Litigation Advisory: Breaking New Ground in Dover Amendment Law

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Last month Mintz Levin won a victory in Massachusetts Superior Court that promises to have positive repercussions for all academic and religious institutions in Massachusetts who seek to benefit from the land use protections of state law commonly known as the Dover Amendment. The Dover Amendment is the 1950 Massachusetts statute that requires local permitting authorities to give more favorable treatment than what is conventionally required to the land use and zoning applications of, among others, nonprofit educational institutions and religious organizations.

Specifically, the Dover Amendment states that "[n]o zoning ordinance or by-law shall prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the [state], or by a religious sect or denomination, or by a nonprofit educational corporation" — except that reasonable restrictions in eight specified areas may be imposed so long as these restrictions do not unduly hinder the religious or educational use. Those eight areas of permissible zoning restriction are: bulk of structures, height of structures, yard sizes, lot area, setbacks, open space, parking and building footprints.[1]

The court decision, *Murdoch v. Zoning Bd. of Appeals of Wenham et al.*,[2] significantly limits the bases for appeal by plaintiffs seeking to overturn a local zoning board's approval of a use authorized by the Dover Amendment. Under the 14-page opinion, a plaintiff challenging a local Dover Amendment approval, in order to have legal standing to sue, must credibly allege that he is aggrieved in one or more of the areas in which the statute specifies the protected educational or religious use may be reasonably regulated. If the only credible evidence a plaintiff can bring forward relates to impacts the Dover Amendment was not designed to protect, the court held, he is without legal standing and his appeal therefore must be dismissed.

In this Superior Court case, Mintz Levin's client, Gordon College, located in Wenham, Massachusetts, sought to erect eight light towers at its new state-of-the-art athletic field, in order to support night games for its inter-collegiate sports teams and its intramural program. To be effective, the light towers needed to be at heights ranging from 60 to 85 feet. But the Town of Wenham Zoning By-law limits the height of towers to 30 feet as of right, or, with a special permit, to a maximum of 55 feet. Gordon College asked the Wenham Zoning Board of Appeals (ZBA) to allow the light towers at the 60- to 85-foot heights, notwithstanding the town by-law, on the grounds that the Dover Amendment authorized the towers to be used at the heights needed to effectively undertake the College's athletic program (an educational use encompassed by the Dover Amendment, according to prior court decisions). After a multi-session public hearing involving expert testimony and other evidence, as well as robust public participation, the Wenham ZBA agreed, granting approval for the light towers at the requested heights, pursuant to the Dover Amendment.

Neighbors to the athletic field appealed the Wenham ZBA decision to Superior Court, alleging they were adversely affected by the towers. Among their claims was the contention that the lights on the towers were too bright. At a minimum, they argued, this allegation of excessive illumination gave them legal standing to survive a motion to dismiss and bring their case to trial.

On behalf of Gordon College, Mintz Levin argued that the Dover Amendment lists the eight specific and limited areas in which a local permitting authority may impose reasonable restrictions on a proposed educational use — and level of illumination is not among those permissible restrictions. Therefore, even if the plaintiffs were correct that the brightness of the lights adversely affected them (a contention the College also refuted factually with an expert lighting report), the Dover Amendment does not allow a plaintiff to move forward with an appeal on this ground or other grounds not specifically listed among the eight areas a local board is allowed to regulate under the Amendment.

The Superior Court agreed, holding that in order to bring a valid appeal of a local Dover Amendment decision a plaintiff must allege that he is aggrieved by "one of the enumerated cognizable interests that the Dover Amendment is designed to protect." The neighbors thus did not have standing to proceed with their appeal based on their excessive illumination claim and, for this and other reasons, the court granted the College's motion and dismissed the neighbors' appeal.

While this Superior Court opinion does not bind the decisions of other Massachusetts courts in future cases, it nonetheless bolsters the ability of academic institutions and religious organizations to utilize the Dover Amendment to fend off appeals of the often controversial and hard-won land use permits they have secured in order to advance their educational or religious missions.

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Mintz Levin's Benjamin Tymann and Peter McCarthy represented Gordon College at the Wenham ZBA and in Superior Court.

Endnotes

[1] *See* Mass. Gen. L. ch. 40A, § 3, para. 2.

[2] Essex Superior Court Docket No. 2008-00793 (Memorandum and Decision on Defendant Gordon College's Motion to Dismiss Mar. 2, 2009).

If you would like to discuss this court decision or how the Dover Amendment might be relevant to your land use plans, please contact one of the attorneys listed below or any member of Mintz Levin's Education Practice Group or Real Estate and Land Use Practice Group.

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