

## G.L. c. 40A, §3 – the “Dover Amendment”

“No zoning ordinance or by-law shall regulate or restrict the interior area of a single family residential building nor shall any such ordinance or by-law prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements....

No zoning ordinance or by-law shall regulate or restrict the use of materials, or methods of construction of structures regulated by the state building code, nor shall any such ordinance or by-law prohibit, unreasonably regulate, or require a special permit for the use of land for the primary purpose of commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture, nor prohibit, unreasonably regulate or require a special permit for the use, expansion, reconstruction or construction of structures thereon for the primary purpose of commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture, including those facilities for the sale of produce, wine and dairy products...

No zoning ordinance or bylaw in any city or town shall prohibit, or require a special permit for, the use of land or structures, or the expansion of existing structures, for the primary, accessory or incidental purpose of operating a child care facility; 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....

## Section 3 Uses May be Subjected to Site Plan Review

*Jewish Cemetery Ass'n of Mass. v. Bd. of Appeals of Wayland*, 18 LCR 428  
(Massachusetts Land Court) (August 13, 2010)

It is true that "towns may not, through the guise of regulating bulk and dimensional requirements under the [Dover Amendment], proceed to 'nullify' the use exemption permitted. . . ." [\*The Bible Speaks v. Bd. of Appeals of Lenox\*, 8 Mass. App. Ct. 19, 31, 391 N.E.2d 279 \(1979\)](#) (citing [\*Sisters of the Holy Cross v. Brookline\*, 347 Mass. 486, 494, 198 N.E.2d 624 \(1964\)](#)). However, the plain language of the Dover Amendment affords municipalities discretion in regulating religious uses as long as this regulation is reasonable. Plaintiffs appear to adopt the blanket assertion that Dover Amendment uses cannot be subjected to site plan review and, for support, cite to [\*The Bible Speaks\*, 8 Mass. App. Ct. at 20](#), which, in part, involved the validity of a local bylaw in context of the Dover Amendment. In *The Bible Speaks*, the Appeals Court was called on to interpret a bylaw scheme that required a site plan in tandem with **[\*\*22]** a special permit. [\*Id.\* at 31](#). The court reasoned that, taken together, the local bylaw's site plan review provision and the special permit provision "invest[ed] the board with a considerable measure of discretionary authority over an educational institution's use of its facilities and create a scheme of land use regulation for such institutions which is antithetical to the limitations on municipal zoning power in this area prescribed by [the Dover Amendment]." [\*Id.\* at 33](#).<sup>16</sup> In conclusion, the Appeals Court held that the site plan/special permit bylaw at issue exceeded the Dover Amendment's allowance of reasonable regulations. *Id.* Even though the bylaw at issue in [\*The Bible Speaks\*](#) was found to be an unreasonable regulation in context of the Dover Amendment, such case does not stand for the proposition that all site plan review violates the Dover Amendment as an absolute matter of law. In light of the above, I find that uses protected by the Dover Amendment may be subject to site plan review as long as such review is limited to reasonable regulations.

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<sup>16</sup> In its analysis, the Appeals Court noted that "there is nothing in the language of [\*G. L. c. 40A, Section 3\*](#), which contemplates the requirement **[\*\*23]** of site plans and informational statements as monitoring devices for educational uses, . . ." [\*8 Mass. App. Ct. at 32\*](#). However, it does not follow that the absence of an express reference to site plan review in the Dover Amendment automatically results in an unreasonable regulation. In fact, the site plan review process "implies regulation of a use rather than its prohibition." [\*Y.D. Dugout, Inc. v. Bd. of Appeals of Canton\*, 357 Mass. 25, 31, 255 N.E.2d 732 \(1970\)](#). It "contemplat[es] primarily the imposition, for the public protection, of reasonable terms and conditions upon the commercial use of land zoned for business." *Id.*

*Wildstar Farm, LLC v. Westwood Planning Bd.*, 18 LCR 433  
(Massachusetts Land Court) (August 13, 2010)

Plaintiffs' Complaint asserts that the EIDR Provision is facially invalid in that it is inconsistent with [Section 3](#).<sup>11</sup> While the EIDR Provision is indeed confusing and ambiguous in several areas, as **[\*437]** made apparent in this court's discussion regarding jurisdiction, *supra*, [Section 7.3.3](#) limits the EIDR Provision's "[m]andatory review" of [Section 3](#) uses "consistent with those statutory provisions, . . ." This court reads such language as effectively cross referencing [Section 3](#)'s prohibition of zoning regulations that "regulate or restrict the use of materials, or methods of construction of structures regulated by the state building code, [or] . . . prohibit, unreasonably regulate, or require a special permit for the use of land for the primary purpose of commercial agriculture . . . ." Case law interpreting this language suggests that the application of the EIDR Provision to uses subject to [Section 3](#) would result in imposing only reasonable conditions. See *Prime*, 42 Mass. App. Ct. at 802. Given [Section 7.3.3](#)'s incorporation of [Section 3](#)'s legal standard, the EIDR Provision does not impose a more stringent standard of review **[\*\*20]** upon [Section 3](#) uses than allowed by statute.<sup>12</sup>

In light of the above, I find that Plaintiffs fail to satisfy their burden of demonstrating that the EIDR Provision is facially invalid.

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<sup>11</sup> Plaintiffs' memo in support of their Motion for Judgment on the Pleadings fails to expound upon the issue of facial invalidity.

<sup>12</sup> The meaning of [Section 7.3.3](#)'s phrase "but on other matters shall be advisory only" is unclear as it indicates that there are some uses for which the Planning Board may only provide an advisory opinion. Moreover, the phrase "other matters" is ambiguous in itself as it may refer to non-[Section 3](#) uses, [Section 3](#) uses for which there is no mandatory review, or something else entirely. Although this portion of [Section 7.3.3](#) is perplexing, its ambiguity does not warrant a finding that [Section 7.3.3](#) as a whole violates due process of law. After all, [Section 7.3.3](#) is clear that the Defendants' treatment of [Section 3](#) uses must be moderated.

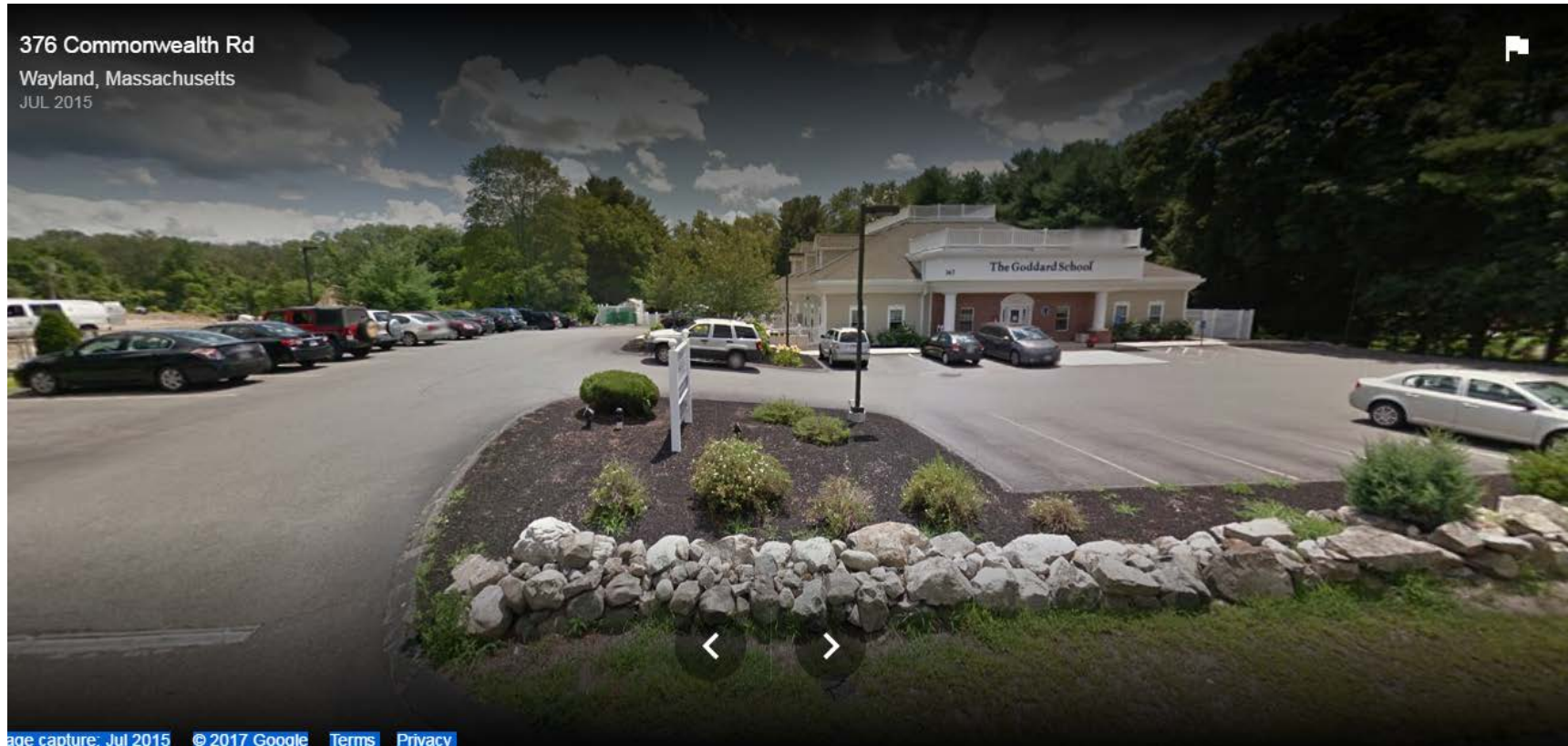
## Day Care Facility - Easy

*In-Home Day Care, 10 Fitchdale Ave., Bedford*



## Day Care Facility – More Difficult

*Goddard School, 376 Comm. Rd., Wayland*





## Religious Use – Easy

*Congregation Or Atid, Wayland*



## Religious Use – More Difficult

*East/West Biet Olam Cemetery (off Concord Road, Wayland)*

**2010**



**2016**



Jewish Cemetery Ass'n of Mass. v. Bd. of Appeals of Wayland, 18 LCR 428  
(Massachusetts Land Court) (August 13, 2010)

\* approx. 20 acres of land developed into a large cemetery is protected under G.L. c. 40A, §3, but is subject to Site Plan Review consistent with the “reasonable regulation” restriction in the statute.

## Agricultural Use – Easy

*Mainstone Farm*





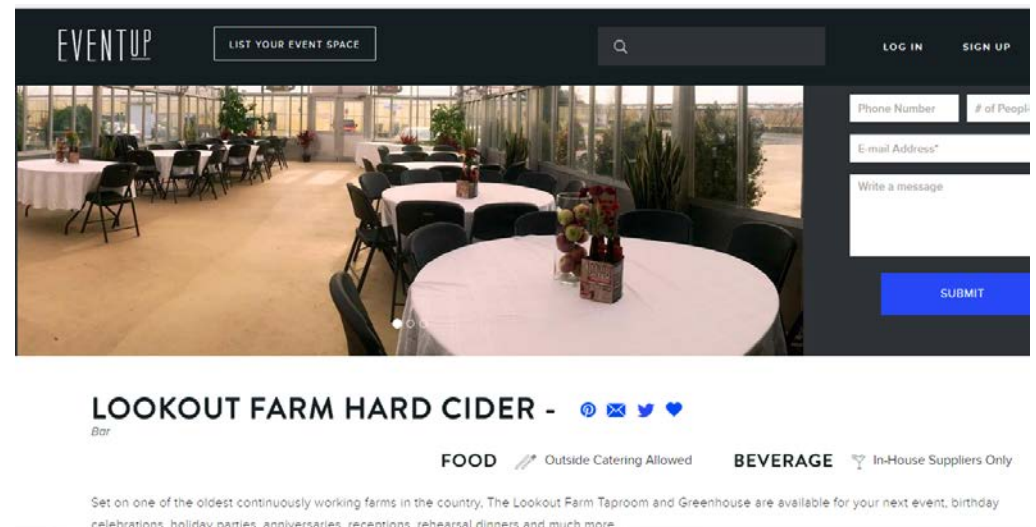
## Agricultural Use – More Difficult

### *Lookout Farm, South Natick*



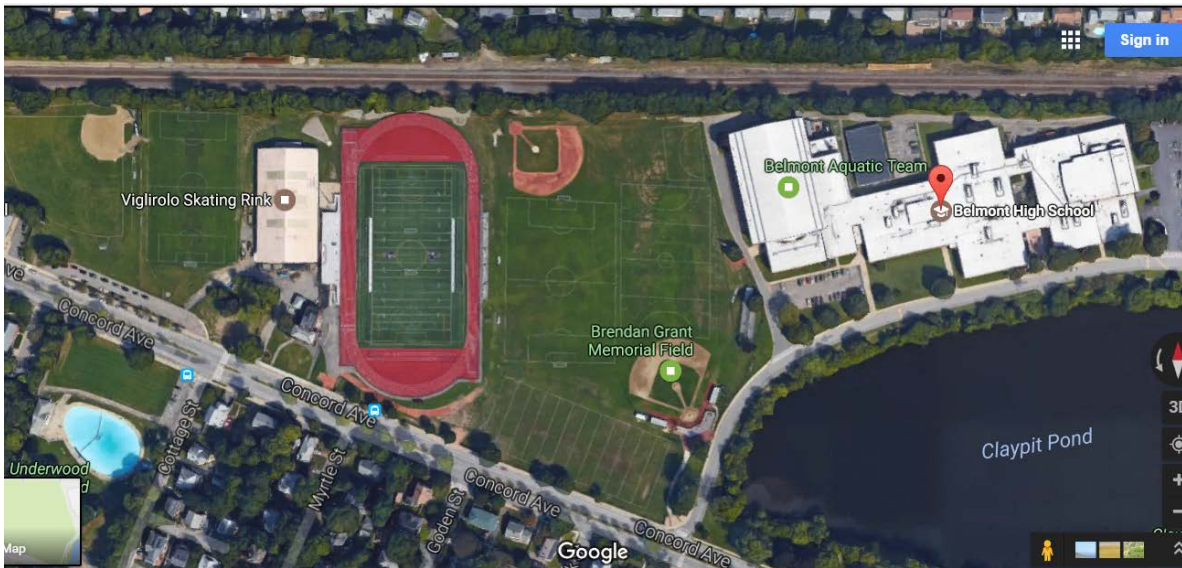
*Town of Natick v. Modern Cont'l Constr.*, Middlesex Superior Court (96-03843-J) (March 6, 1998)

\* Lookout Farm is protected by G.L. c. 40A, §3



## Non-Profit Education Use –Difficult

*Belmont High School Athletic Complex, Belmont, MA*



*Forster v. Board of Appeals of Belmont*, Middlesex Superior Court  
Docket No. 2001-CV-03560 (March 15, 2002)

\* 60' and 80' light poles for school athletic field protected under G.L. c. 40A, §3 and allowed where compliance with zoning bylaw's height restriction of 20 feet proved unfeasible.

## Education Use –Difficult

*SMOC Behavioral Health Clinic, Marlborough, MA*





# Sudbury

## 2130. Exempt Uses.

In order to maintain uniformity and consistency throughout residential districts in the Town of Sudbury, the following regulations shall apply to the use of land and/or buildings on residentially zoned property for religious, non-profit educational, or child care facilities, or other exempt uses provided for in M.G.L. Chapter 40A, Section 3:

- 2131. All buildings and structures constructed on the subject property shall be subject to the Dimensional Requirements of Section 2600 of this bylaw for the district in which the exempt use is located.
- 2132. Exempt uses shall be regulated as set forth in section 2200, Principal Use Regulations.
- 2133. Parking for any exempt use shall comply with Section 3100 of this bylaw.
- 2134. The Performance Standards in Section 3400 shall apply to all new construction of any exempt use.
- 2135. The Screening and Landscaping standards of Section 3500 shall apply to all new construction of any exempt use.
- 2136. The proposal shall be subject to the Site Plan Review process set forth in Section 6300 of this bylaw in order to provide information to town boards and departments as to how the project complies with the requirements of the Zoning Bylaw with respect to bulk and height of structures, yard sizes, lot area, setbacks, open space, parking and building coverage requirements.

**\* Problem: Bylaw contains no self-imposed limits on application of zoning standards on Section 3 uses.**



# Concord

## *11.8.7 Site Plan Review for religious uses, educational uses and child care facilities:*

The purpose of this section is to ensure that all religious and education uses, and all child care facilities are reasonably regulated in regards to bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements. The Board and the Planning Board have the authority to place reasonable conditions on the aforementioned issues, but are not permitted to withhold approval of Site Plan Review.

*11.8.7.1* In reviewing the site plan submittal for religious uses, educational uses and child care facilities, the following issues shall be considered:

- (a)* Relationship of the bulk and height of structures and adequacy of open spaces to the natural landscape, existing buildings and other community assets in the area and compliance with other requirements of this Bylaw, which includes, but is not limited to, building coverage requirements, yard sizes, lot areas and setbacks.
- (b)* Physical layout of the plan as it relates to convenience and safety of vehicular and pedestrian movement within the site, the location of driveway openings in relation to traffic or to adjacent streets and, when necessary, compliance with other regulations for the handicapped, minors and the elderly;
- (c)* Adequacy of the arrangement of parking and loading spaces in relation to the proposed uses of the premises;

- (d) Physical lighting of the site, especially the adequacy of the method of exterior lighting for convenience, safety and security within the site and for protection of neighboring properties, roadways and the night sky.

*11.8.7.2* Where a special permit from the Board is required or a variance from the Bylaw is requested in connection with any action subject to site plan review for religious uses, educational uses and child care facilities, site plan approval shall be by the Board. In such case the Planning Board shall submit a report to the Board concerning the matters described in subsection 11.8.7 prior to any public hearing. In considering a site plan for religious uses, educational uses and child care facilities, the Board shall insure a reasonable use of the site consistent with the uses permitted in the district in which the site is located. The Board shall give due consideration to the report of the Planning Board and where the decision of the Board differs from the recommendations of the Planning Board the reasons therefore shall be stated in writing.

*11.8.7.3* Where a special permit or a variance is not required or requested, site plan approval for religious uses, educational uses and child care facilities shall be by the Planning Board. The Planning Board shall file its decision with the Town Clerk within ninety (90) days of receipt of an application, unless such time is extended in writing by agreement with the applicant and notice of such extension is filed with the Town Clerk. The Planning Board may impose such appropriate conditions, limitations, and safeguards as will insure compliance with the terms of approval.

**\* Concord Bylaw incorporates limitations from Section 3, so it is valid.**

# Framingham

## §VI(F) – Site Plan Review

2. Applicability: The Planning Board shall conduct site plan review and approval...

a. The following types of activities and uses require minor site plan review by the Planning Board unless the activity or use also falls into a category which requires major site plan review, in which case major site plan review shall prevail: ... (5) Any new structure or alteration of an existing structure or change of use in any structure for an entity claiming exception under G.L. c. 40A, § 3. Site plan review shall be limited in such circumstances to the imposition of reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.

**\* Framingham Bylaw incorporates limitations from Section 3, so it is valid.**

## Proposed Wayland Zoning Bylaw:

### 603.3

Notwithstanding Section 601.2, *supra*, all proposed uses of land protected under G.L. c. 40A, §3 (i.e., agricultural, educational, religious, or child care uses) (“Section 3 Uses”) shall be subject to site plan review under Article 6, which shall be limited consistent with those statutory provisions. The purpose of this Section is to ensure that all such uses and facilities are reasonably regulated in regards to bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage.

#### 603.3.1

In reviewing the site plan submittal for a Section 3 Use, the following issues shall be considered:

- (a) relationship of the bulk, height of structures, and adequacy of open spaces to the natural landscape, existing buildings and other community assets in the area, and compliance with other requirements of this Bylaw, which includes but is not limited to lot coverage, yard sizes, lot areas and setbacks.
- (b) physical layout of the structures, driveways, utilities and other infrastructure as it relates to the convenience and safety of vehicular and pedestrian movement within the site, the location of driveway openings in relation to traffic or to adjacent streets, and when necessary, compliance with other requirements for the disabled, minors or the elderly;
- (c) adequacy of the arrangement of parking and loading areas in relation to the proposed use of the site; and
- (d) physical lighting of the site, including the methods of exterior lighting for convenience, safety and security within the site, and in consideration of impacts on neighboring properties and excessive light pollution.

#### 603.3.2

Site plan review of a Section 3 Use site plan review shall be by the Planning Board (“Board”). In considering a site plan for a Section 3 Use, the Board shall consider whether the proposed uses are in harmony with the uses permitted in the underlying zoning district. Subject to the limitations of G.L. c. 40A, §3, the Board shall impose any such conditions, limitations, and safeguards as it deems appropriate to protect the interests of, and consistent with, the planning objectives for the underlying zoning district. The Board shall file its written decision with the Town Clerk within ninety (90) days of receipt of an application, unless such time is extended by agreement of the applicant.