-law.” The facilities proposed by BHS that the recently-permitted utility connections are designed to serve are uses permitted by right under the Zoning Bylaw and under G.L. c. 40A, § 3. They have received the required Design and Site Plan approval from the Planning Board. To the best of my understanding, the fact that residents have appealed the DSPR decision to the Zoning Board of Appeals does not stay or negate the validity or legal effect of that decision. For that reason, I do not believe that G.L. c. 40A, § 7 furnishes any lawful basis for me to revoke or annul the permits already granted to BHS for this project, or deny those permits that BHS is expected to apply for in the future, and I decline to do so.

Mr. C. Dylan Sanders  
Beveridge & Diamond  
June 30, 2023  
Page 2

To the extent that G.L c. 40A, § 8 applies to this response, you may appeal to the Zoning Board of Appeals pursuant to that section.

Sincerely,



Glenn R. Clancy, P.E.  
Director

Cc: Ellen Cushman, Town Clerk  
George A. Hall, Anderson & Kreiger

**EXHIBIT E**

MEMORANDUM OF TOWN COUNSEL

(INCORPORATED INTO PLANNING BOARD DECISION)

# ANDERSON KREIGER

## MEMORANDUM

To: Belmont Planning Board

From: George A. Hall, Jr.  
Anderson & Kreiger LLP

Re: Belmont Hill School Application for Design and Site Plan Approval/Planning Board  
Case No. 22-16/ "Dover Amendment" Issues

Date: December 16, 2022

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The purpose of this memorandum is to address the arguments presented to the Planning Board in three legal memoranda, one from the applicant and two submitted by or on behalf of neighborhood residents, concerning the proper application of G.L. c. 40A, § 3, paragraph 2 (familarly known as the "Dover Amendment") to the above project.<sup>1</sup>

The Dover Amendment states that local zoning bylaws may not

prohibit, regulate or restrict the use of land or structures ... for educational purposes on land owned or leased 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.

It appears indisputable (and not disputed) that the Belmont Hill School (BHS) is "is a nonprofit educational institution providing a formal middle school and high school education in the 7th through 12th grade," and that, as such, the uses carried out by BHS on its campus are allowed by right under the Dover Amendment. Under the Schedule of Use Regulations in the Belmont Zoning Bylaw (§ 3.3), any such use is allowed by right.

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

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<sup>1</sup> More specifically, I am addressing the December 5, 2022 Memorandum submitted to the Board by Robert H. Fitzgerald on behalf of the Belmont Hill School, the November 30, 2022 letter filed by Jamy B. Madeja on behalf of "Belmont Concerned Citizenry," and the December 13, 2022 letter to the Board filed by Tanya Austin on behalf of "a group of concerned citizens of Belmont."

sort proposed by BHS in this application. The Bible Speaks vs. Board of Appeals of Lenox, 8 Mass. App. Ct. 19, 31 (1979).<sup>2</sup>

The arguments raised on behalf of the concerned citizens fall into three categories: (1) that a town's right to enforce "reasonable regulations concerning the bulk and height of structures [etc.]" gives the Board the authority to impose conditions limiting or reducing the scale of the project, (2) that an accessory use like a parking lot may lose the protection of the Dover Amendment if it is excessive in scale to the needs of the school, and (3) that the Board can and should use certain discretionary provisions in the Zoning Bylaw to compel further study of the project. I will address these separately below.

#### Reasonable Regulations Concerning the Bulk and Height of Structures [etc.]

While the Dover Amendment does not allow municipalities to prohibit or require special permits for educational uses, the exemption does not allow an educational institution to disregard the dimensional regulations that uniformly apply in the underlying district, including minimum parking requirements, unless they are "unreasonable" as applied to the school's campus. When an educational institution seeks to avoid a dimensional or parking regulation on the ground that it cannot reasonably be applied to the proposed improvement to its campus, the school has the burden of "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." Tufts College v. City of Medford, 415 Mass. 753, 759 (1993).

It is my understanding that the project proposed by BHS will comply with all of the applicable dimensional and parking regulations in the Belmont Zoning Bylaw except for § 5.1.3(g)(1), which requires a 150' separation between access/egress driveways.<sup>3</sup> BHS has requested a waiver from this requirement. I think it clear that BHS has the burden of showing that the regulation is

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<sup>2</sup> As noted by BHS's counsel, this proposition is also supported by several other appellate cases, including Radcliffe College v. Cambridge, 350 Mass. 613, 618 (1966) (parking), Trustees of Tufts College v. City of Medford, 415 Mass. 753 (1993) (parking), and Newbury Junior College v. Town of Brookline, 19 Mass. App. Ct. 197 (1985) (dormitories).

<sup>3</sup> I think it is important to point out that dimensional thresholds that trigger Design and Site Plan Review, such as the number of parking spaces or the size of the accessory structure, are not dimensional limitations with which BHS can be deemed "noncompliant," triggering an obligation to satisfy the Tufts test. A threshold for a form of administrative review is exactly that; it does not imply any kind of presumption that the proposed number of parking spaces should not be allowed. In some cases, the Bylaw *requires* enough parking to trigger DSPR approval.

unreasonable as applied, as described in Tufts, before the Board approves the waiver BHS seeks from that section.<sup>4</sup>

Ms. Austin's letter suggests, however, that BHS would have a similar burden with regard to conditions that the Planning Board might impose that would go above and beyond the dimensional limitations contained in the bylaw for this district, such as greater setbacks for the proposed facilities building, wider buffers between the parking areas and abutting properties, or even a reduction in the total number of parking spaces. The Board should not be misled by those arguments. Each of the cases discussed by Ms. Austin on pages 4-8 of her letter address a school's claim to be exempt from dimensional regulations adopted by the city or town *in its zoning ordinance or bylaw*, not the power of planning boards to impose additional requirements through site plan approval. The fact that municipalities may require Dover-exempt uses to obtain site plan approval rests on the premise that site plan review contemplates "regulation of a use rather than its prohibition," Prudential Ins. Co. of America v. Board of Appeals of Westwood, 23 Mass. App. Ct. 278, 282 (1986). One of the main purposes of Design and Site Plan Review in Belmont is to ensure that the sometimes complex dimensional rules in the Bylaw have been correctly applied in the design of the project (see § 7.3.5(b), which directs the Board to consider whether the underlying dimensional requirements, parking minima, and landscaping requirements contained in the Bylaw have been met). Beyond such compliance, the Board's powers are limited to imposing conditions that are "reasonable" (as § 7.3.3(d) of the Zoning Bylaw explicitly requires).

Any court is going to begin with the presumption that compliance with the dimensional requirements applicable in the underlying district will be sufficient to protect the neighborhood in the way the Zoning Bylaw intended. This is not to say that a Board cannot require the applicant to explore alternative designs or layouts that accomplish more or less the same project purpose, for similar costs, while improving traffic circulation or providing greater protection for abutting uses. Some such alternatives might allow for greater setbacks, better screening, reduced (or enhanced) lighting, improved stormwater management, and the like. But the burden is not on BHS to show that such conditions are unreasonable under the Tufts test; I expect a court would require the Town to show that requiring a landowner to design to stricter standards than those applicable to other landowners is justified by an important zoning interest, taking the project's purpose and cost into account.

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<sup>4</sup> It does not appear to me that the Board has the inherent power to waive compliance with § 5.1.3(g)(1) for non-Dover-exempt uses under the Design and Site Plan Review bylaw, so a waiver would have to meet the Dover standard articulated in Tufts. 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.

The other sections of the bylaw cited on pages 3-4 of Ms. Austin's letter are not the kinds of uniform dimensional regulations to which the Tufts test would be applicable, for the various reasons explained below:

- Ms. Austin contends that the proposed building will violate the height requirement by reaching to 38 feet. That contention appears to be based on calculating the distance between the "lowest grade" to the peak of the roof, which is not how the Bylaw determines building height. The Bylaw requires a measurement from "grade" (defined in § 1.4 as "[t]he average of the ground level adjoining the building at all exterior walls based upon the existing contour lines"). Sheet A3.1 of the submitted site plan shows the building height, measured to the peak of the roof, to be 29'6" above "average grade. The Board may wish to seek confirmation from the Office of Community Development that the grade has been calculated correctly, but it appears that the building height is well under the 36' limit and that there is no height violation proposed here.
- Section 5.1.3 prohibits parking facilities that are accessory to an allowed principal use if they are not on the same lot as the principal use. I think it is clear that Section 5.1.3. is a use restriction – a prohibition against the use of land or structures that in this instance are to be used for educational purposes – and therefore cannot be applied here. The fact that there is an exception to this prohibition for parking facilities "located within 400 feet of the building entrance to be served" does not transform this section into a regulation "concerning the bulk and height of structures, and determining yard sizes, lot area, setbacks, open space, parking or building coverage requirements."<sup>5</sup>
- Section 5.3 is a discretionary standard pertaining to landscaping requirements, directing that existing plants should be retained "wherever possible" and that trees of 6 inches caliper or greater within 25 feet of a street should not be removed "unless dictated by plant health, access safety, or identification of the premises." The "wherever possible" standard suggests that, even for projects that do not have the benefit of the Dover

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<sup>5</sup> The Tufts case includes a discussion about the City of Medford's requirement that parking be provided on the same "lot" as the principal use, but the situation the Court was addressing there was quite different. The City was trying to enforce a parking minimum against the University: a requirement that the square footage associated with a proposed library addition required the addition of a certain number of parking spaces on the same lot. The lower court had decided the "same lot" requirement was unreasonable as applied to the campus; the Appeals Court vacated that holding (and the SJC agreed) based on the City's stipulation that the location of the proposed garage *met* that requirement, not because they found it to be reasonable. Nothing in Tufts suggests that the City could have prohibited the use of land on another lot to provide *additional* student parking not required by the Zoning Ordinance.

amendment, this limitation is not intended to allow the Planning Board to effectively deny the proponent the intended use of the property. BHS is contending that it has met the “wherever possible [for the intended use]” standard; I leave it to the Board to evaluate that claim on its merits.

- Section 7.4.3 imposes standards for the granting of special permits. Again, this is a use limitation not applicable to Dover-exempt uses. The Town may not require a special permit for the project, nor may it impose special permit standards as a condition of granting Design and Site Plan approval.

### The Scale Argument

Ms. Austin urges the Board to make its own determination as to BHS’s parking needs in order to decide whether the parking area is, in fact, Dover-exempt. She argues:

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.

Ms. Austin essentially admits that there is no case law supporting this proposition, and there is ample reason to doubt that Massachusetts courts would allow zoning and planning boards to second-guess an educational institution’s reasonable estimation of its own needs.<sup>6</sup> The SJC’s decision in Martin v. The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 434 Mass. 141 (2001) (upholding Belmont’s approval of the Mormon Temple building notwithstanding the steeple’s noncompliance with the height limitation), while not exactly on point, is illustrative of the SJC’s skepticism that local boards should be making decisions about what is or isn’t necessary to serve the institution’s purposes.

Even if such a hypothetical case might arise at some point, Ms. Austin’s suggestion that the Board should determine that the BHS project exceeds that threshold 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. Many facilities

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<sup>6</sup> One can always posit some *reduction at absurdum* example of a proposal that would exceed any reasonable estimate of the school’s requirements, as Ms. Austin has done, but there is a reason there are no cases addressing such proposals: schools don’t propose them for obvious practical, prudential and economic reasons.

– shopping malls, sports venues, function facilities, etc. – construct enough parking to accommodate unusually large events. I am not aware of any case that would suggest that a planning board, through site plan review, could require the downsizing of such a facility when it meets setback, screening, maximum lot coverage, minimum open space, and other applicable dimensional limits.

Ms. Medeja's letter makes a similar argument regarding the scale of the project, suggesting that the Board's power to enforce reasonable regulations means that it can require BHS to consider alternatives, implicitly suggesting that this should include alternatives to using the proposed East Campus for parking, or in the campus layout more broadly. For all the reasons stated above, I do not believe the Planning Board's powers here include the ability to deny BHS the use of this particular parcel for its intended purpose, in a manner that complies with the underlying dimensional requirements, in favor of an alternative location for the parking area.

#### Development Impact Report

Both Ms. Austin and Ms. Medeja urge the Board to require BHS to fund a Developmental Impact Report. My understanding is that, in lieu of such a report, the Board has engaged peer review consultants, at BHS's expense, to look into specific issues where impacts to abutting property owners are most likely, and that this is consistent with recent past practice. I think that is a prudent approach. Given that the limits on local boards' site plan review powers with regard to Dover-exempt uses have not been fully fleshed out by case law, I think it is wise to take that more targeted approach.