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Zoning Board of Appeals, Town of Belmont
c/o Chairperson Casey Williams
Office of Community Development
Homer Municipal Building, 2nd Floor
Belmont, MA 02478

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

Dear Chairperson Williams and Board Members:

Our firms, Beveridge & Diamond and Fitch Law Partners, represent the numerous residents of the Town of Belmont named on the attached list. We submit this letter in connection with the appeal by these citizens of the April 19, 2023 Design and Site Plan Review Opinion concerning the proposed multi-phased project proposed by Belmont Hill School, Inc (Planning Board 23-04). This appeal is scheduled for a public hearing on August 21, 2023.

A. Procedural Posture

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 have appealed the April 19, 2023 Design and Site Plan Review Opinion and Decision (the “Decision,” or “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, by a split vote of 3 – 2, was a prerequisite to the right of the BHS project to receive permits from the Office of Community Development, 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).

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, for the reasons discussed below.¹

Accordingly, the residents we represent invoke their right of appeal under the Town's bylaw, and ask that the Zoning Board of Appeals reverse the Planning Board's approval of the BHS site plan, and remand this matter to the Planning Board for further consideration, for the reasons discussed below.

B. Argument

1. The Planning Board mistakenly understood that G.L. c. 40A, § 3, the "Dover Amendment," precluded the Board from conditioning its approval on any requirements that were not expressly set forth as requirements of the Bylaws.

In approving the proposed Site Plan, the Planning Board acted on a fundamental misunderstanding of its own authority, and that misunderstanding undermined the integrity of the

¹ The Bylaws do not include a requirement that a special permit appeal be made by a person "aggrieved." In any event, among the appealing parties are persons aggrieved, including direct abutters and persons who could otherwise demonstrate that they are persons aggrieved.

Decision and resulted in the board unnecessarily and unlawfully curtailing its review, and the final terms of its approval. Specifically, the Planning Board erroneously believed that because the proposed use was associated with educational uses that are protected under G.L. c. 40A, § 3, the so-called “Dover Amendment,” the Planning Board was not free during site plan review to condition the project as it otherwise is required to do by the Zoning Bylaws, to protect abutters, the neighborhood and the environment, where such conditions are not based on requirements expressly set forth in the Zoning Bylaw. The Planning Board, therefore, did not consider whether there were reasonable conditions or alternatives that would better protect abutters, the neighborhood, and the environment that could be incorporated into its approval of the site plan, but nevertheless would *not* nullify the protected use or be tantamount to a denial of a use protected by statute. Rather, the Planning Board proceeded under the false belief that it faced a choice of either imposing what it characterized as “ad hoc” or “arbitrary conditions” that would amount to denying a protected use, or approving the project without any substantive conditions whatsoever. There is, of course, a third option, one mandated by the Bylaw and allowed by the Dover Amendment: the Planning Board could have approved the proposed site plan, subject to further *reasonable* conditions that would not nullify the protected educational use but would at the same time further the Town’s legitimate municipal interests in protecting abutters, the neighborhood, and the environment.

Because the Board’s misunderstanding of the Dover Amendment and its own authority tainted the Decision and underlying reasoning, as well as the entire process leading up to the Decision, the more than one hundred residents who bring this appeal request that the ZBA reverse the Planning Board’s approval, and return the matter back to the Planning Board, so that the Board may reconsider whether, in approving the project, further conditions are necessary to protect abutters, the neighborhood, and the environment, as the Bylaw requires the Planning Board to do and the Dover Amendment permits.

2. The Bylaws require the Planning Board, when conducting Site Plan Review, to protect abutters, the neighborhood, and the environment.

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

7.3.1(a) To maintain *the integrity and character of all zoning districts* and adjoining zones by insuring that proposed development fulfills the purposes and complies with the requirements of the Belmont Zoning By-Law . . .

7.3.1(b): To insure that the development which is subject to . . . 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.*

(Emphasis supplied.) The Planning Board is the authority charged with executing these requirements of the Bylaw. And Section 7.3.3(d) of the Zoning Bylaw provides as follows:

The Design and Site Plan Review application shall be approved provided that all of the requirements of these Bylaws are fulfilled. *The Board may attach reasonable conditions to any approval.*

(Emphasis supplied.) Accordingly, when conducting Site Plan Review the Planning Board is required to approve an application if the project complies with the Bylaws. Notwithstanding that the Board is required to approve a project that fulfills “all of the requirements of [the] Bylaws,” the Board “may attach reasonable conditions” necessary to further the purposes of the Bylaws, which include minimizing impact on abutters, the neighborhood, and the environment.

3. The Dover Amendment permits a municipality to require that a protected educational use meet reasonable conditions, as a condition of approval.

Because the BHS project at issue is one associated with an educational use by a nonprofit, it enjoys a measure of protection by paragraph two of G.L. c. 40A, § 3, the so-called Dover Amendment. And to be crystal clear, the residents appealing here are not challenging that the project under review is an educational use, but only the Planning Board’s misinterpretation of its own authority under the Dover Amendment. While the statute protects educational uses from local discrimination, the Dover Amendment also permits municipalities to apply reasonable regulations and conditions to a project that is nonetheless protected by the Dover Amendment, so long as such reasonable regulations and conditions do not discriminate against a protected use or nullify the protected use.

The Dover Amendment provides, in relevant part:

[N]or shall any [zoning] ordinance or by-law prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and

determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.”

G.L. c. 40A, § 3, second para. (emphasis added).

The Dover Amendment represents a specific exception to the general power of municipalities to adopt and enforce zoning regulations and by-laws. *See Crall v. Leominster*, 362 Mass. 95, 101–102 (1972). But the exception is *not* a general exemption from local regulation. Municipalities are allowed by the statute to require that a protected project or use nevertheless meet reasonable local regulations or conditions. As the Supreme Judicial Court has described the statute’s purpose, “[t]he whole of the Dover Amendment . . . seeks to strike a balance between preventing local discrimination against an educational use, . . . and honoring legitimate municipal concerns that typically find expression in local zoning laws.” *Trustees of Tufts College v. Medford*, 415 Mass. 753, 757 (1993) (citation omitted). Massachusetts Courts have long recognized that, far from precluding local regulation of protected educational uses, the Dover Amendment “encourages a degree of accommodation between the protected uses and matters of critical municipal concern . . .” *Trustees of Tufts Coll. v. City of Medford*, 33 Mass.App.Ct. 580, 584, (1992), *aff’d*, 415 Mass. 753 (1993), citing *Sisters of the Holy Cross v. Brookline*, 347 Mass. 486, 492–494 (1964), *Radcliffe College v. Cambridge*, 350 Mass. 613, 617 (1966); *see also Hume Lake Christian Camps, Inc. v. Planning Board of Monterey*, 492 Mass. 188, 194 (2023).

In sum, 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, or to impose conditions that would be tantamount to a denial or nullify the 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.

And there are, of course, entirely legitimate municipal concerns that justify further conditioning approval of the Site Plan. As is well understood and well appreciated, the Belmont Hill School is located in a predominantly residential neighborhood, noteworthy for its heavily forested canopy and character, and associated wildlife habitat, flora and fauna. The Belmont Hill School, while a protected educational use, is the exception to the predominant residential character of the neighborhood that the school occupies. And its proposal involves, among other things, the construction of an entirely new “East Campus” that will dramatically change and impact the neighborhood and the environment, replacing both woods and five residences. That East Campus includes the construction of a new maintenance facility. It also includes the proposed construction a large car parking lot that will result in the clear cutting of numerous trees, many of them significantly matured and thus irreplaceable, to be replaced by a paved parking lot, a heat island that would be equivalent in size and heat storage capacity to that

of a supermarket situated in a business zone. And this parking lot is to be constructed, the average temperature in the neighborhood elevated, and the trees and associated habitat lost, to facilitate increased traffic and use of cars in the school's neighborhood, following the hottest year on record, precisely when the Town has – and should be – committed to reducing Belmont's carbon footprint and improving the community's overall sustainability.

4. The Planning Board's approval was tainted by a mistaken understanding that it could not condition its approval on substantive conditions not expressly set forth in the Bylaws.

As discussed above, the Dover Amendment permits a municipality to impose reasonable and facially neutral conditions on a protected use that the municipality is nevertheless bound to approve, so long as those conditions do not nullify or unreasonably interfere with a protected use. It is readily apparent from the Decision, however, that the Planning Board thought the Board was precluded from exercising the authority given to the Board under the Bylaws to condition a project "to minimize impacts on its abutters, the neighborhood, and the environment," because the proposed use was associated with an educational facility. Simply put, it is readily apparent that the Board, in approving the project, believed its "hands were tied" by the Dover Amendment. 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 substantive conditions to its approval where such conditions did not reflect regulations expressly set forth in the Zoning Bylaws.

This fundamental misunderstanding was succinctly illustrated on Page 9 in the BHS Site Plan Review Decision, where the Decision states quite plainly that the Planning Board understood that it could only enforce "'reasonable restrictions' *of the ZBL*" (emphasis in the original), meaning that the Planning Board, in approving the Site Plan, understood that the Board could not condition its approval of the BHS project on conditions if such requirements were not expressly set forth in the Zoning Bylaw. This fundamental misunderstanding is further evidenced on page 10 of the Decision, in which the Decision states that the Planning Board's role in conducting site plan review of a proposed use that is protected by the Dover Amendment is "limited" "to assure compliance with reasonable regulations *that appear in the applicable zoning bylaw*" (emphasis supplied). Also on page 10 the Decision acknowledged that the Bylaw allows the Planning Board to require that a project meet "reasonable conditions," but said that this "is not a blank check" to impose restrictions "not found in the ZBL against a Dover-protected use."

This misunderstanding also was evident throughout the proceedings leading up to the Decision when, at numerous times, certain members of the Planning Board stated that the Planning Board could only condition its approval on conditions where such conditions were already found in requirements of the Bylaws. For example, and perhaps most explicitly, the

Planning Board Chairperson said, and published a slide that stated, that any conditions “must be in the ZBL” and that the Planning Board could not require the project to meeting conditions – “reasonable or otherwise” – if such conditions were “not found in the ZBL.”

Additionally, the Board’s legal misunderstanding caused the Board to inappropriately cut off community input on aspects of BHS’s application, or permit exploration of alternatives, which the Board mistakenly believed to be beyond its jurisdiction. Comment and discussion of the size, massing, and height of the Maintenance Facility, including an interior filling station and interior fuel tanks, was limited and often shut down. Likewise, valid alternatives suggested by community members were never addressed at meetings and never meaningfully considered by the Board, including a full discussion of the proposal of a Board member to require a Development Impact Report be undertaken. If remanded, these alternatives – suggested in comment letters but never fully explored – may, and should, be considered by the Board, such as: narrowing the striping in the current lots to increase capacity; adding legal parking on Marsh Street; moving one of the parking bays from the yew grove to closer to Park Avenue to avoid destroying many healthy mature trees; keeping the gas station on the main campus; building additional parking on the main campus; and adding and improving signage and directions for overflow parking on neighborhood streets, many of which are closer to campus than the proposed lot. Importantly, these alternatives do not fundamentally alter BHS’s project to address the stated needs of the school.

In sum, it is clear from the Planning Board’s Decision that it falsely believed, in approving the project, that it lacked authority to impose – or even consider – conditions on its approval necessary to protect abutters, the neighborhood, and the environment, and conditions otherwise necessary to further purposes of the Zoning Bylaws.² Indeed, nowhere does the BHS Site Plan Review Decision actually make a finding that the proposed Site Plan, as approved, minimizes impacts on abutters, the neighborhood, and the environment.

5. The Planning Board’s Decision reflected a false choice between denying the proposed project outright and approving the project without conditions.

Because the Planning Board was laboring under a misunderstanding that the Dover Amendment precluded the Board from requiring the project to meet *reasonable* conditions, if those conditions were not requirements found in the Bylaws, it largely limited its review to whether the project, in fact, complied with the express Bylaws.

² The conditions that were included in the Decision are perfunctory and redundant, like maintaining the predominant use as educational, or complying with other laws. It is clear from the Decision itself that the Planning Board believed that the Dover Amendment deprived the Board of its usual authority to condition its approval on requirements necessary to protect abutters, the neighborhood, and the environment.

The Board – or more accurately, the majority of the Board that voted to approve the project and the Decision – dismissed out of hand the suggestion that the Board had the authority to require the project to meet *reasonable* conditions if those conditions were not requirements expressly set forth in the Bylaw. As the Decision conceded, the Bylaw ordinarily gives the Planning Board, when reviewing projects not protected by the Dover Amendment, the power to impose reasonable conditions, but, as the Decision stated, “[t]his is not a blank check to impose arbitrary restrictions not found in the ZBL against a Dover-protected use.” Decision, p. 9. Continued the majority in the Decision, “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 [Zoning Bylaw.]”

To be sure, the Bylaws do not and cannot give the Town a “blank check,” to impose ad hoc or “arbitrary restrictions.” *But neither does the Dover Amendment give BHS a “blank check” to exempt its project from reasonable conditions the Planning Board might otherwise have found are the minimum necessary to protect abutters, the neighborhood, and the environment.* As the Supreme Judicial Court has said, the Dover Amendment “encourages a degree of accommodation between the protected uses and matters of critical municipal concern. . .” *Trustees of Tufts Coll.*, 33 Mass.App.Ct. at 584.

That “degree of accommodation between the protected uses and matters of critical municipal concern” is what is missing from the Decision. The Decision reflects that the Planning Board had created – or felt it was faced with – the false choice of imposing “ad hoc” or “arbitrary conditions” that would amount to denying or nullifying a protected use, and approving the project without any conditions whatsoever. There is, of course, a third option, one mandated by the Bylaw and allowed by the Dover Amendment: the Planning Board can approve the proposed site plan, subject to *reasonable* conditions that do not nullify the protected educational use. That is the option that the ZBA should now require the Planning Board to consider.

C. Conclusion

In sum, the Planning Board, in approving the proposed Site Plan, acted under a mistaken understanding that its own authority to condition the project to protect abutters, the neighborhood, and the environment, as the bylaws require, was curtailed by the Dover Amendment because the proposal was associated with an educational use. The statute, however, did not curtail the Board's authority under Site Plan Review. The Board was free to impose reasonable conditions on its approval so long as those conditions did not nullify the protected use.

The ZBA does not itself have to decide what, in fact, reasonable conditions might be necessary to protect abutters, the neighborhood, and the environment. That question is for the Planning Board to consider, under a correct understanding of the Board's authority under the Dover Amendment. All this board need find to remand this matter to the Planning Board is whether the Planning Board acted under a misunderstanding of the scope of its authority. As discussed above, it is clear from the face of the Decision that the Planning Board did, because the Decision said repeatedly that the Board did not have the authority to impose conditions apart from the explicit requirements of the bylaw.

For these reasons, the residents named below respectfully ask that the Zoning Board of Appeals:

- (1) void or otherwise overturn the April 19, 2023 Decision of the Planning Board on Design and Site Plan Review Opinion;
- (2) 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; and
- (3) revoke or otherwise void any permits issued by the Office of Community Development for the BHS project and require OCD to withhold any further permits for the BHS project pending further proceedings by the Zoning Board of Appeals and Planning Board.

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Thank you for your careful attention to this matter.

Sincerely,

/s/ Dylan Sanders

Dylan Sanders
Beveridge & Diamond, P.C.

/s/ Alessandra Wingerter

Alessandra Wingerter
Fitch Law Partners, LLP

August 16, 2023

cc: Gabriel Distler, Staff Planner, Town of Belmont, MA
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Planning Board, Town of Belmont, MA
George Hall, Esq.

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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
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Eric Almquist 121 Clifton St, Belmont
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Jacquie Dow 95 Clifton St, Belmont
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David Lesnit 15 Village Hill Rd, Belmont

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Cynthia Muckjian 108 Village Hill Rd, Belmont
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